

# Constitutional Court: the first year

The editor talks to the President of the Constitutional Court, Justice Arthur Chaskalson

*Consultus:*

THE Constitutional Court was formally inaugurated on 14 February 1995. *Consultus* reported fully on that event in its issue of April 1995. We are privileged to conduct this interview with you just more than a year after that historic occasion which, in your own words, "...[marked] the beginnings of a new legal order in our country". The judgments delivered so far range over a wide area of the law and it would be impossible to discuss or comment on them individually within the confines of this interview. Accordingly, with your consent, I will try to limit my questioning to matters which are of importance to practising advocates. Before doing so, however, which decisions would you personally single out as being of paramount constitutional interest in South Africa?

*Justice Chaskalson:*

I think all the early decisions are important because they are establishing the framework within which the constitutional jurisprudence will be developed. There have been a number of decisions which I would consider to be particularly important. The decision on the death sentence has obviously had far reaching implications for society and it also deals with the approach to be adopted in interpreting the limitations clause; the decision in the *Shabalala* case deals with important practical issues related to docket privilege; the decision in the dispute between the Western Cape provincial government and the President which deals with the separation of powers is also important because it establishes the boundaries between the power of par-

liament and power of the President. I also think that the decisions on the National Education Bill which deal with the division between provincial powers and the powers of parliament are important for the development of that part of our jurisprudence. But there have been several important judgments which I think will be seen in time to have established the core of the constitutional jurisprudence for the future.

*Consultus:*

Although there has been much public debate on some of the court's decisions (e.g. on the death penalty) there is a growing realization – as inter alia evidenced by press commentary – that the court has gained the esteem and respect of the public and the legal profession.

*Justice Chaskalson:*

Well, I hope that is correct. That is really for other people to say.

## The court: building and emblem

*Consultus:*

South Africans are used to court buildings that are physically visible. Having regard to the place of the Constitutional Court in our society, do you not deem it desirable that the court should be housed in its own building?

*Justice Chaskalson:*

Yes, I think that is very important. The premises which we are occupying now are temporary premises. I have already raised with the Minister of Justice the question of a permanent home for the court and we are engaged in preliminary discussions about that. The mat-



*The official emblem of the Constitutional Court.*

ter is obviously one that will call for a cabinet decision because it will involve the commitment of funds necessary for the building of the court. But I hope that there will be a favourable decision and I hope also that we will see a new court building established before my own term of office comes to an end.

*Consultus:*

What is the symbolic meaning of the court's emblem and the specially designed green gowns?

*Justice Chaskalson:*

As far as the court emblem is concerned it consists of a tree which is the African symbol of justice. You will see that under the tree people are sheltering and symbolically it reflects the court providing justice to the people of the country. Also the base of the tree picks up the design of the national flag. As far as the gowns are concerned, we chose colours which are to be found in the national flag. I think it was no more than that.

## Advice to practitioners

*Consultus:*

How does the court, as a tribunal, differ from the Supreme Court and other courts – from the point of view of a practitioner? ➤

*Justice Chaskalson:*

To begin with the court consists of eleven judges and all of us attend every case. It must be quite difficult for practitioners to appear before eleven judges and to have to answer questions which can come from all directions. I think that the nature of the argument is also slightly different in the sense that the constitution requires us to have regard to comparable public international law and to comparable foreign jurisprudence. This means that practitioners who have to appear in our court have to be prepared, and address us on comparative constitutional law. That involves a good deal of research on their part and also a good deal of research on the part of the judges.

*Consultus:*

Can you give any guidelines or advice to practitioners regarding preparation for hearings – especially regarding the type of argument and the preparation of heads of argument?

*Justice Chaskalson:*

The way we conduct our proceedings is to call for detailed written argument in advance and to prepare ourselves for the court hearing so that the hearing is taken up largely with questions directed by the judges to legal practitioners appearing before them rather than to the development of arguments. We have made it clear that we do not want legal practitioners to read out their written arguments to us but rather to develop their argument and to respond to questions put to them. It is not necessarily materially different to the procedure in other courts but I think practitioners who appear in the constitutional court are aware that there is always a vigorous exchange between the judges and the practitioners during the course of the oral hearing.

I am not sure that the preparation will be materially different to the type of preparation which will be undertaken in any other appeal matter, for instance for appearance in front of the Appellate Division. What is necessary, though, is that counsel be familiar with the comparative jurisprudence and be



**Justice Arthur Chaskalson**  
President of the  
Constitutional Court

**A**RTHUR Chaskalson was born in Johannesburg on 24 November 1931. He matriculated at Hilton College in Natal in 1948. He is a graduate of the University of the Witwatersrand, BCom (1952) and LLB cum laude (1954). He was admitted to the Johannesburg Bar in May 1956 and took silk in July 1971. In 1978 he helped established the Legal Resources Centre, a non-profit organisation, which sought to use law to pursue justice and human rights in South Africa, and served as director from November 1978 until September 1993. He was a member of the Johannesburg Bar council from 1967 to 1971 and from 1973 to 1984. He was appointed chairman of the Johannesburg Bar in 1976 and in 1982. He was a member and later convenor of the National Bar Examination Board (1979-1991), and the vice-chairman of the General Council of the Bar of South Africa (1982-1987). He has been a member of the Board of the Faculty of Law of the University of the Witwatersrand, Johannesburg since 1979, an honorary professor of law at this university since 1983, and was a member of the Board for the Centre of Applied Legal Studies (1979-1994). He was also a member of the National Council of Lawyers for Human Rights (1980-1991) and chairman of the Rhodes Scholarship

Selection Committee for South Africa (1988-1993). He was elected as an honorary member of the Bar Association of the City of New York, 1987-1988, was a member of the faculty at the Salzberg International Bar Association (1983-1993), and was elected as a commissioner of the International Commission of Jurists in 1995. He is also, together with the Chief Justice, joint honorary president of the General Council of the Bar of South Africa.

Judge Chaskalson was awarded the degrees of Doctor of Laws Honoris Causa by the University of Natal in 1986 and the University of the Witwatersrand in 1990. He has also received various awards, such as the Premier Group Award for prestigious service by a member of the Faculty of Law at the University of the Witwatersrand in 1983, the Claude Harris Leon Foundation award for community service and the Wits Alumni Honour Award for exceptional service to the community, both in 1984, and the Human Rights Award for 1990 of the foundation for Freedom and Human Rights, Berne, Switzerland.

He is married to Dr Lorraine Chaskalson, who lectures in English literature at the University of the Witwatersrand. They have two children, Matthew and Jerome. 

ready to deal with questions directed not only to decisions of our own courts but of decisions in foreign courts as well.

## Advocacy in the court

### *Consultus:*

How did you find the standard of advocacy of those practitioners who have already appeared before the court? Indicate strengths and weaknesses.

### *Justice Chaskalson:*

On the whole we have been fortunate in the people who appeared in front of us; largely they have been senior practitioners and persons well versed in constitutional law. I think that one of the matters to which practitioners should pay attention is whether the papers are in order at the time they are referred to the Constitutional Court. We have had a number of cases in which the references have not been correct which raise issues which ought to have been dealt with by the supreme court before the referral, and that has created problems for the court. I suppose that was understandable because in the early days people were not familiar with the provisions of the constitution or the rules of the court and may not have given attention to these matters. It seems that the position is beginning to change and more attention is being paid at the time of the referral to the question whether the referral is competent.

## Training: practitioners and judges

### *Consultus:*

Has the organised legal profession – Bar and attorneys – done enough to train their members in constitutional law and the culture of human rights?

### *Justice Chaskalson:*

This is important. Like so much else it will be a process – the constitution is going to influence all the courts, from the magistrate's court upwards and over a period of time practitioners will become more and more familiar with the

constitution, with its underlying values and with the way those values can impact on the development of the law. Our own experience in the court has been, as I have said, that the practitioners who appear before us have usually done a great deal of work and are familiar with the principles which are necessary for the purposes of developing their arguments. Whether this is generally so, I cannot say.

### *Consultus:*

Is there scope for the training of our judiciary – both supreme court judges and magistrates?

### *Justice Chaskalson:*

I think it is important that we should have judicial orientation programmes and judicial training programmes. This is the case in many countries elsewhere in the world. In the United States of America, Canada and Australia, the United Kingdom and elsewhere new judges are expected to go through orientation courses to prepare themselves for what lies ahead. In this regard we lag well behind developments in other parts of the world. It has been matter of concern which has been debated at the Judicial Service Commission. The Commission has indicated that it supports the principle of judicial training and has entered into discussions with the Department of Justice in that regard. I hope that we will see the fruits of that in a comparatively short period of time and that we will be able to start programmes either this year or next year.

### *Consultus:*

The court's judges have not been all appointed from the ranks of practising advocates – as in the case of supreme court appointments until recently. Its members, therefore, have varying legal backgrounds. Is this an advantage?

### *Justice Chaskalson:*

I think the diverse backgrounds of the members of the court is an asset and contributes a great deal to the discussions that take place between us.

## Procedure

### *Consultus:*

The court's procedure has been described as "informal" as opposed to that of other courts. Do you agree?

### *Justice Chaskalson:*

I am not sure that the procedure is in fact more informal than in other courts. We require our documents to be prepared in a proper form. We require arguments to be addressed to us in a normal way. It may be that the atmosphere in the court is a relaxed atmosphere, but I would not regard it as being in any way less formal than is the case in other courts.

## Access and jurisdiction

### *Consultus:*

At this point would you say that the majority of the court's hearings resulted from appeals and referrals, or from parties directly accessing the court? Should the parties' right of access be limited?

### *Justice Chaskalson:*

The great majority of the cases which have been heard by the court have come to it either on referral or on appeal. The court is not anxious to deal with matters by way of direct access. It is not desirable, that matters of importance should be dealt with without another court having first had the opportunity of considering the issues and dealing by us at the time of either the referral or the decision which is subject to an appeal. In fact the court has made it perfectly clear that it will only permit direct access in exceptional circumstances and that is a policy which practitioners can expect that the court will adhere to.

### *Consultus:*

Broadly speaking, does exclusive jurisdiction make the court's work more onerous? Is the so-called "distilling process" – prior hearing and appeal – or referral not more beneficial for the judicial process?

### *Justice Chaskalson:*

The fact that the court has exclusive

jurisdiction in certain matters does mean that cases come to us on referral without another court having given a definitive judgment on the issues. But the referral procedure does require that the court concerned should apply its mind to the question whether the issue may be decisive of the case or whether it is in interest of justice that the issue be referred to the Constitutional Court. This means that the referring court ought to consider whether there is substance in the point and we have been urging courts to take this task seriously and to give us the benefit of their views at the time of the referral. We are beginning to see a number of judges doing this and that is certainly of benefit to us in the work that we have to do.

*Consultus:*

In terms of s 35(3) of the Constitution a court shall, in the interpretation of any law and the application and development of the common law and customary law, have due regard to Chapter 3 (Fundamental Rights). Having regard to this provision is there clarity on the jurisdiction of the Constitutional Court – especially as far as the development of the common law is concerned?

*Justice Chaskalson:*

This is a matter that has been argued before us\* and I hope that by the time this interview is published in *Consultus* or soon thereafter you will have the answer in the form of a judgment.

## Publicity

*Consultus:*

What method is used or should be used to ensure that the court's decisions reach (and are followed by) other courts – judges and magistrates?

*Justice Chaskalson:*

To begin with the Constitutional Court judgments are placed on the Internet. So anybody with access to the Internet can find the judgments as and when

they come out. There are also a number of services provided by publishers who are dealing with matters which have been heard or are pending before the court – the issues which have been or are to be debated, and the decisions that have been given – so practitioners who subscribe to those services can follow the progress of their cases on the way to court, the arguments and when judgments are given.

*Consultus:*

Do you think the media are doing a good job in informing the public of the court's hearings and judgments? Should the court not appoint a "court press officer", as has been suggested, to brief the media?

*Justice Chaskalson:*

It is also important that the press should keep the public informed of the judgments of the Constitutional Court and of the implications those judgments for ordinary people. The decisions of the court should become a means of instructing people in regard to their rights under the constitution and what the new constitutional order means for all of us. To this end we are very pleased when we see schools sending people to the court to listen to cases and this has happened on some occasions. Students also come quite regularly and we find by and large there is always a fair crowd at court during the course of hearing. Sometimes the court is full, on other occasions there may only be a few people, but there are always people in the court listening.

I do not consider the standard of reporting the court's judgments to be very good there are some notable exceptions and I would not like to be understood as saying that none of the reporters are good, but on the whole the nuances in the judgments, the implications of the judgments for the broader public and the development of the law is not well reported by the press. I think it would be a good thing to have a press officer who is able to inform the press and deal with the press on matters of importance and I hope that this will be possible in time. When judgments are given the Constitutional Court arranges for the

clerks to prepare a brief summary of the judgment which is not attributable to any member of the court. The summaries are there to assist the press in their work. When the judgments are delivered copies are always available for the press as well as copies of the summaries. This has helped to some extent but in the end it is important that judgments should be analysed and reported in the press by people with an understanding of law. Many of the reporters do not have that understanding.

*Consultus:*

Should not hearings be televised to support communication with the public?

*Justice Chaskalson:*

The problem with television in courts is one which is not peculiar to South Africa. In South Africa there has been a general rule against permitting television cameras in the court. The presence of television cameras can detract from the argument, can lead to lawyers and witnesses addressing the public and not the judges, and can lead to arguments which are not based on legal principles but upon emotional contentions. There has been ongoing debate in many parts of the world in regard to the wisdom of permitting television cameras in courts. There are people who think that the televising of court proceedings serves an important educative function. My own view is that the experience in other countries has not been particularly favourable to the televising of court proceedings. Certainly in the United States of America televising of trials has tended to detract from the trial and, although not necessarily influencing juries, has had an impact on the way that the trials are conducted and on the length of the trials themselves. As far as I am aware, there are no appeal courts anywhere else in the world in which proceedings are televised. I may be wrong on that, but I know that in the United States whilst television is permitted in some trial courts, the US Supreme Court does not permit television. As far as I am aware the higher courts in most of the countries ►

\* Note by Editor: *Du Plessis and Others v De Klerk and Another, a defamation case.*

with similar legal systems to ours do not have television in courts.

*Consultus:*

What is your view on Chapter 3 (Fundamental Rights) of the constitution, which has been influenced by the Canadian and German models. Does it make sufficient provision for aspects which are unique to South Africa?

*Justice Chaskalson:*

Well, the chapter on fundamental rights has been influenced not only by Canadian and German models but by international human rights jurisprudence. I do not think there is any problem about that. As far as courts in South Africa are concerned, they have made it perfectly clear that they will construe the chapter in the light of our own history and the wording of our own constitution and in doing so they will be fully able to cater for circumstances which are peculiar to South Africa and to develop a jurisprudence which is appropriate to life in South Africa.

*Consultus:*

There are many provisions in South African legislation which, even on the face of it, are inconsistent with the constitution. Is it not desirable that a cleaning-up operation be launched by parliament to eradicate those provisions, thereby decreasing unnecessary referrals to the court?

*Justice Chaskalson:*

Almost all the work which we have been called upon to do until now has been concerned with what I might call old law, in other words, legislation which was on the statute book at the time that the constitution came into force. It is obviously necessary for the legislature to bring legislation in line with the constitution and unfortunately that can be quite a protracted undertaking. With so much happening in the past year or two, with the new constitution having to be adopted, with new policies which have to be implemented, it may have been difficult for the government to give attention to these matters. But certainly it is important it is

far better for parliament to bring its law into line with the constitution than for the court to have to strike down laws, and for parliament then to react to the court's decision.

### Some practical matters

*Consultus:*

On a critical note the view was expressed that the number of cases heard by the court is low, compared to other courts.

*Justice Chaskalson:*

The number of cases will always be less than in other courts. We sit en banc in all cases, and do not split into panels. I consider that to be a good system which ensures that the diversity of the court is reflected in all its judgments. Ultimately the case load depends on the matters that are brought before the court. There is not a long delay in securing a hearing. In fact, it might be quicker to secure a hearing before the Constitutional Court than before any other appeal court. The delay, I think, is less than the delay in securing a hearing before the Appellate Division or in having a hearing by a full bench of the provincial division. The reason for this is that there are fewer cases which are referred to the Constitutional court. Part of the work of the court is concerned with dealing with people who seek access to it directly in which rulings are given which do not always call for written judgments. The court is very busy and has a great deal of work to do a lot of reading with considerable reference to comparative law and jurisprudence. The fact of the matter is, however, that we allocate a hearing within a reasonable time so I do not think there should be any complaints as far as that is concerned.

*Consultus:*

What practical assistance do the judges get in preparing their judgments?

*Justice Chaskalson:*

Each of the judges has two law clerks to assist him or her in connection with the work. The clerks are young people,

recently out of university, who come to the court and spend a year or so at the court. This is based on models which have been developed in the United States, Canada and Europe and it has been a very successful undertaking. The law clerks are able to assist the judges in many different aspects – finding authorities for them and bringing to their attention relevant cases and the like – and as far as the clerks themselves are concerned it is a very important year in their career. We have noticed that applications for these positions come from the top students and it seems that as in the United States and Canada it will be a much sought after position. We certainly have far more applicants for places than we can accommodate. The Association of Law Societies has agreed that services as judge's clerk at the Constitutional Court should count for articles and I anticipate that during the course of this year there may be legislation to this effect.

*Consultus:*

Are your library facilities adequate?

*Justice Chaskalson:*

We are in the process of building up our library and already have the law reports of a number of countries. We hope to make this the best constitutional library in the country and in time to develop facilities for public access to our library through a reading room in which practitioners and scholars can be given access to authorities which are either available only in the Constitutional Court or at any rate not readily available. That will take time and I should imagine that the reading room will not be a reality until we have our own building but it is certainly a long term goal that we have.

*Consultus:*

Judge Chaskalson, thank you very much for the time you made available for this interview.

PRACTICE: Legal aid continues on page 74.