

The new Chief Justice

A ringing and decisive break with the past

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THE past three years have witnessed any number of extraordinary departures from past practices in this country. Within the administration of justice, the advent of the power of judicial review of legislative action, measured against the standards set in a written Constitution, amounted to a revolutionary alteration of the legal system's basic norm. On the personal level, however, there can be no doubt that the elevation of Ismail Mahomed to the Chief Justiceship represents the law's equivalent of the election of Nelson Mandela as President of the country. In his own words, in a different context, it signified "... a ringing and decisive break with a past which perpetrated inequality and irrational discrimination and arbitrary governmental and executive action" (see *S v Mhlungu and Other* 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at para 8).

At one level, Chief Justice Mahomed's life experience exemplifies the triumph of the human spirit and will over "irrational discrimination and arbitrary ... executive action". His classification by the law as an "Asian" South African meant that his secondary education was obtained through the Pretoria *Indian Boys' High School* and that, after a substantial interlude at Wits during which he graduated in political science and law¹, he was prevented by the then racist character of the Pretoria Bar from practising in his home city and by the Group Areas Act from occupying chambers at the Johannesburg Bar which did admit him as a member. Thus he was forced for a number of years to rely on the use of the offices of his friends at the Bar and to eat his lunch in common areas of the building or on the pavement outside.



Chief Justice Ismail Mahomed

That the new Chief Justice emerged from these beginnings to be the jurist and practitioner of the stature which he has attained speaks volumes for his intellectual capacity, oratorical and forensic skills and his limitless industry and determination. It is clear, too, that he is imbued with the reconciliatory magnanimity which is so marked in President Mandela for, in accepting his new position, he will spend most of his working life in the very province in which he was forbidden by law until 1985 to spend more than 24 hours at a time. We truly remain a "very strange society".

Experience

Ismail Mahomed brings to the Chief Justiceship a length and breadth of experience in the practice and adjudica-

tion of the law unmatched by any incumbent of that office since our first Chief Justice, Lord de Villiers. While most of our Chief Justices have followed the route of about twenty years at the Bar, ten as a puisne judge and a further ten on the Appellate Division², Justice Mahomed has a career of some 34 years at the Bar, a cumulative period of 37 years as a part-time judge of appeal since 1979 (in Swaziland, Lesotho and Namibia, presiding over the latter two courts for the last few years), three years as a puisne judge in South Africa and two years as Deputy President of the Constitutional Court. Indeed, if Lord de Villiers's dream of an appeal court with pan-Southern African jurisdiction were to become a reality in the next few years, there would

be only one ideal candidate to be its Chief Justice!

Justice Mahomed's career as an advocate was characterised by all accounts (and especially those of his juniors) by enormously hard work in preparation followed by brilliant performances in court. While he showed himself adept and had a diverse practice in all branches of the law, his leading position as the senior "black" advocate inevitably thrust him prominently into the public arena in many trials in which opponents of the regime stood accused of criminal acts and many civil matters in which the legality of executive and administrative action was being challenged. Thus his name appears as counsel in leading criminal and administrative law cases, such as *S v Hassim and Others* 1971 (4) SA 120 (N); 1972 (2) SA 448 (N) and 1973 (3) SA 443 (A); *S v Ramgobin and Others* 1985 (3) SA 587 (N) and 1986 (1) SA 68 (N); *Staatspresident v UDF* 1988 (4) SA 830 (A) and *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A). A significant case outside these confines is *National Union of Textile Workers v Stag Packings (Pty) Ltd* 1982 (4) SA 151 (T). He took silk in September 1974.

Despite this demanding work-load, Justice Mahomed found the time to turn his considerable oral skills to writing, co-authoring a work on *Group Areas and their Development* (with Lewis Dison, 1960) and contributing numerous articles to law journals, notable among which are: "Preventive Detention and the Rule of Law" (1989) 106 *SALJ* 546; "Disciplining Administrative Power—Some South African Prospects, Impediments and Needs" (1989) 5 *SAJHR* 345, and "The impact of a bill of rights on law and practice in South Africa" 1993 *De Rebus* 460.

His alma mater, with the government of whose Law School he has remained involved, made him an honorary professor in 1990, and the universities of Delhi and Pennsylvania have conferred honorary doctorates of law on him. His judicial experience in neighbouring countries means that he is a much-respected figure in judicial circles of the Commonwealth.

Decisions

A review of some of his decisions as a judge of appeal reveals a clarity of language, a close logic in reasoning and a breadth of vision which combine to make compelling reading and persuasive judgment. He is wont to start with a clear exposition, often in point form, of the basic principles governing the situation under review. (See, for example, the legal principles relating to applications for the adjournment of trials in *S v Acheson* 1991 (2) SA 805 (NmHC) at 811-812, and those of concern in the granting of bail in the same judgment at 822-823.) His judgments are further redolent with colourful imagery and the use of powerful language. One or two samples will suffice:

"All constitutions seek to articulate, with differing degrees of intensity and detail, the aspirations of a nation, the values which bind its people, and which discipline its government and its national institutions; the basic premises upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that exercise, and the moral and ethical direction which that nation has identified for its future. In some countries, the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution." (*S v Makwanyane* 1995 (3) SA 391 (CC) and 1995 (6) BCLR 665 (CC) at para 262.)

On the interpretation of such an instrument:

"The judicial process is entirely different. What the Constitutional Court is required to do in order to resolve an issue, is to examine the relevant provisions of

the Constitution, their text and their context; the interplay between the different provisions; legal precedent relevant to the resolution of the problem both in South Africa and abroad; the domestic common law and public international law impacting on its possible solution; factual and historical considerations bearing on the problem; the significance and meaning of the language used in the relevant provisions; the content and the sweep of the ethos expressed in the structure of the Constitution; the balance to be struck between different and sometimes potentially conflicting considerations reflected in its text; and by a judicious interpretation and assessment of all these factors to determine what the *Constitution* permits and what it prohibits." (*Ibid* at para 266.)

and

"A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is *sui generis*. It must broadly, liberally and purposively be interpreted so as to avoid the 'austerity of tabulated legalism' and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government."

(*Government of the Republic of Namibia and Ano v Cultura* 2000 and *Ano* 1994 (1) SA 407 (NmSC)).

Justice Mahomed's exposure internationally is reflected in his knowledge and use of comparative authority in abundance, and he is likewise not averse to the use of academic texts. Again, no one who saw his obvious delight in co-chairing the first formal round of constitutional negotiations at CODESA just before Christmas 1991 will be surprised at his keen sense of the delicate balance which needs to be struck between judicial and public policy from time to time.

The new Chief Justice is a serious and passionate man, typically preferring to peruse the latest volume of the law reports rather than join in a game of volleyball in the 'open time' built into the Centre for Applied Legal Studies' annual judges conference. He often starts a contribution to a discussion at low >

volume, prompting calls of 'louder!', but building to an emphatic crescendo by way of emphasis. At the same time, he has a well-honed sense of humour, and is quite prepared to laugh at his own idiosyncrasies, especially when his imitator is an eminent recent silk. He uses such humour to leaven his often intense but constructive engagement with counsel's arguments in court.

Future role

And what of the Chief Justice's future role at the head of the Supreme Court of Appeal? There can be no doubt that Justice Mahomed would not have accepted nomination to this symbolically illustrious position had the final Constitution not restored the Appellate Division (in its new guise) to the mainstream of the constitutional debate. That court remains the final arbiter of all disputes in regard to the common law, an area in which the Chief Justice has already displayed his ability (see, for example, *Oryx Mining and Exploration (Pty) Ltd v Sec-*

retary for Finance 1991 (4) SA 873 (NmSC) and *Meyer v Hessling* 1992 (3) SA 851 (NmSC)). But it will now also have a critical part as the penultimate port of call for all constitutional questions, as well as perhaps an even more important responsibility in coaxing the common law closer to the principles of democracy, openness, freedom, equality and dignity which underlie the Bill of Rights. As Ma-homed DP noted with some prescience in *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) at para 87:

"The interpretation which I have come to favour has the advantage of giving to the... Appellate Division a very clear and creative role in the active evolution of our constitutional jurisprudence by examining, and in suitable circumstances expanding, the traditional frontiers of the common law by infusing it with the spirit of chapter 3 of the Constitution and its purport and objects."

If the historical precedent of Lord Denning, who moved "sideways" in the

hierarchy of courts from the House of Lords to be Master of the Rolls in the Court of Appeal so as to have more scope for influencing the development of the law, is anything to go by, we are in for exciting developments in Bloemfontein. There is no one better equipped to be the inspiration for this process than the new Chief Justice, Ismail Mahomed.

Footnotes

- 1 Incidentally, he is the first LLB graduate from Wits to become Chief Justice, although of course the president of the Constitutional Court is also such a graduate.
- 2 There have been some singular exceptions to this average background: some of the earlier CJ's had little practice at the Bar and long tenure as puisne and/or appeal judges (Lord de Villiers, Sir William Solomom and Sir Johannes Wessels), while the modern exception is LC Steyn, with no experience at the Bar and about ten years' service on the Bench prior to appointment as Chief Justice. 

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