

# Concourt efficiency is declining

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Chief Justice Mogoeng Mogoeng has decreed that all judges must attempt to hand down reserved judgements within three months. But an analysis of the Constitutional Court's performance shows that he and his fellow judges do not practise what he preaches and indicates a steady decline in efficiency in the apex court.



The Constitutional Court is failing to meet the three month target for handing down reserved judgments. Archive photo: Ashraf Hendricks

The analysis involved all cases considered by the court for the years 2016 to 2019 and up to March this year – a total of 182 matters.

However, 48 of the matters, where judgements were handed down without hearings, were excluded (though a lawyer informed us that these too are often long delayed).

The analysis shows that for judgments delivered so far in 2020, it has taken an average of 204.5 days or just more than six-and-half months from hearing to judgment delivery.

- For judgements delivered in 2019, it took an average of 151.6 days (five months).
- For judgements delivered in 2018, it took an average of 160.6 days (five-and-half months).
- 2017 statistics show an average of 130.6 days (four months) and in 2016 the average was 106 days, or three-and-a half-months.

The longest period between hearing and judgement was for a matter involving the rights of learners at private schools (known as the Pridwin case) delivered by Justice Leona Theron.

This was argued in May 2019 and the judgement — which ruled that private or independent schools may no longer rely on contracts with parents as the basis for kicking children out of school without a fair hearing — was handed down on June 17, 2020: A total of 398 days, or 13 months, later.

In seven other matters in the analysis period, the court took longer than 300 days to hand down judgments.

A report on the Office of the Judiciary website states: “Judicial Officers have a choice to reserve judgements [with no date] where circumstances are such that the delivery of a judgment on a fixed date is not possible. The norms and standards state that the Judicial Officers should make every effort to hand down reserved judgments no later than three months after the date of the last hearing.”

## **Justice delayed**

Constitutional law expert Professor Pierre de Vos described the situation at the apex court as “unacceptable”.

“Some might want to give the court some leeway because there are 11 judges and the discussions and deliberations about cases might lengthen the time period (for writing judgements).

“But on the other hand, they hear far fewer cases. They are better resourced, each judge has two clerks to assist them. And of course the cases are most important in terms of legislation invalidation and human rights.

“So it’s unclear why it takes so long. It is a new thing. It wasn’t always like this. It has been getting worse over the past few years.

“One would expect the head of courts, who sits on this court, to chase up on these judgements, but I am not sure why that has not happened.”

De Vos said it was important for the court to set an example for other judges.

“It’s not good if the court, of which the chief justice is a part, is not doing what he is telling everyone else to do.”

## **Norms and standards**

Alison Tilley, of judicial watchdog group Judges Matter, said the chief justice frequently referred to the norms and standards in relation to handing down decisions in meetings of the Judicial Services Commission and aspirant judges were always asked if their judgments have all been handed down.

“The standard being set is across the judiciary, but is not being adhered to by those who enforce the rules, in the Constitutional Court.

“The chief justice must either propose the amendment of the norms and standards, or ensure his court complies with them. This aspect of court management is a role the chief justice must play, and the discussion about the appropriate candidate for the new chief justice appointment in 2021 must deal with this,” Tilley said.

A legal source told GroundUp that case management had fallen by the way because the chief justice was not always present and his deputy, Judge Raymond Zondo, was tied up in the commission investigating state capture.

But OCJ spokesperson Nathi Mncube said the reason is that the 17th constitutional amendment “substantially increased the

jurisdiction of the Constitutional Court” (see his full response in box below). This amendment gives the court jurisdiction over any case of general public importance that it chooses to hear, not only constitutional matters.

But the amendment was brought into effect in 2013 and it is difficult to understand how it explains the decline in efficiency from 2016 to 2020.

### **Full response by OCJ spokesperson Nathi Mncube**

The 17th Constitutional Amendment substantially increased the jurisdiction of the Constitutional Court so that, as well as constitutional matters, the court will also have jurisdiction over other matters of general public importance that it chooses to hear. The court is now the apex court, and court of final appeal, on all matters.

This amendment has resulted in a marked increase in the workload of the court. Despite these increases the judicial establishment has remained unchanged placing increasing pressure on judges to ensure that access to justice is upheld. The fact all applications must be considered by the full court, a minimum quorum of eight (8) Judges, and the increasingly complex and sensitive nature of matters brought to the court, along with an increase in urgent applications has contributed to the delay in the delivery of judgements.

It must also be borne in mind that the Constitutional Court is the last port of call for all litigants in South Africa. There is no further appeal from the judgement of the court. The judgements of the court are binding on all courts within the republic and as a result, as the apex court, the judgements need to be clear and thorough in the exposition of the facts and law so as to give the necessary precedential guidance.

Additional to the many applications that each justice must consider, all Constitutional Court judgements go through a rigorous process of having to be independently dissected by each judge. In recent times a number of cases have resulted in multiple draft judgments which takes time to be read and finalized. The chief justice cannot simply dictate truncated timelines to his colleagues with the hope of rushing judgments through without proper reflection. He too takes time to try and draft responses that seek to accommodate, where possible, the views of his colleagues. Delays are therefore never without good reason and the courts will always do so only as a way of doing justice to the issues rather than simply rush to avoid criticism. Three months is aspirational but has always been a foreseeable challenge for our courts, especially the Constitutional Court. And the norms and standards make provision for this possibility.

The norms and standards prescribes that judicial officers must strive to finalise all matters, including outstanding judgements, decisions or orders as expeditiously as possible. The norms and standards, however, also make provision for the situation that some cases may, due to the complexity and magnitude thereof, take longer to finalise than the norms set out therein. The standard of three (3) months is therefore a recommendation, with the added proviso that save in exceptional cases where it is not possible to do so, every effort shall be made to hand down judgments within that time.