LAW DEVELOPMENT FOR THE PEOPLE: STAKEHOLDERS PARTICIPATION IN THE LAW REFORM PROCESS

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By Dr Angelo Mtitu Mapunda

In this paper I examine the role of a stakeholder from the perspective of a consultant hired to serve as a resource person for a particular component of the laws listed for a review or amendment. In the process I will detail, the procedure of becoming a stakeholder, the problems encountered in bidding for consultancy, the uncertainties in mapping out what precisely is expected of the consultant, the loneliness involved, in executing the tasks and the satisfaction ultimately derived in accomplishing the task successfully.

1.0 BACKGROUND

In December 2006, the Law Reform Commission of Tanzania (referred to as "Lrct") circulated a position paper based on recommendations of team of consultants from UDSM. The Position paper identified areas in the civil justice system which need to be reviewed/amended.

In July 2007 the Commission circulated to legal stakeholders the Position Paper on the Review of the Civil Justice System in Tanzania inviting stakeholders to air their comments [The Commission's letter Ref. CFA 71/124/01 dated 19th July 2007]. It would be interesting to know how many common members of the public were invited to comment on the position paper. From the tenor of the letter the invitation was extended to legal stakeholders.

The stakeholders were given three months (up to 30th September,2007) to submit their comments. The letter was very moving and encouraging too:

"In your role as a key stakeholder of the Civil Justice System in Tanzania, the Law Reform Commission places considerable value on your views and comments. The development and the quality of the legal system in this country rests, in part, on your shoulder and your views on how to improve and reform this administration of the rules relating to

the civil justice system are very important. Your comments on the Position Paper will no doubt, provide an invaluable input in the review exercise."

The views of the stakeholders were subsequently deliberated by a Special Task Force. The task force consisted of a retired judge; a magistrate; two representatives from the Tanganyika Law Society; a law lecturer from the University of Dar es salaam; a corporate counsel from the Tanzania Banker's Association and two staff from the Commission [vide Report of the Special Task Force of the CJTWG about Observations and Recommendations of Stakeholders Concerning the Position Paper on the Civil Justice Reform dated 17th November, 2008]. In this task force no commoner , however enlightened or literate, was recruited in this team.

1.1 DEFINING A STAKEHOLDER

A perusal of the various documents I received from the Commission over the years, does not comprehensively define who is a "stakeholder". There are thus diverse stakeholders depending on the nature of the laws reviewed.

Those who participate in the reviews in whatever capacity become stakeholders. Stakeholders may broadly include employees of the Commission, lawmakers, interpreters, enforcers, consumers, beneficiaries and those adversely affected by the law or any combination of these.

This functional definition is derived from the provisions of Sections 8-10 of the Law Reform Commission of Tanzania Act [Cap.171) and partly from the list of persons who have participated in the law reform workshops [Letter Ref. CFA71/124/01 dated 19th July, 2007 from the LRC to various stakeholders to provide comments on Position Paper on review of Civil Justice System in Tanzania ; Report of the Special Task Force of the CJTWG about Observations and Recommendations of the Stakeholders Concerning the Position Paper on the Civil Justice system dated 17th November, 2008; Letter Ref.No.CFA.71/124/02E/39 titled Invitation to Attend a Consultative Meeting in Respect of Court of Appeal Rules dated 28th August, 2008]

In my case my roots of stake-holdership trace to the opportunity I was afforded to review the Appellate Jurisdiction Act, the Constitution and Court of Appeal. In that assignment the Commission had outlined clusters/components of laws that had a direct impact on the application of the Court of Appeal Rules. It is those laws that generated the stakeholders for: the consultancy work, the commentaries, the validation workshops and ultimately the end- users of the reviewed laws.

2.0 THE ROLE OF THE CONSULTANT STAKEHOLDER

In the Civil Justice sphere, the Commission has identified components of the laws (clusters) for review. These components consist of either laws that are related or whose administration impact on each other. The Commission sources out consultants through an open tender.

2.1 My first participation as a consultant stakeholder was in 2008 when I bid for the review of the Appellate Jurisdiction Act, the Court of Appeal Rules and the Constitution.

2.2 I subsequently participated in the same role on the Review of the Government Proceedings Act, [Cap.17 R.E.2992]; the Arbitration Act, [Cap.15 R.E.2002]; the Appellate Jurisdiction Act, [Cap.141 R.E.2002]; and the Civil Procedure Code Act, [Cap.33 R.E.2002 in March 2012.

2.3 In June 2012 I took over the Review of the Magistrates Courts Act [Cap.11 R.E.2002]; the Ward Tribunals Act, [Cap.206]; the Courts (L:and Disputes Settlements) Act [Cap.216]; the Tanzania Evidence Act [Cap.6 R.E.2002] and the Law of Limitation Act [Cap.89 R.E.2002]. In the latter component my participation was not by design. I belatedly took over following withdrawal of the consultant who had been originally awarded the assignment.

I would thus like to share my experience of the first consultancy I did with you because it is the one that ultimately initiated me into the art of bidding for legal consultancy work. In this second component, the qualifications for the consultancy were much higher.

2.4 For each component, the Commission Floated a Consultancy Tender - commonly known as an Expression of Interest inviting bids from consultants.

2.5 The Expression of Interest contained terms of reference for the consultant to adhere in the review of the laws listed (TORs).

3.0 QUALIFICATIONS DEMANDED OF THE CONSULTANT

The Terms of Reference specified the required Profile of the Consultant to include:

3.1 Holder of a law degree from a recognized University;

3.2 Not less than 5 years post qualification experience of practicing law/academia in Tanzania/common law jurisdiction

3.3 In depth knowledge of the laws, procedures and legal climate in Tanzania. Implying, a sound understanding of the laws involved in the review and the challenges faced

3.4 Understanding of comparative best practice in relation to the laws in other commonwealth jurisdictions.

3.5 Proven expertise in producing recommendations and draft legislation for reform to a Civil Justice system in another common law jurisdiction.

3.6 Fluency in oral and written English and mastery of legal jargon(legal language). The last two conditions are likely to discourage the majority of Tanzanian lawyers from bidding.

I find the criteria prohibitive and intimidating. It would be interesting to learn from the Commission how many lawyers submitted bids for each of the consultancies; how competitive were the bids and if not, what discouraged more lawyers from bidding.

4.0 EXECUTING THE ASSIGNMENT

4.1 The key objectives in the reform of the civil justice system are: improvement of the machinery of justice by means of reforms in jurisdiction, procedure and court administration with a view to reducing delay, cost and complexity and instilling a more efficient disposal of civil cases to serve public needs and expectations.

4.2 The issues the consultant had to focus on were specified with specificity. Broadly, that the civil justice system often results in undue delays in bringing civil cases to conclusion; it is too unequal and inequitable as it discriminates between the powerful, well resourced litigant against the poor litigant; it too uncertain and unpredictable; the

court procedures are incomprehensible, too adversarial , too technical and in some cases simply archaic

The consultant stakeholder invariably undertakes the following tasks:

4.2.1 Submits an Inception Report which is subjected to Peer Review by a technical team at the Commission to determine its qualitative competitiveness.

4.1 Submits a Technical and Financial Bid;

4.2 Once the technical bid is adjudged competitive, negotiations for financial bid may start.

4.3 Signs a Contract for the consultancy prescribing the scope of the work; payment terms; time schedules and reporting procedures. The terms of the contract are largely non negotiable. All the terms are prescribed by the Commission. The only negotiable items are the fees and time schedules.

4.4 Produces an Inception Report

4.5 Produces a Position Paper

4.6 Position Paper is Circulated to stakeholders by the Commission for comments

4.7 .Produces a Draft Report incorporating the views of the stakeholders.

4.8 Conducts validation Workshops/ Consultative Meetings of Stakeholders jointly with the Commission. The stakeholders are picked by the Commission with no consultations with the consultant stakeholder to gauge whether these will be the most suitable, productive or ideal participants.

4.9 Produces reviewed reports incorporating views of stakeholders from the validation workshops

4.10 Prepares a draft Final Report

4.11 Drafts amended legislation largely depending on the scope of the assignment prescribed in the terms of reference.

5.0 KEY METHODOLOGICAL ASPECTS

The consultant stakeholder must bear in mind that a properly constructed, well thought of inception report is the foundation to a quality work.

It is upon such a sound inception report that the consultant stakeholder systematically builds up the position paper, the final report and the recommendations on the amendments he ultimately proposes. The basics to a quality inception report include:

5.1 A proper grasp of the objectives of the review both within the framework of the ultimate objectives as well as within the specific objectives of the particular law or set of laws reviewed.

The consultant stakeholder needs to comprehend what are the overall objectives of the Review of the Civil Justice System in Tanzania.

5.2 The overall objectives as spelled out in the **Position Paper on the Review of the Civil Justice System** are "*to improve the machinery of civil justice in Tanzania by means of reforms in jurisdiction, procedure and court administration and in particular to reduce delay, cost and complexity"* and to "*undertake a radical review of the business of the courts and to make recommendations for the more efficient disposal of civil cases in keeping with public needs and expectations.*"

5.3 The specific objectives pertaining to the Review of the Appellate *Jurisdiction* Act and the Court of Appeal rules and related legislation to enable the findings in the Position Paper be used by a team of Justices of Appeal appointed by the Honorable Chief Justice as the basis for their consultation and an aid to their making of recommendations intended to enhance *"**administration of justice at appellate court and ease congestion of civil cases awaiting hearing at the Court of Appeal**" [vide: The Law Reform Commission: Terms of Reference for Consultancy to Undertake a Comprehensive Review of the Court of Appeal Rules dated March 2008].*

5.4 The basics in Preparing an Inception Report

5.4.1 Consultant stakeholder must outline assumptions that will guide the Preparation of the Position Paper. The

assumptions will depend on the intended output for the review of the particular law. In the case of the Court of Appeal Rules I constructed six assumptions. One, that the law regulating the functions, administration and procedures of the Court of Appeal, namely the Constitution, the Appellate Jurisdiction Act and the Court of Appeal Rules will still be retained as the principal sources for the Court. What is contemplated are amendments of those provisions seen as bottlenecks to the efficient administration of justice. Two that the Court of Appeal will remain as the highest court in the hierarchy for the foreseeable future. No contemplation that a higher court like the Supreme Court, will be established above it. Three, that Court of Appeal Rules under discussion did not start from a fresh page (clean slate/tabula rasa) but were modeled from precedents from its predecessor Court of Appeal of Eastern Africa and rules from other appellate courts within the commonwealth family. Four, that judges of the Court of Appeal had themselves over the years, repeatedly commented on shortcomings in the rules. Likewise, academic commentaries, critiques, researches, legal practitioners and members of the public had alluded to those shortcomings. Fifth, the shortcomings were not entirely to blame on the structure of the rules and procedures of the Court. They were largely caused by an interplay of factors such as inadequacy of financial, human and logistical resources for the Court. Sixth, the training of judges and judicial personnel of the Court in common-law oriented jurisdictions as opposed to civil law jurisdictions contributes to their adversarial attitude as opposed to the proactive attitude in applying the rules.

5.4.2 A clear, comprehensible statement of the assumptions, dictates the choice of the methodology of conducting the research for the material required to prepare the Position Paper. In the case of reviewing the Court of Appeal Rules, the methodology adopted consisted of:

5.5 Collection of relevant decisions of the Court of Appeal and High Court which had highlighted problems and issues affecting the Appellate Jurisdiction Act and Court of Appeal Rules. Most of the decisions were unreported. Fortunately this was easy for me because the Faculty of Law editorial team to the Law Reports of Tanzania is supplied with

most of the decisions of the High Court and Court of Appeal. In those decisions the Court of Appeal and the High Court had made pronouncements on the problematic areas in the Constitution, the Appellate Jurisdiction Act and the Court of Appeal Rules.

5.6 Collection of academic commentaries and critiques from articles in journals, conference papers and other workshops.

5.7 Taking stock of the rules and procedures of the Court that touch on bottlenecks and delays, endless references, and unnecessary adjournments.

5.8 Conducting interviews with advocates, academicians, judges, magistrates and litigants on what they perceived to be problematic rules and procedures in the Court.

5.9 Studying Court of Appeal Rules from other commonwealth jurisdictions and particularly contiguous territories of Kenya and Uganda.

5.10. Examining Court of Appeal Rules and Procedures of non-commonwealth jurisdictions to discern any best practices which Tanzania could emulate (rules of supreme courts in Botswana, and Seychelles).

6.0 CHALLENGES

6.1 The Commission tends to prescribe a very tight time schedule within which to complete the tasks.

6.2 Lack of ready made formats for the consultant to adopt. When preparing the first inception report I had no ready made formats to use. I could not get any from the lawyers I thought had some. There was a large element of trial and error (groping) when I prepared the first inception report. Until to-date I have no clue how it got accepted by the Commission. In other tenders, the bidders get invited to an opening and receive a report of how the rating was conducted and the successful bidder selected. That way the bidders know where they scored low.

6.3 There is an element of apathy /indignation from lawyers to bid for the consultancy work. There is a feeling that it is often the same individuals who are awarded the consultancy. Moreover, since the consultant gets paid it is his business to shoulder the responsibility.

6.4 Little meaningful assistance/cooperation from colleagues including those in academics and within the legal fraternity. It is a very lonely job. Colleagues when contacted either to assist with proof reading, checking the content and status of the law or chip in ideas never responded.

6.5 Insufficient involvement of members of the public. There are members of the public who have valuable experience in litigating in the Court of Appeal either on their own or with their counsels. I consider these to be valuable stakeholders to be involved in the reviews.

6.6 Key recommendations are not utilized fully by the consumer stakeholders. In the menu of laws recommended for reform there is a still a list that has not been implemented.

For example, in the review of the Court of Appeal Rules there were key recommendations based on broad consensus of the stakeholders in the validation workshops that were never used when promulgating the Court of Appeal Rules 2009. Some of the problematic areas which still remain unresolved are whether the provisions of the Constitution form a source of substantive rights. Can a party cite the Articles of the Constitution as a source of his substantive rights. For instance, there is currently a debate raging on within the legal fraternity whether a party can rely on the provisions of Article 107A of the Constitution of the United Republic of Tanzania to claim the right of access to substantive justice without undue regard to technicalities. The Court says that is not the case despite the fact that these overriding principles of the constitution are expressly imported into the Rules by Rule 2 to the Court of Appeal Rules 2009 [ULEDI HASSAN ABDALLAH v. MURJI HASNEIN MOHAMED (2) RETURNING OFFICER, MTWARA TOWN COUNCIL, (3) THE ATTORNEY GENERAL, Civil Appeal No.2 of 2012, Court of Appeal of Tanzania at Mtwara (unreported);

6.7 Also the recommendation on absence of provisions in the Appellate Jurisdiction Act conferring the right of review on the Court of Appeal. As a result, whereas there are procedures for Review in the Court of Appeal Rules 2009 (under **Rule 66 Part 111B)** there is no law conferring the right for review in the Court.

6.8 Furthermore, the recommendations that applications for stay of execution of decrees be heard by the High Court to free the Court of Appeal concentrate on its constitutional mandate of hearing appeals was not accepted. The Court stated recently in the case of TANZANIA ELECTRIC SUPPLY CO LTD v. DOWANS HOLDINGS SA (COSTA RICA) and DOWANS TANZANIA LIMITED (TANZANIA), Civil Application No.142 of 2012, Court of Appeal of Tanzania at Dar es

salaam (unreported at pages 7-8) that the High Court can only entertain an application for stay of execution of a decree for the period between the date of the judgment and up to the date of filing of Notice of Appeal. Once a notice of appeal is filed the High Court has no jurisdiction to entertain an application for stay.

The Court states conclusively:

> *"It is settled law in our jurisprudence, which is not disputed by counsel for the applicant, that the lodging of a notice of appeal in this court against an appealable decree or order of the High Court commences proceedings in the Court. We are equally convinced that it has long been established law that once a notice of appeal has been duly lodged, the High Court ceases to have jurisdiction over the matter" save for those expressly reserved for jurisdiction in the High Court by the Appellate Jurisdiction Act like applications for leave to appeal and applications for extension of time."*

As a result the Court of Appeal will continue to be overwhelmed with applications for stay of execution.

7.0 IMPARTIALITY AND INTEGRITY OF THE COMMISSION

I am in no doubt that over the 30 years of its existence, the Commission has demonstrated innovation, best business practices and accountability together with intangible qualities such as integrity and vision in its identification and short listing and award of tenders to consultant stakeholders. This has hopefully helped the Commission to build a reliable data base for legal consultants. The Commission should not confine itself to this data base. There is still a lot of legal minds out there which needs to be tapped and channeled into this data base.

8.0 RECOMMENDATIONS

8.1 The consultancy should be awarded to groups of experts instead of the current practice of awarding it to individuals. The group may be a firm/partnership or of persons who have specifically associated/partnered to bid for the particular consultancy by submitting a joint bid. In awarding

the consultancy to a group, the group tendering should be directed to designate who will be their lead consultant and accounting member. Alternatively, when awarding the tender to the group, the LRCT may designate the group leader. This is a standard procedure in scientific and medical research. Group work, unlike an individual consultant, ensures smooth continuity in the event one of the members is unable to execute the assignment for whatever reasons, be it incompetence; lack of diligence, illness or death.

8.2 There should be a wider circulation of the findings to other stakeholders such as non- governmental organizations, civil societies, professional bodies other than Tanganyika Law Society and members of the public at large to elicit meaningful participation and response from the public.

This could be facilitated by publishing the findings of the consultants in Swahili language in local newspapers.

8.3 The Commission should ensure sustainability and continuity of the review work. At present there appears to be periods of intense activity followed by a lull in the activities of the LRCT and lack of sufficient public information on what is going on with the various recommendations. For example little is publicly said about what is happening to the recommendations on the review of the Government Proceedings Act, the Civil Procedure Act and the Arbitration Act. When are we expecting to enjoy the fruits or see the amendments recommended to these laws?

8.4 There should be a programme for the review of the Criminal Justice System of Tanzania as well.

8.5 There is need to restate and elevate the overriding principles of Article 107 (A) (2)(e) of the Constitution of the United Republic of Tanzania, 1977 in every piece of legislation reviewed. This will avoid treating this very important provision as being subject to other laws of the land and thus diluting its spirit.

Article 107(A) (2) directs that in

"delivering decisions in matters of civil and criminal nature in accordance with the laws, the Judiciary shall comply with the following rules, that is to say-

(e) to dispense justice without being tied up with technical provisions which may obstruct dispensation of justice".

8.6 Interpreting Article 126(e) of the Uganda Constitution 1995, worded in similar terms to Article 107A of the Constitution of the United Republic

of Tanzania, in the case of **SAGGU v. ROADMASTER CYCLES (U)LTD, [2002]1 EA 258,** the Court of Appeal of Uganda has held that such a constitutional provision contains overriding principles. Accordingly, where the constitution contains such a provision *(i) a defect in a jurat or any irregularity in the form of the affidavit cannot be allowed to vitiate an affidavit; (ii) a judge has power to order that an undated affidavit be dated in court or that the affidavit be re-sworn and may order the offending party to pay costs; (iii) where an application omits to cite any law at all or cites the wrong law but the jurisdiction to grant the order exists, the irregularity or omission can be ignored and the correct law inserted in court.*

8.7 Although Rule 2 to the Court of Appeal Rules 2009 replicates (imports ***verbatim)*** the overriding principles in Article 107 A (2) of the Constitution of the United Republic of Tanzania, the Court has taken a different position. It has held that some of the procedural rules are so fundamental that non compliance will may render a proceeding incompetent. Thus in a chain of decisions, the Court has held that omission of the full names of the attesting officer in a jurat is a fundamental defect that renders an application incompetent as in FELIX FRANCIS MKOSAMALI V. JAMAL A.TAMIM, Civil Application No.4 of 2012, Court of Appeal of Tanzania at Tabora (unreported). Likewise, failure to cite the correct provision of the law or sub-clause (PAMELA P.BIKATUMBA v.THE DIRECTOR ABB TNALEC LTD, Civil Appeal No.107 of 2011, Court of Appeal of Tanzania at Arusha (unreported); or wrong citation (KINONDONI MUNICIPAL COUNCIL v. ALPHONCE BUHATWA, Civil Application No. 150 of 2007, Court of Appeal of Tanzania at Dar es salaam (unreported) or non citation to support an application, will render an application fatally defective.