JUSTICE KIRBY'S LEGACY OF JUDICIOUS AND EFFECTIVE CIVIL PRACTICE

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ABSTRACT

In the instantaneous aftermath of the announcement of Justice Kirby's retirement from the bench, the predominant conversations fixated around who was to be his replacement. These discussions were held with the incontrovertible appreciation of the invaluable contributions made by Justice Kirby to Botswana's jurisprudence, particularly during his illustrious stay at the Court of Appeal. Attempting to abridge Justice Kirby's legacy into a distinct portfolio is a considerably unmanageable task. One immediately gets to appreciate his legal dexterousness and the ease with which his expertise straddles virtually all fields of the law. Consequently, we found ourselves pleasantly spoilt for choice in our selection of the area in which we must pay tribute to a colossal legal giant. We ultimately settled on assessing Justice Kirby's contributions in civil practice. This paper, therefore, examines Justice Kirby's contributions to civil practice in Botswana, principally through his adoption of a contextual and purposive interpretation of the Rules of the High Court. Through the classical case of Gofhamodimo v Koboyankwe; Tiro v the Attorney General, and other select cases, the paper highlights the instrumental efforts of Justice Kirby in curbing some of the potentially calamitous consequences of a formulaic approach to the Rules of the High Court, 2008, which ushered in a robust system of judicial case management. His contribution in this regard is conspicuous and presents a triumph in ensuring just, efficient and speedy disposal of cases, which is what the judicial case management system intended. The percipience with which he approached and interpreted the Rules shaped the law in civil practice and unquestionably places him amongst the most memorable judicial figures in Botswana's legal history.

1. INTRODUCTION

To many, the introduction of the judicial case management system, through the 2008 Rules of the High Court, suggested that strict adherence to the Rules was a necessity in attaining justice, and a panacea for the effective functioning of the judicial system. To an extent, and looking at

the objectives which were intended to be achieved by judicial case management, these expectations were not wholly misplaced. However, early implementation of the Rules brought to the fore some disconcerting teething problems which threatened to unravel the very objectives which underpinned the Rules.

These challenges were predominantly prevalent in the application of Order 42 of the Rules of the High Court which deals with case management conferences. Early on, there was a spate of cases in which judges either dismissed cases or entered final judgment on account of a party's failure to comply with any of the Orders relating to case management. In a formulaic approach to the interpretation of the respective Orders, judges were of the opinion that they were required to make these fatalistic orders in instances where there was failure to strictly adhere to the dictates of the Rules.

Consequently, the Court of Appeal found itself inundated with appeals from litigants who were discontented by the inflexible manner in which High Court judges applied Order 42. In this respect, Justice Kirby commendably rose to the occasion by calling for a purposive interpretation of the Rules through which judges exercise a measure of discretion in dealing with non-compliance with the Rules. In the process, he provided instructive guidelines. The extensive reliance on his landmark judgments, by both the High Court and the Court of Appeal, accentuate their significance.

In this paper, we demonstrate that Justice Kirby's philosophy to interpretation and application of the Rules indicates that, while the 2008 Rules of the High Court curbed the undesirable situation where the progress of cases was dependant on the whims and caprices of the litigants, the Rules are but a means to an end, being justice and the efficiency of the judiciary.

2. TRAJECTORY OF THE RULES OF PROCEDURE OF THE HIGH COURT

To sufficiently appreciate the immense contributions of Justice Kirby to civil practice, and judicial case management in particular, it is apposite to chronicle the developments which gave rise to the current judicial case management system. This discussion shall illustrate that, over the years, the Rules of the High Court have gone through significant developments in order to address both new and old problems. Section 28 of the High Court Act[1] ("the Act") empowers

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[1] Act 21 of 1974, (Cap 04:02).

the Chief Justice to make Rules of Court prescribing anything that will enable better carrying out of the purposes of the Act. The Rules include, *inter alia*, the manner of pleading, forms to be used, fees to be payable, the duties and powers of the various officers of the Court.

In 1969, the Chief Justice promulgated Statutory Instrument No. 117 of 1969 ("the 1969 Rules"). These Rules were amended a number of times. Some amendments were as a result of the changing social climate and the need to improve efficiency of the Rules in dispensing justice. For example, Order 34 of the 1969 Rules gave the Court power to order restitution of conjugal rights with a return date on which, if there was non-compliance, the Court could order a decree nisi for divorce. Form 21 of the 1969 Rules provided the form in terms of which a spouse was given a timeline upon which to restore conjugal rights to the other. Effectively, the spouses would return to Court and report on whether or not conjugal rights had been rendered.

Other jurisdictions abandoned this rule/law because of the emerging human rights, particularly those on freedom of choice and the changing climate around patriarchy. The action of restoration of conjugal rights was abolished in England in 1971 following the presentation of a 1969 Law Reform Commission report.[2] The report posited that it was intolerable interference with the freedom of individuals for the court to order adults to live together and that it was hardly an appropriate method of attempting to effect reconciliation. In Botswana, abolition of marital power,[3] which was also as a result of the changing social climate, influenced the abolition of the suit for restitution of conjugal right and therefore dealt away with the need for the Rule. The new Rule on matrimonial causes (Order 49 of the extant Rules) promotes the right to privacy by allowing the judge to interview the parties privately.

Other changes in the Rules were influenced by the need to ensure clarity and certainty with respect to certain procedures and processes. They were intended to give litigants better guidance on what is expected of them in crafting certain pleadings, as relates to both substance and form. For example, the 1969 Rules did not contain the form an affidavit should take in order to be accepted by the court. Therefore, parties had greater latitude in the manner that they drafted and presented affidavits. This unlimited discretion was certainly problematic. It is probably for that reason that Order 13 of the extant Rules was developed to specify how an affidavit should be drafted. It provides that affidavits shall be drawn up in the first person and

[2] The Law Commission's Published Working Paper No. 22, Family Law: Restitution of Conjugal Rights 17 February 1969.
[3] Abolition of Marital Power Act No. 34 of 2004 (Cap. 29:07).

separated in paragraphs. It delineates the requisite information in the affidavit, matters that ought not be included in the affidavit, and the need for an appropriate jurat in various circumstances such as where a deponent is illiterate or blind.

Another Rule that ensured clarity and certainty is Order 70 of the extant Rules. It did not have an equivalent in the 1969 Rules. This Rule clarified the appropriate procedure for redress under Section 18 of the Constitution.[4] This was particularly important as such redress mostly arose in criminal cases. In *Kobedi v The State*,[5] the attorneys for both parties had in fact not been aware of Order 70 and were consequently unaware of the process with regards to service of a section 18 application which is outlined in Order 70 (3). Similarly, the extant Order 78 ensures certainty on the procedure of appealing to the High Court under Section 13 of the Trade Unions and Employers Organizations Act.[6] Some Rules, such as Order 23 of the 1969 Rules, on dismissal for want of prosecution, were for purposes of managing backlog by ensuring that cases that were not pursued with diligence for a year were brought to an end.[7]

However, it was only in May 2008, that a robust judicial case management system was introduced through Statutory Instrument No. 40 of 2008 ("the 2008 Rules"). Justice McNally remarked that the judicial case management system may be regarded as something of a triumph for the judiciary of Botswana. He noted that the system removes the supervision of the progress of the case from the hands of the parties' lawyers, and places it in the hands of the judge to whom it has been allocated. He observed that, while several neighbouring countries have tried to introduce judicial case management, it had failed for one reason or another. However, that in Botswana it has been a success, both in significantly reducing the backlog of civil cases and in speeding up the progress of matters through the Courts.[8]

Up to May 2008, the prosecution of civil cases had proceeded at a leisurely rate, largely at the will of counsel involved. This system was open to abuse and some cases took years to be concluded, often to the detriment of one or other of the parties, while backlogs of thousands of cases accumulated.[9] Order 42(1) of the 2008 Rules provides that the Registrar shall allocate each existing (before May 2008) and new cause to a judge who shall manage a cause as provided for in order 42. Thus, once registered, every case is seized from the hands of the

[4] Act No. 30 1966 (Cap. 01:01).
[5] 2002 (2) BLR 502 (HC).
[6] Act No. 23 1983 (Cap. 48:01).
[7] *Botipeng v Healthcare Holdings (Pty) Ltd t/a Gaborone Private Hospital* 2000 (2) BLR 112 (CA).
[8] *Phakalane Estates (Pty) Ltd v Water Utilities Corporation* 2011 (1) BLR 83 (HC).
[9] *Gofhamodimo v Koboyankwe and Others* 2011 (2) BLR 424 (CA).

parties or their attorneys and belongs to the court. The court bears the responsibility of dealing with the matter expeditiously and fairly by setting out what the parties are required to do, and when they are to do it.[10]

Order 42 introduced case management reports and delineated what is to be contained in the reports, proposed final pre-trial orders and case management conferences. The Rules specifically stated timelines to be adhered to. An initial case management report was to be filed at least 14 days before the initial case management conference; a case management order was to be issued by the judge within 14 days after completion of the conference; the same applies for pre-trial orders. The introduction of Order 42 was simultaneous with the reduction of time under Order 23 dealing with dismissal of cases for want of prosecution as highlighted above. The new Order 23 reduces the period of inactivity on the case from one year to six months. It would seem that the amendment of Order 23 was designed to complement the case management system.[11] The purpose of Order 42 was to expedite the passage of actions and opposed applications through Court.[12]

It should be noted that some form of case management existed in the 1969 Rules. In terms of Order 28, on agreement of issues, of the 1969 Rules, an attorney desirous of setting an action down for trial or of obtaining a date for the hearing thereof was to request the counterparty's attorney to attend a conference at a mutually convenient time with the object of reaching an agreement as to possible ways of curtailing the dilation of trial. This was to be done 'as soon as possible after the close of the pleadings, and before delivering a notice of set down or filing a written request for such date, as the case may be.'[13] The Rule set out the issues to be discussed, being *inter alia* the possibility of obtaining admissions of fact and of documents; inspection or examination; making of any discovery of documents; the consolidation of trials and the quantum of damages. A minute would have to be prepared by the parties and presented at the commencement of the trial. If the minute was not prepared the parties would advise the judge.

Failure to participate in collating the minute was sanctioned by an order for payment by a party, of a portion of the costs when the attorney for such party has refused a request to attend a conference in terms of Rule 1 of Order 28. Thus, trial could proceed without the minute

[10] *Rantabe v Kanjabanga and Others* (Civ Case 2914/02) (Unreported) (HC).
[11] *First National Bank of Botswana Ltd v Tau* 2009 (1) BLR 112 (CA).
[12] ibid.
[13] Order 28 (1) of the 1969 Rules.

and even if the judge was minded to sanction a non-compliant party, it was limited to a portion of the costs attendant to such non-compliance. This system was unpalatable because there were no timelines and the judge could only see the minute on the day of trial. The 1969 case management was at the whims of the litigant's attorneys who controlled when they filed a report to the judge on agreed issues. The 2008 Rules were a welcome change in the judiciary in imposing timelines in this regard.

The 2008 Rules were amended in 2011 through Statutory Instrument No. 1 of 2011 ("the 2011 Rules") maintaining the judicial case management system. The notable changes are in the reduction of the timelines in Order 42. The timeline for submitting an initial case management report was reduced to at least 3 days before the initial case management conference. The submission of a proposed final pre-trial order was reduced to at least 4 days before the final case management conference. Another notable amendment was the addition of order 42 Rule 14, granting judges the power to relax timelines set by the Rules, to condone technical irregularities which do not occasion prejudice on the counterparty, and order amendments, in an effort to determine the real issues between the parties.

Furthermore, the timeline for filing a declaration after entry of appearance to defend, was reduced from 30 Court days to 14 Court days. The time for filing a plea was also introduced as it did not exist in the 2008 Rules. In the 2008 Rules, a defendant would be directed by the judge on when to file a plea. The 2011 Rules also introduced actions that could be taken by a defendant where the plaintiff failed to file and serve a declaration within the prescribed time.[14] The Rules also introduced actions that could be taken by a Plaintiff where the Defendant failed to file and serve a plea within the prescribed time.

A drastic change of the 2011 Rules came in 2021 through Statutory Instrument No. 202 of 2021 ("the 2021 Rules"). One of the weaknesses of the 2008 Rules was that, although the Rules had timelines for litigants, judicial officers themselves were not subjected to timelines in the way of action(s) on their part. These then became problematic in instances where the progress of the case was hampered by the inaction of the judge. In order to address this challenge, in 2021, notable amendments were made by introducing monitoring of timelines for disposing of cases by judges. The 2021 Rules also introduced a system in terms of which a non-compliant judicial officer may be dealt with by the Chief Justice, including through referral

[14] Order 24 Rule 8 and Order 25 Rule 11 and 12, 2011 Rules of the High Court.

to the Judicial Services Commission.[15] The Rules now stipulate that for urgent applications, delivery of judgment shall be 10 days after the hearing. Where an interim relief is sought, it shall be at the close of hearing, or any time before the threatened conduct.[16] Judges are to deliver rulings/judgments in provisional sentence, summary judgment or opposed interlocutory applications 20 court days after the hearing.[17] The Registrar of the High Court is mandated to monitor compliance with judicial standards for delivery of rulings or judgments.[18]

It will be seen that Order 42 of the 2011 Rules only had timelines in relation to the filing of the case management reports before the case management conference. It did not specify when the parties should meet and prepare the report. This was usually agreed by the parties. A new order 27 has been introduced setting out the times when a plaintiff ought to consult with a defendant after filing a plea; when the parties should meet; the timeline between the conclusion of a case management report and the filing of same; and the time within which the Court is to schedule a conference.

The Rule on barring which had been deleted in the 2008 Rules, has been re-introduced in the 2021 Rules. If a party files their papers out of the prescribed timelines they are automatically barred. The counterparty may apply for default order, final judgment or dismissal. A party that has been barred may apply for leave within 30 days after the automatic bar and bears the costs attendant thereto on attorney-client scale.[19]

The purpose of the 2011 and 2021 Rules, it seems, is to tighten the timeframes in the 2008 Rules, which timelines were generous to the parties, and to ensure that the judges themselves do not defeat the purpose of judicial case management by sitting on judgments for several months or years.

3. FORMULAIC APPROACH TO THE RULES

The introduction of judicial case management was to expedite the progress of cases through the Courts. Nganunu CJ (as he then was) remarked that the Rules were aimed at substance and justice rather than procedure.[20] They were meant to curb the *laissez-faire* attitude adopted by litigants and/or their lawyers that dragged matters on for years. Order 1 Rule 2 of the 2008

[15] Order 2B (3) of the 2021 Rules.
[16] Schedule 6, 2021 Rules.
[17] ibid.
[18] Order 2B (1) of the 2021 Rules.
[19] Order 31 (6) of the 2021 Rules.
[20] Hon. Chief Justice J.M. Nganunu, Judicial Reforms Judicial Reforms as a vehicle for justice delivery, Southern African Chief Justices' Conference, 7-8 August 2008.

Rules provided that the application of the Rules shall be directed towards the achievement of a just, efficient and speedy dispensation of justice. Curiously, this provision was omitted from the 2011 Rules. However, it has since been reintroduced in the 2021 Rules.

Commenting on the advent of judicial case management which was introduced by the 2008 Rules, in the case of *Motsamai v Bodutu*[21] Walia J. said:

> The new Rules have now been promulgated and this is perhaps a good time to remind attorneys that in furtherance of the objects of those Rules, the Courts will have zero tolerance for disregard of the Rules, orders of Court and slothful litigation…judicial case management is a reality, warnings have been sounded and orders unfavourable to the tardy and negligent, such as the one in this application, have been made. There can be no excuse for litigants before this court not to conduct their cases with dispatch and if the laggards suffer adverse consequences, then they have only themselves to blame.[22]

The courts have on numerous times buttressed Justice Walia's sentiments by taking strong action where attorneys have been dilatory or negligent in adhering to the Rules, including dismissing actions or granting final judgment to express their disapproval in no uncertain terms. It has been held that parties who recklessly disregard the Rules and have no respect for the court or its orders must realize that they do not have a place to abuse the judicial process and clog progress at the expense of more deserving cases.[23] The courts have shown disapproval of flimsy excuses by litigants that demonstrate a level of laxity whose net end is not only to stonewall against efficient and timeous litigation but defeats the whole object of judicial case management.[24] The sentiments of Justice Dingake in the case of *Debswana Diamond Co (Pty) Ltd v Engen Botswana and Another*[25] also shed considerable light on the attitude of the courts towards non-compliance with set timelines. His Lordship cautioned as follows:

[21] (Mc 274/04) (Unreported) (HC); *Debswana Diamond Co. v Engen Botswana (Limited)* [2010] 2 BLR, 170.
[22] Ibid, p174.
[23] *Regent Insurance Botswana (Pty) Ltd v Sintala* (Civ Case 946/10) (Unreported).
[24] *Mogotsi v The Attorney-General* (Civ Case 261/10) (HC) (Unreported).
[25] 2010 (2) BLR 170.

> …If this Court does not strictly enforce scheduling orders, we risk sliding back to the olden days where justice was often held hostage by attorneys who, having initiated litigation or defended it, appeared to develop cold feet and, instead of retreating or bringing the litigation to an end, would instead drag it on for no good reason.[26]

In the case of *Maje v Bokamoso Private Hospital Trust and Another*,[27] the Court held that it was high time for the courts to demand strict compliance with the Rules and not allow parties to benefit from their disregard of the Rules. Similarly, in the case of *Digwa v Independent Electoral Commission*,[28] the Court cautioned that, if parties are permitted to wantonly disregard the Rules, such an approach would "not only distort their object, but lead to chaos and absurdity, in the orderly and acceptable manner of conduct of legal proceeding".[29]

In an effort to adhere to the judicial case management system and indeed to curb lackadaisical conduct, the courts often take a narrow and strict approach in the interpretation of the Rules. A narrow and strict approach to the Rules will certainly swiftly dispose of matters but it will be at the expense of justice and fairness which the court should ordinarily promote, even through the judicial case management system. If the Rules are interpreted by the letter and not with respect to the spirit behind the statute then the process of justice may fall off the bandwagon of efficient disposition of cases.

In interpreting Order 13 Rules 12 and 17, Justice Dibotelo J (as he then was) in the case of *Sesana and others v The Attorney-General*,[30] opined that:

> The provisions of Order 13 Rule 12(1) are peremptory in their requirement that the jurat to the affidavit of an illiterate person shall be certified and the same applies to the provisions of Order 13 Rule 17 in the requirement that annexures to an affidavit shall be signed and certified by the commissioner before whom the affidavit is sworn. Failure

[26] ibid at p.177.
[27] 2012 (1) BLR 1017 (HC).
[28] 2019 All Bots 51 (HC).
[29] ibid at paragraph 15 of the judgment.
[30] 2002 (1) BLR 452.

to comply with the peremptory provisions will render the affidavit a nullity. (own emphasis).[31]

The question whether failure to comply with the dictates of Order 13 of the Rules of the High Court renders the whole application a nullity was subsequently dealt with by the Court of Appeal in the case of *Phillip and Another v Permanent Secretary, Ministry of Health and Others*.[32] Therein, Justice Kirby rendered an enlightening judgment anchored on a purposive interpretation of the Rules as opposed to a formulaic one. The case will be extensively discussed below as one of the select cases reflective of Kirby's legacy in civil practice.

In *Bogorafela v Director of Public Prosecutions,*[33] and *Ncube and Another v Director of Public Prosecutions*[34] Moesi J. found that, in failing to conduct a case management conference, the trial magistrate fell into a grave procedural error and that such failure fatally and greatly impacted the quality of the conduct of the trial, and consequently meant that the interests of the administration of justice were unmet at the end of the day. He held that Order 51 of the Rules of the Magistrates' Courts (Cap 04:04) which requires the holding of a case management conference is couched in peremptory terms and that a failure to comply with those peremptory terms has the invariable consequence of nullity.

The foregoing iron-clad approaches are a narrow and stingy construction of the Rules on the use of the word "shall". The word, as can be seen from the foregoing has been interpreted in a literal and binding manner. Often times, when the Rules are applied in this formulaic manner, the process ignores the object of such Rules. The approach glorifies words over purpose and context. The judges would obliviously tie their own hands in the interpretation of the Rules and render orders cursorily. On this front, a formulaic and stingy approach leads to a robotic-function of the courts.

[31] Ibid at p 453.
[32] 2014 (1) BLR 129 (CA).
[33] Case No. CLHFT-000051 – 15 (HC) (Unreported).
[34] Case No. CLHFT-000060 – 16) (HC) (Unreported).

In *Vijoen v Du Plessis and Another*,[35] it had been submitted that in hearing a dismissal for want of prosecution in terms of Order 23, the judge fulfils a 'semi-robotic' function with no discretion, if sufficient reasons are shown. The Court of Appeal rejected the proposition that the judge is a slave to the Rules and labelled the idea of a semi-robotic judge as strange. It opined that the High Court has always been the master of its own procedure and, while Rules of Court may be statutorily created, they cannot prevent a judge from departing therefrom where strict adherence would result in manifest injustice. As a human institution, the judges of the court should strive to enforce the Rules and to meet the ends of justice. They cannot do so if they adopt a formulaic and miserly approach which serves no other purpose other than hastily disposing of matters.

4. THE RULES FOR THE COURT, AND NOT THE COURT FOR THE RULES

Although the discussion above reflects an approach through which courts in Botswana have strictly applied the Rules and issued fatalistic orders for non-compliance, it is to be noted that some judges have relied on the old adage that the Rules are made for the court and not the Court for the Rules.[36] This approach was accurately captured by Dingake J in the case of *Bruyn v Herbst Feeds (Pty) Ltd*[37] wherein he opined that the court always has discretion on the application of the Rules and observed as follows:

> This is so because Rules are made for the court, and not the court for the Rules; and in applying the Rules to various situations and circumstances, this Court cannot behave like a mechanical calculator.[38]

Moreover, in the case of *African Banking Corporation of Botswana v Makhura and Sons (Pty) Ltd*,[39] the Court noted that the discretion of the court in relation to the Rules must be exercised in the interests of justice. In keeping with this approach, in *Kaloso v The State*,[40] the Court held that, although courts must accord the Rules the sanctity they deserve, they must guard against allowing technicalities to derail the course of justice. In this regard, it is apposite to reference the timeless sentiments of Bowen LJ in the case of *Cropper v Smith*[41] where he indicated that "the object of the courts is to decide the rights of the parties, and not to punish

[35] 2009 (1) BLR 116 (CA).
[36] *Lodges of Botswana (Pty) Ltd v Tawana Landboard* 2013 All Bots 497 (CA).
[37] 2012 All Bots 300 (HC).
[38] ibid at paragraph 15 of the judgment.
[39] 2017 All Bots 548 (HC).
[40] 2018 All Bots 208 (CA).
[41] 1884 (26) Ch.D. 700.

them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights".[42]

The discussion below reflects that Justice Kirby was an instrumental proponent of the adage that the Rules are made for the guidance of the court. To this end, his philosophy was that the court should purposively interpret the Rules in a manner that best attains justice, taking into account the peculiar circumstances of each case.

5. PROPER AND JUDICIOUS INTERPRETATION OF THE RULES

One of the cases which best captures Justice Kirby's approach of a purposive and judicious interpretation of the Rules is the case of *Gofhamodimo v Koboyankwe*.[43] The case came at the backdrop of the early stages of implementation of the 2008 Rules of the High Court in their introduction of judicial case management. In particular, there was a spate of cases in which judges of the High Court had taken the view that failure to comply with any of the Rules relating to case management, particularly Order 42, left them with no choice but to either dismiss the claim or enter final judgment. Over and above that, to the extent that the Rules did not make provision for it, there was uncertainty as to the procedure to be adopted by a party who was disgruntled with such order. High Court judges, as evinced by the High Court decision in the *Gofhamodimo* case itself, had taken the position that, once they either dismissed the matter or entered judgment on account of default, the defaulting party could not approach the High Court for rescission on account of the principle of *functus officio*. To this end, it was maintained that an appeal to the Court of Appeal was the appropriate course to pursue. Justice Kirby's interventions in this regard were comprehensively instructive and have shaped a large part of the jurisprudence on judicial case management and the general interpretation of the Rules.

In giving the 2008 Rules of the High Court historical context, Justice Kirby recorded that the Botswana judicial case management system derives in part from the Federal Rules of Procedure in United States of America ("the Federal Rules"). He noted that Order 42 Rule 12 is a condensed and abbreviated version of Federal Rule of Civil Procedure No. 16 as read with Rule 36, in that country. The Federal Rules are detailed in pre-trial procedures to be followed and circumstances in which each of the sanctions for dilatory or devious conduct provided will

[42] ibid at p. 710. Quoted with approval in the case of *Jet Air Plane Hire (Pty) Ltd v Cul De Sac (Pty) Ltd* 2021 All Bots 106 (CA) and in *Niche Group (Pty) v Liberation Saints International* 2016 All Bots 371 (HC).
[43] 2011 (2) BLR 424 (CA).

be applied.[44] Justice Kirby was of the view that the more accurate word to use in the context of our Rules, is 'potential consequences' not sanctions.[45]

Justice Kirby cautioned against draconian measures taken by judges in employing the case management system, with particular reference to the potential consequences laid down in Order 42 Rule 11 (now Rule 12). He remarked that Order 42 Rule 11 lays down foreseeable consequences of inactivity or non-compliance to befall errant parties or clients. For the application of the consequences laid down, each case is to be decided on its own facts and circumstances by the judge. Each of the Orders has the effect of shutting out one or other of the parties from presenting all or part of his case, with the potential of causing him to lose his case and thus they could all be termed nuclear options (save for a costs order). While it is desirable to resort to lesser options than a dismissal or final judgment, it is not necessary. Justice Kirby emphasized that what is required is that the judge should carefully consider the circumstances and weigh the alternatives before deciding upon a just and appropriate order.[46]

Crucially, Justice Kirby proceeded to lay down the process which should be adopted by the court in the exercise of its discretion as follows:

In exercising his discretion, the judge is to adopt a three stage approach:

(a) first, he will consider, as a fact, whether there has been a default of one of the types listed, and if so, he will record the default;

(b) second, he will consider whether the defaulting party has discharged his onus to show that he had a lawful excuse for such default (or, where failure to participate in good faith is alleged, whether the party alleging such failure has discharged his onus to prove that), and

(c) third, where no lawful excuse has been shown, or lack of good faith has been established, he must decide upon, and enter an order which is just in all circumstances, and record his reasons for doing so.[47]

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[44]ibid.
[45]ibid.
[46]ibid.
[47] ibid at p 436.

In cautioning against a restrictive approach through which courts automatically gave terminative orders on account of non-compliance with Order 42, Justice Kirby guided as follows:

> It is important to note that no right is given to the compliant party to have a final order entered against a defaulting party. Rather, it is the duty of the Judge to enter such order as is just, either *mero motu,* or at the urging of the compliant party. The test of what is just is an objective one. An order is just if it is fair and reasonable in all circumstances of the case. It is one about which the universal observer of court proceedings in Botswana would say without hesitation, as he rose from the public gallery, "that was the proper decision. It comes as no surprise".[48]

Having said so, Justice Kirby proceeded to enumerate considerations to be taken into account. These include, *inter alia*, the need to enforce judicial case management in a just and efficient manner, the degree of non-compliance, whether the conduct of the defaulting party demonstrates a lack of seriousness in advancing the case, the reasons advanced for the default, and the degree of fault attributable to the client as opposed to that attributable to the attorney.[49]

To appreciate the vast influence of the *Gofhamodimo* case, it is worthy to highlight that it was relied upon and referenced in countless cases by both the High Court and the Court of Appeal.[50] Moreover, the case has been relied upon by the Industrial Court.[51]

Another case which is reflective of Justice Kirby's philosophy of a contextual and purposive interpretation of the Rules is the case of *Tiro v Attorney-General*.[52] Therein, the Attorney General had raised a point in *limine* that an ostensible application for review had been

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[48] ibid at p 347.
[49] ibid.
[50] *Mamasi Investments (Pty) Ltd v African Banking Corporation* 2018 All Bots 84 (CA); *Nkonga v Nkonga* 2015 All Bots 315 (HC); *Okgethile v Kgabenyane* 2018 All Bots 27 (CA); *Oxman Investments (Pty) Ltd v Backloads* 2015 All Bots 263 (HC); *Ramotshogwana v Koontsenyana* 2020 All Bots 99 (CA); *Tshiamo v Kobae* 2013 All Bots 51 (HC); *Kgamane v Ikitseng* 2017 All Bots 414 (HC); *Kenosi v Thegetsang* 2016 All Bots 357 (HC); *Cannon Burry (Pty) v Lempadi* 2016 All Bots 374 (HC); *Motshwari v Botswana Postal Services* 2015 All Bots 429 (HC); *Jay-Bee Associates (Pty) Ltd v Attorney General* 2012 All Bots 154 (CA); *Leitshamo v Attorney General* 2019 All Bots 23 (CA); *Zaanish Holdings (Pty) Ltd v Katrac Holdings (Pty) Ltd* 2012 All Bots 155 (HC); *Tjizwina Investments (Pty) Ltd v Regent Insurance Botswana (Pty) Ltd* All Bots 323 (HC); *Theunissen v Tink* 2012 All Bots 187 (CA); *Riqualife Holdings (Pty) Ltd v Trident Francistown (Pty) Ltd* 2012 All Bots 178 (CA); *Apron Bernard Group (Pty) Ltd v Thusanyo Funeral Undertakers (Pty) Ltd* 2019 All Bots 2 (CA); *Elan Botswana (Pty) Ltd v Welldone Communications (Pty) Ltd* 2017 All Bots 555 (HC); *Moloane v Assemblies of God Botswana* 2016 All Bots 592 (HC); *Hautshwana (Pty) Ltd v Bankwa Panel Beaters and Spray Painters (Pty) Ltd* 2014 All Bots 407 (CA*); Debswana Diamond Company (Pty) Ltd v Gaetsaloe* 2014 All Bots 398; *SMC Brands v Goodwin* 2018 All Bots 320 (CA); *Auto Cham (Pty) Ltd v Dikgang Publishing Company (Pty) Ltd* 2016 All Bots 167 (CA).
[51] *Moengele v G4S Botswana* 2015 All Bots 112 (IC).
[52] 2013 (3) BLR 98 (CA).

brought under Order 12 and not Order 61 as required by the Rules. The issue for determination was whether using a procedure other than Order 61 was an abuse of process which stood to be struck out. The court a quo had heavily relied on the word "shall" being mandatory in Order 61 (1). Justice Kirby considered the interpretation of seemingly mandatory Rules that contain the word "shall" which feature in virtually all Botswana cases on judicial review.

He held that, where a particular procedural provision is mandatory, its non-observance in the decision-making process will render the decision itself a nullity. Where it is merely directory, the court or decision-maker has the discretion to depart from it or to allow or condone a departure from it if the circumstances of a particular case justify a departure from it. In the case of a rule of court, whether a rule is mandatory or directory will depend upon its context in the Rules taken as a whole.[53] In considering whether the word 'shall' as used several times in Order 61 is to be given its primary meaning of 'must' as commanded by the Interpretations Act,[54] it is important to ascertain whether or not the contrary intention appears. Section 2 of the Interpretation Act is instructive and it provides that "*Each provision of this Act applies to every enactment…except in so far as the contrary intention appears*."

Justice Kirby emphasized that the purpose of the Rules as set out in Order 1 (2) is directed towards the achievement of a just, efficient and speedy dispensation of justice and provide a compass to judges as to their application. He observed that, in addition, Order 5(1) of the Rules provides that non-compliance with any of these Rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the judge so directs, but the proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with, in such manner and on such terms as the judge may think fit.

Regard being had to Order 1 (1), Order 5(1) and Order 42 (14), Justice Kirby came to the conclusion that, few if any, of the Rules of court can be construed as mandatory in an absolute sense. They are directory in that generally they are to be obeyed unless there is just cause for a departure therefrom, and either the other party raises no objection or the court allows or condones such departure. He held that the appropriate order is for the offending part to be struck off with leave to amend or replace the offending parts, unless the non-compliance is accompanied by an intention to evade the substantive requirements of the correct rule or

[53] ibid.
[54] Section 45 of the Interpretation Act, Act no.20 1984 (Cap.01:04) provides: In an enactment 'shall' shall be construed as imperative and 'may' as permissive and empowering.

procedure to the prejudice of the counterparty. In that instance, striking out completely would be justified. Even then, the application should not be dismissed, so that it is finally over without the merits of the dispute being addressed at all.

Justice Kirby found that a breach of the Rules may occur through an oversight, negligence, or a *bona fide* belief in the correctness of the procedure adopted. However, that it will be an abuse of the court process if that breach is deliberately committed in order to secure an unfair advantage over the other side, or to avoid requirements of the correct procedure relating to time, leave of the court, persons to be cited, response periods, or other provisions, designed to achieve fairness to the respondent. He opined that is not an abuse of the court process for a party to adopt an alternative procedure when the only result is to forgo an advantage, perhaps a time-consuming advantage, which he enjoyed under the correct procedure. This is instructive particularly where self-actors and/or attorneys not intending to flout the Rules are concerned.

The *Tiro* case was relied upon in the case of A*ttorney-General and Another v Botswana Federation of Public Sector Unions and others*.[55] The Court found that the Rules, particularly Order 1, Order 5, and Order 42, clothed the court with discretion to condone technical irregularities, relax and vary time limits and even grant amendments. Such permissiveness is geared towards the attainment of a speedy and efficient justice system, which should not be bogged down and frustrated by technical objections, rather than substance. In this regard, the word "shall" was found to be permissive rather than mandatory. The Court cautioned that although the Rules are generally permissive, the court should always strive for compliance, unless good cause can be shown to exist for such non-compliance, with prejudice to the counterparties being borne in mind.

The *Tiro* case was also relied on in *Motsamai v the State*[56] where the Court held that it is well established that 'shall' is not invariably mandatory and that the consequence of non-compliance will invariably result in a nullity of the process. The question of whether or not the term 'shall', as contained in Order 51 Rule 3(6) of the Magistrate Court Rules, is mandatory or

[55] 2012 (3) BLR 801 (HC).
[56] 2018 (3) BLR 35 (CA).

directive is one of statutory interpretation. The Court also buttressed that whether a Rule is mandatory or directory will depend upon its context in the Rules taken as a whole.[57]

As flagged above, one of the cases in which one is able to appreciate Justice Kirby's legacy in civil practice in the interpretation of the Rules of the High Court is the case of *Phillip and Another v Permanent Secretary, Ministry of Health and Others*.[58] The Court *a quo* had held that any failure to comply with Order 13 Rule 16, which requires annexures to an affidavit to be initialed, was inexcusable and was fatal to the applicants' case. The High Court consequently dismissed the whole application for non-compliance with the Rules. Upon appeal, the Court of Appeal had to deal with the narrow issue of whether the court *a quo* was correct to dismiss the urgent application solely because of the lack of initials on some annexures to the founding affidavit. The Court, per Justice Kirby, found that, where an exhibit or annexure attached to an affidavit is to be relied upon as evidence, proper compliance with Order 13 Rule 16 is required. However, he noted that the court *a quo* could have struck out the offending annexures, leaving the merits to be argued on the material that remained; or he might, if so requested, have given the applicants leave to have the annexures properly authenticated. The Court also found that the court *a quo* could have considered relaxing the exigencies of the Rules in the interests of the swift determination of an urgent application in terms of Order 12 Rule 12 (1).

The foregoing constitutes proper and judicious interpretation of the Rules. It is clear, from the *Gofhamodimo* and *Tiro* cases, that what was intended is not to curtail the trial judge's discretion in applying the Rules under the case management regime. What was intended is that the judges avert their minds to the object and purpose of the Rules, applying their discretion judiciously where options for consequences of non-compliance are provided (or even where such options are not spelt out).

This ought not to give litigants the idea that they can get away with non-compliance since the Court of Appeal cautioned against applying nuclear options where other options existed. In the case of *Mbaiwa v Kapimbua*,[59] the appellant's case had been dismissed for want of prosecution under Order 23, and he reinstituted his case by filing a new matter. The Court was faced with the overlapping principles of *res judicata* and that of *functus officio* since a final

[57] The Tiro case was relied upon and referenced in several other cases. *Moeti v Attorney General* 2017 All Bots 494 (HC); *Monei v Attorney General* 2021 All Bots 3 (CA); *Aerecon Botswana (Pty) Ltd v Commissioner of Labour and Others* 2021 All Bots 253 (IC).
[58] 2014 (1) BLR 129 (CA).
[59] 2017 (2) BLR 260 (CA).

order had been made. Justice Kirby opined that, the sanctions in the judicial case management regime, were introduced specifically to compel compliance and to speed up litigation. In each case, or in most cases, the consequence was that an issue or issues were to be decided without the necessity of adjudicating on their merits, and judgment was final. If a litigant were able to subvert that sanction merely by issuing a fresh summons, the whole purpose and efficacy of judicial case management would be undermined.

Moreover, in the case *Wilderness Air Botswana (Pty) Ltd v Lumsden*,[60] having acknowledged the guidance of the *Gofhamodimo* case, the Court found that there was gross and reckless disregard of the Rules caused by the appellant's own legal representatives which merged with the appellant's agenda to delay the case for as long as it could do so as to frustrate the respondent's claim and then wither him financially. The Court demonstrated its disapproval of such conduct and noted that it compromised and undermined the very object, spirit and ethics of a just, efficient and speedy dispensation of justice. Consequently, the Court found that the order striking out the appellant's defence was considered appropriate not only because of the appellant's lack of seriousness but because on examination of the nature and strength of the appellant's defence, it was *prima facie* bogus.

6. REFLECTIONS ON KIRBY'S APPROACH(ES)

It is interesting to note that Justice Kirby's guarded approach against making final orders on account of non-compliance with the Rules predates his Court of Appeal days. As a High Court judge, in July 2008, being a couple of months after the 2008 Rules of the High Court were introduced, Justice Kirby was faced with the case of *Seleke v Attorney General*[61] in which the parties had not complied with the respective Order. In delivering his ruling, in default of appearance of both parties, he noted that he was aware that one of the consequences provided under Order 42 Rule 11 was a dismissal of the matter. However, he observed that, since the Rules were still new, he would not order a dismissal of the matter and would rather give the parties further opportunity to comply. In the same breath, he cautioned the parties that he might not be inclined to be so lenient should there be further infractions.[62]

[60] 2015 BLR 262 (CA).
[61] 2008 All Bots 433 (HC).
[62] Two days later, Justice Kirby delivered a substantially identical ruling in the case of *Sisya v Frontline Investments (Pty) Ltd* 2008 All Bots 446 (HC). See also *Nasha v Water Utilities Corporation* 2008 All Bots 383 (HC).

The eagerness to employ the Rules and to ensure speedy disposal of the Rules must be guarded and weighed against the object of the Rules as introduced in May 2008. Justice Kirby's approach to the interpretation and application of the Rules was such that the courts ought to breathe life into the Rules and adopt a holistic approach that does not read one Rule in isolation of the rest of the Rules, contrary to the purpose of the case management Rules. In so doing, judges will interpret the words used in the Rules in their context, regard being had to the scope, background and spirit of the implementation of the Rules themselves. Thus, the same word used in different contexts may mean different things, for example, Justice Kirby found that the word "may" can sometimes be peremptory.[63]

The approach by Justice Kirby demonstrates that judges are not slaves to the Rules nor are they robots who blindly read the Rules and adopt the literal and narrow meaning without consideration. In that sense, he shows that, if judges exercise discernment and employ wisdom, they can meet the ends of justice. Moreover, his approach is such that the Rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the courts.[64]

It goes without saying that the employment of a formulaic approach to the Rules is contrary to the purpose of the case management regime as the Rules were meant to guide judges not to enslave them and shackle the parties in technicalities that would otherwise defeat the ends of justice. Where judges interpreted Rules to mean that they have no discretion, often times, they nullified proceedings and dismissed matters unsympathetically in instances where they could have allowed the non-compliant party to amend or where they could have simply struck out the offending portions and appropriately dealt with the balance of the case.

Judges have some latitude or discretion bestowed upon them in terms of Order 5 (1) and Order 42 (14) of the Rules. If properly utilized, these Rules can mete out justice in the manner envisaged by the judicial case management system. Where a court is faced with non-compliance, to be properly addressed under Order 42 Rule 12, it must consider the options it has and avoid draconian measures unless the case warrants such draconian measures. Where a draconian or nuclear measure is adopted with good reasons, that is, proper discretion, the Court of Appeal will seldom interfere.

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[63] *Tiro v Attorney General* 2013 (3) BLR 98 (CA).
[64] *Federated Trust Ltd v Botha* 1978 (3) SA 645 (A) at 654C – D.) Per Van Winsen AJA, cited in the *Tiro* case.

It is instructive that Justice Kirby found that breach of the Rules could be as a result of oversight or belief in the correctness of a procedure, which then turns out to be inappropriate. Thus, judges ought to interrogate the motives and whether prejudice would be occasioned if the Rules are not followed to the letter. This will ensure access to justice by all, even those who are not learned. Justice Kirby's approach to the Rules is that of purposive interpretation of the Rules meant to achieve justice, equity and efficiency. His contribution in this regard has been immense.

7. CONCLUSION

In Botswana, where other alternative dispute resolution mechanisms are still at infancy stages and relatively unavailable to ordinary citizens, litigation remains the leading dispute resolution mechanism. Recently, there has been a move to expand the jurisdiction of the Small Claims Court and the Magistrate Court, and a new division of the High Court has been established at Maun. These are welcome developments in the way of improving access to the courts and justice.

However, meaningful access to the court also has to include judicious interpretation and application of the Rules of Court. If a formulaic and narrow interpretation is adopted by the courts, the court may as well shut its doors to those who are illiterate, unrepresented or simply not attorneys. Those who are represented may not be spared as they may have to pay for the sins of their attorneys on technicalities. If the courts are riddled with technicalities whose net effect is to create unnecessary hurdles to justice as opposed to ensuring that recalcitrant litigants are met with the consequences of their non-compliance, justice may never be meted out. The judicial case management system, though meant for speedy and efficient disposition of matters, should not be so stringent as to make access to justice elitist, such that matters that end up at trial or being heard on the merits are for those who can afford the services of attorneys, while the rest are dismissed because they do not have sufficient knowledge of the Rules.

The rules of practice and procedure are a means to efficient justice. Justice should not be sacrificed for efficiency. To draw analogy from the wisdom of Lord Denning[65]; justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: 'The judge was not just'. By pricking the bubble of the contemporary dogma created by a narrow view of the case management system, Justice Kirby left a legacy of judicious

[65] *Metropolitan Properties Co (F G C) Ltd v Lannon and Others* [1968] 3 All ER 304.

interpretation and application of the rules of procedure, as an exemplary threshold for our jurisprudence in civil practice. His approach to civil practice was perspicacious and rooted in the proposition that common sense often makes good law.[66]

[66] *Peak v. United States*, 353 U.S. 43, 46 (1957).