The apartheid era:

1948 – 1994

By Joos Hefer, former acting Chief Justice and former acting President of the Supreme Court of Appeal

The period from 1948 to 1994 is of particular significance in the annals of the Appellate Division. It was, of course, the apartheid era and all our courts became deeply embroiled in litigation relating to the government's race and security laws. This was inevitable given the massive body of laws, regulations and other measures required to keep the system in place for 46 years and the fervent and sometimes violent manner in which they were enforced and resisted. One of the tragic features of apartheid was that, as it progressively became more repressive, resistance grew. As resistance grew, so did repression. And so did the involvement of the courts. In many cases the courts were powerless because, as Mick Corbett later put it in a presentation to the Truth and Reconciliation Commission:

'The courts had no power to question the validity of the laws Parliament made. Still less could they declare them invalid. The courts had no option but to apply the law as they found it, however unjust it might appear to be.'

The result was that the courts eventually came to be seen as agents of the regime.[1] Their legitimacy was openly challenged. Of course, only a small percentage of the litigation generated by the system eventually came to the country's highest court. But, probably because this is where the main battles were fought, the AD's involvement affected it more radically than any other court. Its public image lay in ruins when apartheid came to an end and it came as no surprise that the judicial power to control the legislative and executive branches of government was granted to other courts but denied to the AD in the Interim Constitution of 1993.

The court acquired its status as the final court of appeal when appeals to the Privy Council were abolished in 1950.[2] Although this was seen at the time as a harmless step aimed at little more than ridding South Africa of one of the last vestiges of British rule[3] the government would soon have reason to regret its decision.

This came about in 1952 when the AD declared the Separate Representation of Voters Act[4] (the Voters Act) invalid. At that stage the cornerstones of apartheid had already been laid[5] and the system, it seemed, was well on its way. The Voters Act purported to take it one step further by removing the coloured voters in the Cape Province from the common voters role. Fourteen years earlier the AD had ruled[6] that the courts had no jurisdiction to pronounce on the validity of Acts of Parliament and the government seemed to think that Parliament's immunity to judicial interference was boundless. But the AD dispelled this impression in its judgment in *Harris and Others v Minister of the Interior and Another*[7] (the Voters case) by holding that, although the judgment in *Ndlwana* correctly declared Parliament to be the supreme and sovereign law-making body in South Africa, it was wrong in holding that Parliament was free do adopt any procedure it deemed fit in the law-making process. The rights of the coloured voters, the court reasoned, were entrenched in the South Africa Act to the extent that they could only be disqualified by legislation passed with a two-thirds majority of the members of both Houses of Parliament in a joint session. Accordingly, since the Voters Act was passed in the ordinary way with a simple majority at separate sessions of the Houses, it was invalid.

Realising now that, of its own doing, no further appeal was possible[8] and conscious of the fact that it lacked sufficient parliamentary support to get the legislation through Parliament in the prescribed way,[9] the government decided to overcome the court's decision by creating a 'court' consisting of all members of Parliament for the sole purpose of reviewing judgments of the AD in which Acts of Parliament had been declared invalid. The High Court of Parliament Act[10] was rushed through Parliament but within months of its promulgation the AD struck it down.[11] This left the government with the enlargement of the Senate as its only remaining option. But, before passing the enabling legislation for this purpose, Parliament passed the Appellate Division Quorum Act[12] which *inter alia* required a court of eleven judges in appeals where the validity of an Act of Parliament was in issue.[13] Five additional judges of appeal were appointed and only then the Senate was enlarged[14] and packed with supporters. With the newly acquired two-thirds majority, the Voters Act was eventually validated.[15] Cumbersome though this strategy would appear, it was successful. On 9 November 1956, five years after the first act of the drama of the removal of the coloured voters from the common roll, the final curtain fell when a Bench of eleven AD judges refused to declare the Senate Act invalid.[16]

In the meantime the government had ensured that a similar situation would not recur. During 1956 Parliament passed the South Africa Act Amendment Act, 1956[17] which reaffirmed its supremacy as sovereign law-making body and expressly provided that no court would henceforth have jurisdiction to pronounce on the validity of any Act of Parliament except an Act which repeals or amends the entrenched provisions of the South Africa Act.[18] Ironically, this was no more than a restatement of the law laid down in the judgment in the Voters case.

The government's handling of the 'constitutional crisis' (as its confrontation with the

AD was called at the time) left an indelible mark on the government's image and on the image of the court as well. That it sullied the image of the government is understandable. The attempt to establish the High Court of Parliament and the packing of the Senate were rightly perceived as blatant circumventions of the AD decisions; and the appointment of additional AD judges pursuant to legislation specifically aimed at changing the constitution of the court in constitutional matters, as a gross attempt at procuring a sympathetic Bench in the event of the validity of the Senate Act being challenged.[19] Inevitably the perception that the government was set on loading the AD Bench with supporters in the same way it would later pack the Senate rubbed off on the judges concerned. They were scornfully referred to as the 'second team' and sections of the legal community treated them for the rest of their terms with a measure of disdain they probably did not deserve.[20] But whether they earned it or not, the perception remained and the image of the court suffered.

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The appointment of Lukas Steyn, first as a judge of appeal, and later as Chief Justice was equally contentious. Steyn was the Chief State Law Adviser when, in 1951, he was appointed in the TPD and, although his appointment had raised a wave of protest,[21] he was elevated to the AD after only four years service as a puisne judge. At that stage the problem of the coloured voters had not been resolved and, suspecting that Steyn had advised the government on the validity of the Voters Act, many believed that he should not take a seat in the AD. Yet he did. And within a month after doing so he was the only member of the AD Bench who refused to support Centlivres's objection to the Quorum Act. Two years after Steyn's appointment Centlivres retired. Next in line was Schreiner and after him Hoexter. Schreiner was the obvious choice but Henry Fagan, who was third in order of seniority, was appointed.[22] Neither this break with tradition[23] nor the fact that (unlike Schreiner and Hoexter) Fagan was not a party to the unfavourable decisions in the Voters case and the High Court case went unnoticed. Observers were quick to note that the government favoured judges who would not stand in the way of apartheid, which implied that those who accepted appointment, were indeed supporters of the system. As if this was not enough, when Fagan retired in 1959 Schreiner and Hoexter were overlooked again and Steyn became Chief Justice after serving only four years in the AD.[24] Predictably, instead of acclaim, his remarkable feat of reaching the top of the ladder over the heads of others after only eight years of judicial service earned him the label of a government's man, a tag which he wore for the entire duration of his twelve year term. Moreover it strengthened the perception that judges, even Chief Justices, were appointed not on merit, but on account of their loyalty to the government. One can imagine the damaging effect of this perception on the image of the court.

The court under Steyn's leadership soon came in for severe, although sometimes unjustified, criticism. During the sixties and seventies the court was mainly involved in appeals relating to the review of executive and administrative functions and criminal prosecutions under the race and security laws. The outcome of many cases depended upon the interpretation of one of these laws and the court was often criticized for deliberately preferring an interpretation favouring the State in cases where a more equitable construction was feasible. The problem which faced these critics was however that, in order to show that a more equitable interpretation was indeed feasible in cases where the court found the language clear, they could come up with nothing better (apart from their personal views) than the minority judgments in cases where the court was divided. The implication that the majority should have yielded to the minority in all such cases is so far-fetched that the criticism would seem to have been unwarranted.[25] But at the time it went unanswered.

In later years, particularly in the eighties, the criticism became more strident. And not without reason, as a short excursion into history will show. During 1982 the security legislation used to keep apartheid in place[26] was replaced with the Internal Security Act of 1982[27] which retained most of the unsavoury features of its precursors like the banning or restriction of persons and organisations, detention without trial, and the exclusion of the jurisdiction of the courts over a wide variety of security procedures. The 1982 Act was passed in consequence of the report of a commission of enquiry headed by Pierre Rabie who, as the author of the Act, came to be seen as the father of the philosophy reflected therein. By that time resistance to the system had hardened into violence. The violence led to massive police action and the police action to further violence. Before long the country was in flames. In June 1986 the State President declared a state of emergency. South Africa in effect came to be ruled by the State President, the Minister of Law and Order and the Commissioner of Police. The courts were swamped with applications for protection against ministerial and police action under the emergency regulations. Many of these applications eventually found their way to the AD where the very same Rabie now held the reins as Chief Justice.

Although this by itself could hardly reflect favourably on the already scarred image of the court, all might have been well had the Chief Justice not seen fit to allocate most of these appeals to panels consisting of himself and a few apparently selected judges. The result should have been foreseen. Commentators soon noted that, instead of the 'second team' of thirty years ago, the AD now had a 'security team' consisting of the Chief Justice – the father of the diabolical Internal Security Act – and a handful of judges whom he could only have selected for their belief in *salus rei publicae suprema lex*

est[28] or, even worse, for their conscious or unconscious support of the regime. The fact that the 'security team' or some of its members produced judgment after judgment in favour of the State added grist to these commentators' mill and provided the last nail for the coffin of the image of a once venerated court.

This however is not where the story of the AD's progress through the apartheid era ends. Books have been written on the court's performance in political matters[29] but little has been said or written about its work in other fields. Their involvement in political litigation did not keep our courts from doing their normal duties; nor did it keep the AD from producing an impressive body of law in almost every other field of social and commercial activity. In many cases this required tedious excursions into unexplored areas of the common law, the re-examination, extension, adaptation or abrogation of old principles in accordance with the needs of a changing society and the meticulous examination of the relevant case law and legislation. Fortunately it was during the apartheid era that the law faculties of several universities blossomed. A new breed of academics with questioning minds, novel ideas and a passion for research emerged.[30] The result was that new authoritative books, journals and dissertations appeared and soon drew the attention of the judges with a visible effect on their judgments.[31] Of course our judges, particularly the judges of the AD (or at least some of them), were no mean researchers themselves. Indeed, the remarkable ease with which they handled the Roman and Roman-Dutch authorities and found their way through English law and other systems is a feature of many judgments of the time.[32] One stands in awe, for instance, at the way in which the court traced the historic course of the elusive Roman *exceptio doli generalis*[33] and the *condictio indebiti*[34] and applied the knowledge gained to present-day South African situations. One also can only gaze in wonder at Bill Trollip's methodical judgment in *Gentiruco AG v Firestone South Africa (Pty) Ltd*[35]. When that appeal came to the court the South African patent law was largely undeveloped and no-one really understood its intricacies. Moreover the appeal involved issues of a highly complex technical nature. Yet the judgment left its readers in no doubt about the ability of a South African court to handle problems like these.[36] Small wonder that it became the practitioners' bible and the guiding star for future judgments. Small wonder too that international companies occasionally thereafter chose to have their differences settled by our courts.[37]

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Then there is the minority judgment in *Silva's Fishing Corporation (Pty) Ltd v Maweza*[38] in which Lukas Steyn demonstrated by reference to the old authorities why the enquiry into the unlawfulness required for Aquilian liability arising from negligent omissions causing patrimonial loss should not be confined to prior conduct on the part of the defendant. Almost 20 years later Frans Rumpff took this matter a step further in *Minister van Polisie v Ewels*[39]. At that stage the elements of Aquilian liability still remained ill-defined and difficult to discern in the court's judgments. One problem in particular was that, while it was clear that unlawful conduct was required, there was not a satisfactory criterion for unlawfulness. Rumpff's reliance in this regard on the convictions of the community formed the foundation for the formulation in later judgments of the concept of unlawfulness in terms of policy decisions which take account of the convictions of the community as one of the relevant considerations.

Having mentioned Frans Rumpff one