



SOUTHERN AFRICA: MEASURES TO MAINTAIN **COURT OPERATIONS DURING THE COVID-19 PANDEMIC**



Africa Judges and Jurists Forum

A POLICY BRIEF

The Africa Judges & Jurists Forum (AJJF)

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1. Executive Summary

The COVID-19 pandemic has disrupted court operations, as some courts have had to temporarily shut down; postpone legal matters and only entertain urgent matters; and work with skeletal staff as the majority of staff are required to work from home. In some jurisdictions, the judiciaries lost some of their workers and judicial officers to the virus. In those jurisdictions where the courts are gradually resuming operations, judicial officers are inundated with huge case backlog. In this policy brief, AJJF identifies and proposes recommendations aimed at strengthening some of these measures. These recommendations are enumerated in the last section of this paper.

2. Methodology

This policy brief was developed from a research study conducted through a desktop literature review and key informant interviews. The following documents were studied as part of the desktop literature review: practice directions issued by judicial leaders on court operations during the COVID-19 pandemic; regulations promulgated by government on combatting the spreading of COVID-19; articles published by the media on court operations during the COVID-19 pandemic and reports published by law-based organisations. A total of 16 key informants were selected and interviewed as part of the data collection. Of the 16, one key informant was selected from each SADC jurisdiction. They comprised of judges, senior court administrators and senior lawyers who are in private practice and who work in civil society. The key informants requested anonymity, except for three.¹

¹ These are Dr. Musa Kika (Zimbabwe), Mr. Sebastian Kandunda (Namibia) and Dr. Obrien Kaaba (Zambia).

3. Introduction

On 30 January 2020, the World Health Organisation declared the novel corona virus (COVID-19) to be a Public Health Emergency of International Concern. In March 2020, the COVID-19 pandemic reached many African countries, including those in the Southern Africa Development Community (SADC) region. This pandemic is still on-going, and continues to pose a grave threat to human life and public health because of the contagious nature of the virus. As a way of combatting the spreading of the virus, many governments in the SADC region and the world, have imposed various restrictive measures. These include periods of national lockdowns, where individuals are required to stay at home and only move around for essential reasons; national curfews which prohibit movements during certain times; restrictions on public gatherings and limitations, which require employees to work from home as a way of decongesting workplaces.²

As a follow up to these government restrictions, judiciaries in the region have issued directives aimed at protecting their staff from infection as well as preventing the spreading of the virus through the courts. The following are some of the key measures which have been undertaken by the judicial authorities: suspension of court sittings (except to determine matters which are regarded as urgent) for the duration of the lockdown, temporarily shutting down certain court buildings for disinfecting and maintaining skeletal staff in courts.³ These measures have had a drastic impact on the operations of the courts. In particular, they constrain the courts from dispensing justice efficiently and effectively. For instance, as a result of the suspension of court sittings, many litigants have been unable to access courts for the determination of their legal disputes,⁴ while those on criminal

² For a detailed list of these restrictions, see <https://africanlii.org/africanlii-covid-19>

³ See "Justice Under Lockdown: A case study of Zimbabwe, Zambia, Malawi, Mozambique and Botswana" Africa Judges and Jurists (2020) at <http://africajurists.org/publications/>

⁴ Ibid

trials have been deprived of their right to a speedy trial as their cases were rolled over to the end of the national lockdown. Some of the judicial officers and court staff are struggling to discharge their duties from home because of various reasons which include lack of the necessary information and communication technologies (ICTs)⁵ and increased care work.⁶ Others are inundated with work arising from the backlog created by the several suspension of court sittings during the periods of lockdowns. In some extreme cases,⁷ judiciaries lost some of their workers and judicial officers to the virus. Very importantly too, is the reality that even prior to the lockdown, access to justice in the region had been heaving under the weight of a backlog of many years, which was aggravated by the multifaceted effects of COVID-19.

Although the majority of countries in the region have begun COVID-19 vaccination programs, access to the vaccine is still limited.⁸ In most countries, vaccines are being provided to frontline health workers. Even in those countries where the vaccine is accessible to court staff, there is still hesitancy to take the vaccine.⁹ In addition these vaccines do not offer a 100% guarantee of immunity against the virus. As a result, governments and judiciaries are still cautious about returning to full operation, and certain restrictions remain in place. These include curfews, restrictions on the number of people who can access court buildings at any one time and the number of staff who can work from office at any one time. Scientists predict episodes of spikes in the number of infections in the future, because of the slow pace of the vaccination programs as well as the mutation of the virus, which may render certain vaccines to be ineffective. Therefore, there is a possibility that stricter restrictions will be re-imposed in certain

⁵ Including efficient internet and computers.

⁶ The suspension of face-to-face classes in schools means that many parents have to do home schooling.

⁷ For example, in South Africa. See <https://www.timeslive.co.za/news/south-africa/2020-07-13-eastern-cape-judge-patrick-jaji-dies-of-covid-19-complications/>, and in Zimbabwe see <https://www.aa.com.tr/en/africa/top-zimbabwean-judge-succumbs-to-covid-19/2129985>

⁸ See Mandipa Machacha and Tim Fish Hodgson "SADC's silence on access to Covid-19 vaccines is too loud" at <https://mg.co.za/africa/2021-03-11-sadcs-silence-on-access-to-covid-19-vaccines-is-too-loud/>

⁹ See Dewa Mavhinga and Carine Kaneza Nantulya "Overcoming Covid-19 Vaccine Hesitancy Across Africa" at <https://www.hrw.org/node/378126/printable/print>

countries or parts of the countries, in order to contain the spikes of infections. Thus, there is a need for judiciaries in the region to consider implementing or strengthening existing measures in order to maintain court operations without endangering public health and the health of the court staff.

4. Measures to strengthen access to courts and administration of justice

4.1 Digitization

In some jurisdictions, judiciaries have begun digitizing certain key aspects of the operations of the courts. This includes making provision for the electronic filing (e-filing) of court applications and other papers. However, in some jurisdictions the electronic filing system is reportedly unreliable. Three key informants said that the e-filing system in their countries is always malfunctioning and thus, rarely allows litigants and lawyers to file their papers without physically going to the court. In some cases, the system delays the transmission of documents to the court. In other cases, the court's online portal (server) that is meant to receive and store these documents is said to be down on numerous times. These inefficiencies have been attributed to inadequate judicial funding which constraints the judiciary from procuring the best ICT services. Due to such inefficiencies associated with the e-filing system, lawyers and litigants are said to have lost trust in the system and are resorting to physical filing of documents-a process which is much slower because the courts are not fully functional.

Some of the services are yet to be digitized. For instance, four key informants identified four jurisdictions where, although there is e-filing in place, the court fees are to be paid in cash. Therefore, one has to go to court physically to make a payment before their papers can be accepted by the e-filing system. Yet many of the courts are either shut down or have

imposed strict restrictions which make it very difficult to access the building. In some cases, the courts are working with skeletal administrative staff and this makes it difficult to make payments and be served with receipts timeously.

In some jurisdictions¹⁰, courts are conducting hearings virtually, as a way of maintaining litigants' access to the court while protecting the health of court staff and judicial officers. However, one of the key challenges faced in some jurisdictions¹¹ is the absence of a legal framework which allows courts to conduct hearings virtually in some legal matters, especially the criminal cases. As a result, the courts in those jurisdictions can only conduct virtual hearings in selected few cases of civil nature.

In other jurisdictions, the courts are constrained from conducting virtual hearings by the lack of adequate and efficient information and communication technology (ICTs). For instance, lack of efficient internet connectivity by any of the parties or presiding judicial officers disrupts the hearing. This undermines the ability of the court to discharge matters expeditiously. In some jurisdictions, the courts lack proper ICT equipment, such as flat screen conference monitors, and judicial officers are left to use computers, which makes it difficult for them to communicate and follow the oral submissions by the parties in a matter. Similarly, law firms in some jurisdictions lack such equipment.

A further challenge is that the judiciaries in many jurisdictions, are yet to adopt a policy on virtual hearings. The practice directives issued by the relevant judicial leaders direct or permit courts to conduct hearings virtually for the duration of the lockdown or COVID-19 restrictions. This has created uncertainty regarding whether or not litigants will be permitted to make submissions virtually after the lifting of the COVID-19 restrictions. Due to

¹⁰ Including South Africa, Namibia and Seychelles

¹¹ Such as Lesotho and Zimbabwe.

this uncertainty, some law firms are hesitant to invest in the procurement of high-level ICT equipment which improves their ability to participate in virtual hearings and make oral submissions during such hearings. One Key Informant said *“law firms have engaged a wait and see attitude. They do not want to heavily invest in buying equipment which may not be used when the pandemic restrictions are lifted.”*

Furthermore, judicial officers and lawyers in some jurisdictions have limited knowledge of how to conduct or participate in hearings virtually. As alluded to by some of the key informants, in some matters, hearings have either failed to take off or have been interrupted because some judicial officers and lawyers are yet to master the use of ICTs and *Applications* needed for them to participate in or conduct those hearings. Concerns regarding the protection of the confidentiality of certain information have also been raised.¹² For instance, due to limited knowledge of using the devices and features of the *Applications* (such as the mute button on Zoom), private consultations between the lawyers and their clients have been leaked to the public during the hearing.

Another challenge is that virtual hearings are not accessible to the majority of litigants in most jurisdictions, because many people lack access to internet. Internet connectivity is largely confined to the urban and peri-urban areas, leaving out those in the rural areas.

4.2 COVID-19 protocols

4.2.1 Health checks and sanitization

In many jurisdictions, judiciaries have developed and are implementing some protocols to be observed by court users or visitors. These are meant

¹² This observation was made by three key informants from Zambia, Eswatini and Botswana.

to combat the spreading of the virus at the courts. These protocols include screening court visitors by conducting temperature checks and sanitizing them before they enter the court premises. Those with symptoms of COVID-19 and or with temperatures above the normal are supposed to be denied access to the court building. This is a mitigation measure which must be considered by all jurisdictions in the region. However, there is a need to put in place measures which ensure that the screening is effective and lawful. For instance, some key informants reported that the thermometers used to conduct temperature checks are of a poor quality which makes them malfunction sometimes. This causes delays and creates long queues at the court entrance. In some cases, the thermometers are said to reflect an incorrect recording of temperature.

It has also been reported by some of the key informants that the screening and health checks are conducted by security guards and, in some cases by the police. Concerns have been raised about whether these security officers have the legal authority to deny a litigant or a legal representative (in an ongoing matter) access to the building. At law, this is a decision which can be made by the judicial officer only. Thus, judiciaries must consider putting in place measures to ensure that any decision to deny a litigant or legal representative access to the court is confirmed and ratified by the presiding judicial officer.

It has also been pointed out by some of the key informants that, while court visitors are screened and sanitized at the main entrance of the court building, they are not screened or sanitized before they enter the court rooms, judges' chambers or administrative offices within the court building. This exposes the court staff and the other visitors to the risk of contracting the virus. There is therefore a need to ensure that similar temperature checks and sanitization is conducted before a visitor enters the court room or any other offices or chambers within the court building.

4.2.2 Social distancing

Key informants from all the jurisdictions confirmed that all people attending court hearings are required to observe social distancing when in the court rooms. However, the challenge that has been noted is that some of the court rooms are small in size, which makes it difficult for court attendees to observe social distancing. In order to mitigate against this challenge, in some cases, judiciaries require only the parties, legal representatives and witnesses to attend the hearing. This undermines the right of a litigant to a public hearing. A public hearing must be conducted in the presence of the members of the public, in order to ensure public transparency—a measure which facilitates public scrutiny of court proceedings to ensure impartial and independent adjudication.¹³ In order to strike a balance between the right to a public hearing and the need to protect public health, judiciaries must consider allowing members of the media to attend the court proceedings especially in those cases that are of public interest. In addition, such hearings must be live streamed in order to allow the public to follow the proceedings virtually. In some countries¹⁴, such cases are live streamed through television broadcasting stations as well as through social media such as *Facebook*, *Twitter* and *You tube*.

4.3 Determining cases on the basis of written submissions

In the adjudication of matters, litigants are usually required to make written submissions and a hearing is conducted during which they make oral submissions to supplement or clarify their written submissions. However, in order to reduce or combat the spreading of COVID-19 through movements to and from the court, judiciaries need to permit judicial officers to adjudicate matters on the basis of written submissions and only

¹³ See Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003 at <https://www.achpr.org/legalinstruments/detail?id=38>

¹⁴ Such as South Africa and Namibia.

allow oral submissions where necessary. This is possible especially in less contentious civil matters such as uncontested divorce proceedings and claims which involve small amounts of money. Even in those cases which require oral submissions, the courts should consider permitting the legal representatives or litigants to make such submissions virtually or through certified video recordings which are submitted to the presiding judge.

4.4 Court annexed Mediation

Alternative Dispute Resolution mechanisms (ADR) offer parties to a dispute an alternative avenue of accessing justice. These mechanisms are helpful because they are usually less costly when compared to accessing justice through the courts. They may also lead to faster resolution of legal disputes.¹⁵ During the COVID-19 pandemic, ADR may also be useful as a way of promoting access to justice during a period when physical access to the courts is limited. Given the increase in case backlog as a result of COVID-19 restrictions, the resolution of disputes through ADR may be faster than through court adjudication. For these reasons, parties must be encouraged to use ADR more during this period, especially where the dispute is less contentious. One such mechanism is Court Annexed Mediation. This is a form of mediation that is conducted with the assistance of the court. Parties must give voluntary consent to have their dispute resolved in that manner, before the court appoints a mediator.¹⁶

4.5 Dealing with case backlogs

As alluded above, the courts in many jurisdictions are facing huge case backlogs arising from the postponements compelled by the COVID-19 restrictions. In those jurisdictions where the courts have resumed

¹⁵ See Dennis Otieno Oricho "Understanding benefits of alternative dispute resolution (ADR) in the work place mediation"(2010) Journal of Law and Conflict Resolution pp. 011-019.

¹⁶ Ibid.

operations, the volumes of new cases being filled have increased because many cases arose during the lockdown period and the litigants could not access courts. For instance, two key informants indicated that, due to the increase in domestic violence during the lockdown, there are many criminal cases that needs resolution as well as civil cases of parties seeking divorce. Another key informant indicated that the increase in case volumes is also attributable to the numerous human rights violations that took place in the course of the enforcement or implementation of the COVID-19 regulations. Thus, judicial officers are inundated with cases and this causes further delays in the resolution of matters. In order to address this challenge, jurisdictions must consider appointing acting judicial officers to help clear the case backlogs. However, it is important to ensure that the appointment of acting judicial officers is done through a process that is merit based and which does not undermine the impartiality and independence of the judiciary.

In addition, as a means of decongesting the courts, legislators must reform the laws to expand the jurisdiction of specialised administrative tribunals to deal with certain administrative law disputes. For example, in some jurisdictions,¹⁷ despite the establishment of the Administrative Court as the primary court on administrative law review matters, this court does not have jurisdictional competence to resolve most of the administrative law matters, as they fall under the purview of the jurisdiction of the High Court.

¹⁷ Such as Zimbabwe.

5. Recommendations

In view of the above, the Africa Judges and Jurists Forum makes the following recommendations to be considered as ways of strengthening the administration of justice by courts during the COVID-19 pandemic:

5.1 Legislature and the Executive

- i. Enact laws which create a legal framework for virtual court hearings
- ii. Provide additional funding to the judiciary to enable them to procure the necessary ICTs and provide their staff with the necessary training
- iii. Increase the roll out of internet infrastructure to ensure the enjoyment of the right of access to internet by all persons in the country. This will enable them to access the court's digital services.
- iv. Provide adequate funding for the appointment of acting judicial officers to help clear the case backlogs.
- v. Enact laws which expand the jurisdictional competency of special tribunals such as the Administrative Court.

5.2 Judiciary

- i. Adopt a clear policy on the use of virtual hearings as a permanent feature of adjudication where parties consent and where it is physically possible to conduct such hearings.
- ii. Facilitate the training for judicial officers and court staff on the use of ICTs necessary for conducting virtual hearings
- iii. Expand the digitization of other administrative services, including the issuance of receipts of payment of court fees.
- iv. Put in place measures to ensure that decisions to deny litigants and their legal representatives entry into court buildings are made by competent authorities.

- v. In addition to health screening and sanitization at the main entrance of the court building, ensure that similar checks and sanitization is conducted before one enters the court rooms, offices and chambers within the court building
- vi. Ensure live streaming of court hearings, especially in public interest cases, where it is not possible to accommodate many people in the court room
- vii. Encourage adjudication of cases on the basis of written submissions, especially in uncontested or less contested matters. Also consider permitting oral submissions through certified video recordings.
- viii. Encourage the use of court annexed mediation and other forms of ADR.
- ix. Appoint acting judicial officers to assist in clearing case backlogs created by the COVID-19 restrictions.

5.3 Legal profession

- i. Provide adequate training to attorneys and clients on the use of ICTs necessary for their participation in virtual hearings
- ii. Procure the necessary ICTs to enable attorneys and clients to make electronic submissions and participate in virtual hearings.
- iii. Advocate for legal reforms to create an adequate legal framework, including on the appointment of acting judges, conducting virtual hearings and expanding the jurisdictional competency of specialised courts.
- iv. Advocate for adequate resourcing of the judiciary.



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