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NOTES

A CENTURY WORTH CELEBRATING

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INTRODUCTION

It is understandable that no great fuss has been made of the hundredth anniversary of the establishment of South Africa as a nation state within its current borders (through the South Africa Act 9 Edw VII, ch 9). The Act of Union, after all, while it represented a triumph for those arguing for the formal reconciliation of 'Boer and Brit', marked much more negatively the exclusion of the majority of the new country's population from any effective say in the institutions of government. Not only were the proponents of federalism, which might have allowed the less conservative leadership in the Cape Colony to retain a degree of autonomy through which to pursue government based on individual worth, soundly defeated, but the elements of non-racial government preserved in the Cape franchise arrangements (and to a lesser extent, those of Natal) were seen as provisions to be protected as a dying species, rather than as bridgeheads for their expansion more widely within the Union.

Subsequent developments of course merely reinforced these portents, in that the powers of provincial government became increasingly circumscribed in favour of central government, and as the franchise became increasingly determined on grounds of race-classification. So when the franchise became non-sexist, only white women were allowed to vote (see the Women's Enfranchisement Act 18 of 1930), and the electoral influence of those black South Africans who qualified to vote was considerably diluted in the 1930s and 1950s. If one looks at the legislative agenda of the first Union Parliament, one realises too that the security of the new state and racial exclusion were the driving forces behind much of the law it made (see, for example, the Immigration Regulations Act 22 of 1913, the Natives Land Act 27 of 1913, and the Riotous Assemblies and Criminal Law Amendment Act 27 of 1914).

Despite this gloomy picture, I would argue that for those interested in the administration of justice there is indeed something to celebrate, and that is

the establishment of a unified superior court system, with a single appellate body at its apex (for the present ignoring the significance of appeal to the Privy Council, which was seldom used, and finally removed by the Privy Council Appeals Act 16 of 1950). In this brief review marking a century of unified administration of justice at superior court level in this country, it seems important to be reminded of the political circumstances faced by the Supreme Court of South Africa, the better to appreciate its achievements. I do this too because so much of the early jurisprudence of the Appellate Division (AD) directly fashioned our 'legal culture', preparing the ground (both positively and negatively) for the role of the courts in the current constitutional democracy. It is also appropriate to draw some comparisons with the establishment and early record of the Constitutional Court for there are, in my view, important similarities to be noted, which may assist us in monitoring and assessing the work of the latter court in the years ahead.

CREATING AN APEX COURT

Each of the four constituent territories which made up the Union had had its own supreme court, with the Cape leading the way through the Charters of Justice introduced under British rule in 1828 and 1832. It is important to note that both Afrikaner republics had adopted written constitutions in the 1850s, which to a certain extent had provided basic rights for their citizens (narrowly defined so as to exclude 'non-Afrikaners'), so that their courts were accustomed to dealing in matters of broader political moment. The superficial similarity, however, hid two 'widely divergent Afrikaner constitutional traditions', in the words of the historian Leonard Thompson. On the one hand, the Orange Free State had a rigid constitution, the judiciary acted independently, and the Volksraad (or parliament) stayed within its legislative powers, whereas the Zuid Afrikaansche Republiek (ZAR or Transvaal) brought the opposite experience in all these respects into the Union (see LM Thompson 'Constitutionalism in the South African Republics' 1954 *Butterworths South African Law Review* 49 at 73). The fourth colonial court, that of Natal, while superficially based on the same British model as that in the Cape, added little of significance to the future court structure. (For an account of the administration of justice in that part of the country, see Peter Spiller *A History of the District and Supreme Courts of Natal 1846–1910* (1986).) Indeed, the manner in which Zulu leader Dinizulu was tried immediately prior to Union (see *In re Dinizulu* (1908) 29 NLR 161 and 277) is likely to have tarnished its reputation. Perhaps not unrelated to this, the first Natal judge to serve on the AD was G M Holmes, appointed only in 1960.

The leading figure in the Cape legal tradition was undoubtedly its Chief Justice since 1873, Sir Henry de Villiers (more detail on what follows can be found in Eric Walker *Lord De Villiers and His Times* (1925)). Through his constitutionally-prescribed office as President of the Legislative Council (the upper house of Parliament) at the Cape, he had been widely involved in public affairs, and had for example attempted to mediate in the constitutional

dispute between President Kruger and Chief Justice Kotzé in the ZAR after the latter's judgment in *Brown v Leyds NO* ((1897) 4 Off Rep 17). Sir Henry had been attempting for at least twenty years to set up a single court of appeal for all the territories of southern Africa, and this campaign had shown him that a powerful supreme court would not be acceptable to the politicians. His views deeply influenced the approach to the judicial branch of government adopted by the delegates to the National Convention, which he chaired and which gathered in 1908–1909 to draft the Constitution of the Union. In particular, Sir Henry also chaired the Convention committee which considered his proposals for the future structure of the administration of justice, and which became Part VI of the South Africa Act. Thus was the Supreme Court of South Africa established, with effect from 1 June 1910, incorporating the pre-existing courts of the constituent colonies as provincial divisions, and adding an Appellate Division, while retaining the possibility of a final appeal to the Judicial Committee of the Privy Council in London. (For more detail on all these matters, see Hugh Corder *Judges at Work* (1984) at 7–17.)

The AD sat for the first time on 4 June 1910. Although its formal seat was Bloemfontein, cases could be heard elsewhere 'at the convenience of suitors' (South Africa Act, s 109). While there had been a great degree of speculation about who would be appointed as its members, it was almost a foregone conclusion that Sir Henry de Villiers would become the first Chief Justice. He was duly appointed, whereupon he became Lord de Villiers of Wynberg, and he served on the court until 1914. He was joined on the AD by Sir James Rose Innes, former Chief Justice of the Transvaal, and Sir William Solomon, a judge of the same court as Judges of Appeal (JA). The Judges President of the Cape (C G Maasdorp) and of the Transvaal (J A J de Villiers) in turn joined them as Additional Judges of Appeal (AJA). From a formal point of view, much agitation attended the place for hearing many of the early appeals to the court, because Lord de Villiers seemed to interpret the convenience of the 'suitors' to mean judicial convenience, such that the court was rather a travelling tribunal, but this soon resolved itself, especially after the construction of a building for the AD in Bloemfontein, which opened in 1929. (For further details on this aspect, see Corder *op cit* at 22–3, and Ian Farlam 'The Appellate Division: 1910 to 1948' (2010) 23 *Advocate* 16–22.) The other formal matter which occasioned public and professional comment was the selection of judges to fill vacancies occasioned by retirement or death, as well as by the expansion of the number of appellate judges from time to time to cope with the inevitable increase in its workload. (For commentary on the appointments process and its outcome in the period 1910 to 1980, see Corder *op cit* ch 2, and Christopher Forsyth *In Danger for their Talents* (1985) ch 1.) There are currently twenty-one permanent members of the AD's successor, the Supreme Court of Appeal.

So much for the formal aspects of the establishment of a single superior court for South Africa. Of much greater importance is its jurisprudential record, and the impact of such work on the broadly political life of the nation which it has served for one hundred years, to which I now turn.

THE JUDICIAL ROLE IN GOVERNMENT

In what appears above, I have focused exclusively on the only new court created in 1910. Naturally, the superior courts of the former colonies (the provincial divisions of the Cape of Good Hope, the Eastern Cape, the Northern Cape, the Orange Free State, Natal and the Transvaal) continued to hear disputes and hand down judgments, many of which had a significant impact on social relations. The most influential court in the country was, however, undoubtedly the AD, for its writ ran nationally, and its decisions bound all other courts through the doctrine of precedent. In addition, it was effectively the final court of appeal for all South African disputes: until its abolition in 1950, leave was granted to appeal to the Judicial Committee of the Privy Council on only ten occasions (see Forsyth *op cit* at 5), and it was only in one of those instances that the judgment of that body was of any real moment; that being when the Judicial Committee of the Privy Council declared penalty clauses in contracts to be unlawful, and where rather negative comments were made by that committee about Roman Dutch jurisprudence (see *Pearl Assurance v Union Government* 1934 AD 560, and for a brief discussion of the matter, see Forsyth *op cit* at 2–5).

Within the scope of this celebratory reflection on the leading court in this country, I cannot possibly begin to do justice to the complexity of its record across all fields of the law. In this respect, I can but refer to several of the many studies which now exist, which catalogue mainly (but not exclusively) public law aspects of its work. In no special order, the following works constitute the main body of literature in this field: Albie Sachs *Justice in South Africa* (1973); A S Mathews *Law, Order and Liberty in South Africa* (1971); C J R Dugard *Human Rights and the South African Legal Order* (1978); Corder *op cit*; Forsyth *op cit*; David Dyzenhaus *Hard Cases in Wicked Legal Systems* (1991); Stephen Ellmann *Law and Liberty in South Africa's State of Emergency* (1992); Michael Lobban *White Man's Justice* (1996); and Ian Loveland *By Due Process of Law* (1999).

The general impression which one gains from a reading of these studies and of the judgments on which they are based is that the AD succeeded admirably in building a legal system which took the best from both the Roman Dutch authorities and the English common law and which was suited predominantly to the needs of the emerging hegemonic white ruling class. Commentators at the time remarked on the enormous opportunity presented to the court to play a role in the development of a legal system for the new nation state, and which could bring the two major factions in the white population together, just less than a decade after the formal conclusion of a bitter war. So a leading academic (R W Lee, Professor of Roman Dutch Law at Oxford, in 'Law and Legislation in the Union of South Africa' (1923) 40 *SALJ* 442 at 443 and 448), commenting in the context of 'lawyers' law', wrote:

'Seldom have the courts of any country enjoyed the opportunity which the courts of South Africa now enjoy, of moulding the laws to their will, inspired

but not hampered by tradition, aided but not checked by the legislator. . . . The general impression . . . is . . . of a court which enjoys a liberty of action scarcely to be paralleled in the history of modern states.’

While Lee may have been overstating the scope of creativity available to the AD, there can be little doubt that the appointment to its ranks of such a strong and experienced corps of judges at the outset allowed it to make a strong impression on the governance through law of the fledgling nation. The pedigree in public life and the dominant (if not domineering) part played by Lord De Villiers is universally acknowledged. His successor as Chief Justice, Sir James Rose Innes, the former Attorney General of the Cape and an active party politician until his appointment directly to the Chief Justiceship of post South African War Transvaal, gave strong leadership as head of the court until 1927. By the mid-1930s, only six other judges had been elevated to appellate status after the initial group of five, including the redoubtable Sir John Kotzé and Sir Johannes Wessels, and several of them had participated in political life before appointment to judicial office. However, it is equally notorious that, with some singularly principled exceptions in individual cases or even for some short periods of time (such as in the early 1950s), when it came to the adjudication of disputes between those resisting government policy, especially if they were black, and the state, the AD increasingly identified with the government of the day and against individual liberty. The evidence for this is to be seen at least in the concluding chapters of all the above studies, and this judicial ‘executive-mindedness’ reached its most extreme level during the states of emergency of the 1980s.

Why and how did this happen? While there are reasons aplenty throughout the eight decades of jurisprudence until the effective end of apartheid, in considering briefly the role of the AD in government, I will concentrate rather on the decades immediately after the establishment of the court, when it was finding its feet in the structures of governance of South Africa, and establishing its relationship with the legislature and executive in terms of the doctrine of the separation of powers such as it was under the Westminster constitutional system. Martin Chanock has written imaginatively and perceptively about the development of a ‘legal culture’ in this period (see *The Making of South African Legal Culture 1902–1936: Fear, Favour and Prejudice* (2001)). In retrospect, he sums up the South African state after 1910 (see Chanock *op cit* at 10–11) as being characterised by the maxim that the safety of the state was the supreme law, by the ambivalence of the judges who were accorded some respect, but ‘without final power’, by the absence of predetermined structural roles for the executive and the judiciary, by the fragility of the state, by the strong congruence between the use of force and the law, by the apparent supremacy of the government over the constitution, and by the ‘expressed need of the state to demonstrate internationally that it could maintain law and order’. He reaches these conclusions after recounting a summary (*op cit* at 4–10) of two trials in which those who resisted the state were convicted and sentenced to harsh penalties, including execution in the case of a leader of striking white workers (see *R v Long* 1923 AD 52). Given

the strong personalities on the appellate bench at the time and the equally strong identity of interests with those then leading government in Parliament and Cabinet, and bearing in mind the fractious nature of 'white' South Africans (many of whom rebelled against the decision to support Britain at the outbreak of the First World War), while the militant working class on the mines struck repeatedly and often violently until the mid-1920s, is it surprising that the AD's judgments overwhelmingly supported the political status quo? (For greater details on such assertions, see Corder *op cit* chs 4 and 5 and the Postscript. See also, for example, *Krohn v Minister for Defence & another* 1915 AD 191 and *Sachs & Diamond v Minister of Justice* 1934 AD 11.)

In similar vein, in the face of the perceived threat from 'non-Europeans' and 'natives', the AD's approach was almost as unequivocal from the outset, and became more uniform with the passage of time, perhaps with the exception of their response to the early apartheid measures of the 1950s. So we see the phrase 'of European parentage or extraction' being confined to those all four of whose grandparents were white, in *Moller v Keimoes School Committee* (1911 AD 635); the majority of the AD holding that a ministerial regulation which deemed all Asians to be prohibited immigrants on the basis of their unsuitability 'on economic grounds or standards or habits of life' to the needs of the Union was valid, in *R v Padsha* (1923 AD 281); and the court ruling unanimously that racial segregation of services in post offices, again through executive fiat, was valid in law, on the basis that equal services were provided at both counters (see *Rasool v Minister of Posts & Telegraphs* 1934 AD 167). While the court was, in modern terms, equally sexist in holding that 'persons' wishing to register as candidate attorneys did not include women (see *Incorporated Law Society v Wookey* 1912 AD 623), this ruling came to work a less restrictive effect when a majority of the judges ruled that the requirement that 'every native' had to carry a pass at night in Pretoria did not include women (see *R v Detody* 1926 AD 198). However, when it came to the constitutionality of changes to the franchise arrangements for black South Africans, the court had little difficulty in approving them in terms of the procedures set out in the South Africa Act (see *R v Ndobe* 1930 AD 484 and *Ndlwana v Hofmeyr NO* 1937 AD 229).

Thus it was, I would argue, that by the mid-1930s, the AD had through its judgments played its part in the consolidation of a broad, 'white' South African ruling group, to the exclusion of extreme elements within its ranks, and of all those not regarded as belonging to the 'white race'. There were certainly isolated instances throughout the ensuing years in which the AD found for appellants outside the ranks of this ruling group, even in the darkest days of the emergency, thus maintaining a degree of legitimacy for the court and contributing to the preservation in the minds of many of the idea that a measure of justice could be achieved through the law (in support of which see the recent work of Jens Meierhenrich *The Legacies of Law* (2008)). Yet the overwhelming impression is one of identity with white rule, and an unwillingness to push the limits of the separation of powers. Within the

context of parliamentary sovereignty under Westminster, this approach is not surprising, but then is there any reason to mark the hundredth anniversary of the founding of such a court? I would argue that there is yet cause for modest celebration, for at least two reasons, to which I turn in the last part of this note.

PROVIDING A ROLE MODEL

In the first place, the existence of the AD as the highest court in the country from 1910 until 1994 meant that there was a single point at which every dispute in law would finally be resolved, thus uniting at least three relatively distinct legal traditions and sets of judicial precedent which had existed before 1910. This is in itself not an insignificant achievement for, although the Cape legal and judicial professions dominated the subcontinent, there were competing models and testy (even arrogant) individuals to be accommodated. While the outcome in particular appeals may from time to time have been both controversial, perhaps substantially incorrect, and sometimes simply unjust, there can be little doubt that those appointed to appellate judgeships were, with very few exceptions, lawyers of technical competence, great capacity for hard work, and committed to the supremacy of the law. It is so that this last aspect, which is central to every conception of the rule of law, was frequently not complemented by a judicial commitment to the protection of basic rights which has come to be seen as a further essential element in that conception. Yet I would maintain that the formal independence, impartiality, and adherence to high professional standards which characterised the judiciary generally and which were strengthened by the leadership given by the AD, stood the country in good stead at the time of the political transition, and will continue to do so. Some extraordinarily good lawyers served as judges in the AD over the decades, and the level of courage and the commitment to basic principles of justice that were displayed by the judges particularly in the face of early apartheid legislation stand as exemplary beacons for all judges, everywhere. Their commitment to the 'universally significant human achievement' that rule should be through law (see E P Thompson *Whigs and Hunters: The Origin of the Black Act* (1975) at 265) should likewise not be forgotten amidst the welter of justified criticism.

The fact that, despite the dreadful effects on the judicial mind of the excesses of apartheid and the sometimes unduly deferential attitudes to the executive which the AD above all displayed, the continuation in office of such judges under the post-apartheid government was even *politically possible* in 1994, says much about the structure and efficiency of the day-to-day operations of the courts until then. It is true that 'punishment' was meted out to the AD by depriving it of constitutional jurisdiction after 1994, and by establishing a rival final appellate court in constitutional matters, but this exclusionary action did not persist, and by 1997 the newly-named Supreme Court of Appeal was back in the curial fold. It has since then more than made its mark through its judgments on both constitutional and non-constitutional aspects of South African law.

But there is a second and perhaps more important reason why we should be noting the role and attitudes of the AD as highest court in the first few decades after Union, and in marking its subsequent fate. This relates to the way in which it pursued sectional reconciliation between bitterly opposed groups within the 'white' population as described in summary terms above. Here there are lessons for the Constitutional Court (CC) since 1994: indeed, I would argue that there are striking similarities between the roles played by the courts in this regard, albeit in such a radically changed constitutional context. This is a much larger project which deserves detailed treatment unsuited to this note, yet it may be valuable to point to several points of intersection in the experiences of the courts, and their unexpressed public policies.

Let us begin with the fabric. The CC also started its operations in temporary quarters, though there was never any doubt that it would find a permanent home in Braamfontein, not Bloemfontein or anywhere else, and it had to wait less than a decade for its custom-built home on Constitution Hill. Not too much should be read into the contrasting styles of architecture chosen, for the 1929 building fitted the archetype of most of the superior court buildings elsewhere in this country (see the photographs accompanying the articles about the histories of the constituent parts of the Supreme Court of South Africa contained in (2010) 23 *Advocate*) and indeed many others of similar vintage elsewhere in the British Commonwealth. Yet it must be said that the style and symbolism captured by the CC building is unusually engaged with its surroundings and remarkably open and challenging. As to those appointed to the first CC Bench in October 1994, again there were several lawyers with deep roots in political activism and public life: indeed, like Lord de Villiers, the first President of the CC, Justice Chaskalson, had co-chaired the committee at the constitutional negotiations which had drafted the entire interim Constitution, with the exception of the chapter on Fundamental Rights. Even those who were already judges at the time of their elevation to the CC had had rather unusual judicial careers during which they had displayed their commitment to constitutional democratic rights. So, like those appointed to the AD in 1910, the members of the CC in 1994 would have had a strong awareness of the social forces which had produced the interim Constitution (Constitution of the Republic of South Africa, Act 200 of 1993) and a good sense of what was expected of them as the highest court in constitutional matters.

As to their jurisprudence, we must naturally screen out, as far as is possible, the enormous differences between the constitutional texts which these courts had to interpret, as well as the difference in the roles formally allocated to them by those texts. Yet even given these differences, I would argue that the CC has, above all else, pursued an implicit 'nation-making' agenda as a guiding philosophy, with the emphasis on inclusiveness, reconciliation, compromise, redress, basic rights and the delivery of the socio-economic promises so explicitly made in the final Constitution (Constitution of the Republic of South Africa, 1996). In addition, it has taken seriously the

founding values contained in s 1 of the final Constitution, especially ‘accountability, responsiveness and openness’. While the CC has only been delivering judgments for fifteen years, I do not believe that it is too early to make this claim, which is borne out, I would argue, both by its style (including the design of its building) of operating and by some of its landmark judgments.

So the symbolism of hearing the question of the constitutionality of the death penalty as the first appeal (*S v Makwanyane & others* 1995 (3) SA 391 (CC)), the fact that the justices of the CC spoke unanimously but also separately and eloquently in holding it to be unconstitutional, and the fact that the court was even prepared to be seized of the matter in the face of the evident reluctance of the constitutional negotiators to speak clearly on it, all contributed to setting the benchmark for its future judgments and demonstrated its acute self-consciousness about its part in the new dispensation. Since then, there have been many examples of such an approach, such as *President of the RSA v Hugo* 1997 (4) SA 1 (CC), *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC), *Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole*; *South African Human Rights Commission v President of RSA* 2005 (1) SA 580 (CC), *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC), *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC), *Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg* 2008 (3) SA 208 (CC), *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC), and many more. Each of these cases provided the opportunity for the CC to establish and reinforce its commitment to the constitutional democratic enterprise as a whole and to certain aspects in particular, and the leadership of the court realised in the light of the confused aftermath of *Makwanyane* that it was important to ensure that the gist of its findings in each case is framed in such a way that it can be widely used by the media and understood by the public. So the court now produces a non-binding summary together with each of its judgments, and the standard of public reporting of such judgments has improved, facilitating greater legitimacy for the work of the court and promoting understanding of the Constitution to which it must give life.

Perhaps the moment at which the conscious pursuit of this ‘nation-building’ approach was most clearly evident was in the judgment of the CC in *Azanian Peoples Organisation (AZAPO) v President of the RSA* (1996 (4) SA 671 (CC)). As most will know, this appeal concerned a challenge to the civil amnesty provisions of the National Unity and Reconciliation Act 34 of 1995 (s 20(7)), which itself was adopted to give legislative expression to the ‘postamble’ headed ‘National Unity and Reconciliation’ in the interim Constitution. Significantly, the leading judgment for the CC was written in typical style by the senior black judge, Ismail Mohamed, who would become South Africa’s first black Chief Justice not long afterwards. While he recognised that there was much weight in the arguments of the appellants,

and while he sympathised with their anger and grief, he was forced to conclude that to allow the appeal would invalidate one of the key elements of the elaborate process of political compromise on which the constitutional edifice was constructed. In his words (para 19):

‘If the Constitution kept alive the prospect of continuous retaliation and revenge, the agreement of those threatened . . . might never have been forthcoming, and . . . the bridge [between the past and present] would have remained wobbly and insecure. . . . It was for this reason that those who negotiated the Constitution made a deliberate choice, preferring understanding over vengeance, reparation over retaliation, ubuntu over victimization.’

The *AZAPO* judgment, I would argue, represents a critical milestone in the role which the CC has played in the development of the South African nation after 1994. There are sure to be other parallels which one could draw between the work of the AD from 1910 to about 1935 and that of the CC in its first fifteen years, and these ought to be explored.

An obvious focus of any such study would be the CC’s approach to the limits of its jurisdiction under the separation of powers, and particularly its regulation of the exercise of discretionary authority by the executive. Some may argue controversially that the decreasing frequency of appointment of appellate judges with ‘political pasts’ from the 1930s led to timidity when faced with a rampant executive. Others would counter this by ascribing this shift in attitudes to changes in the broader politics of the country, indeed the world, after 1945. Could something similar occur with changing patterns of appointment to the CC?

Whatever the focus, I would argue that the part played by the AD in consolidating its vision of nation-building at that time, and the similar but also profoundly different project on which the CC has been engaged since 1994, represents the most obvious point of congruence. Even if one does not accept this proposition fully, those with an interest in the promotion and strengthening of the current constitutional dispensation should learn lessons from the relative fall from grace which marked the work of the AD from the late 1950s, and apply these in their critical engagement with the jurisprudence of the CC. For this reason alone, the centenary of the establishment of a unified superior court system in South Africa is an event worth celebrating.