The history of the Cape Provincial Division

By Frans Rautenbach, Cape Bar

Few people know that for the first few years of its existence, the Cape Provincial Division of the Supreme Court of the Union of South Africa, as it then was, started its life in the building that is now known as the Slave Lodge, at the top of Adderley Street in Cape Town. Even fewer people know that besides its many other uses in the century or so preceding its stint as the house of justice, the Slave Lodge also had the doubtful reputation of being Cape Town's largest brothel. History suggests that such usage had long been relegated to the past by the time that the Supreme Court took occupation of the premises in 1828.

Although the current building of the High Court in Keerom Street was completed in 1912, the court only moved from the Slave Lodge in 1914. The new building was designed by Hawk & McKinly, and situated next door in the building which housed the Cape Town Club. To date both buildings still stand, as is apparent from the accompanying photographs, which suggest that only the mode of transport in Queen Victoria Street changed significantly over the last century.

The outside finishing of the Supreme Court building was done by means of local granite, whilst bricks for the walls were imported from Australia. The passageways were laid out with fragments of unpolished marble from Italy.

According to the original plan of the building, the main entrance - which is the one shown on the accompanying photograph - would have been in Queen Victoria Street. However, when their lordships learnt that that might mean that they would forfeit the luxury of a view over the Company Gardens, it was decided that the facade of the building would be reversed, so that the main entrance is now in Keerom Street.

The Cape Provincial Division, which has its roots in the Supreme Court of the Colony of the Cape of Good Hope, is steeped in history. The court library has a Roman-Dutch textbook dating back to 1592. Some of its books were donated by Ryk Tulbagh before he became governor of the Cape. The library also still has a number books dating back to 1743, when the first official list of books in the library was drawn up.

When the building was first occupied by the court, it shared the premises with the Master of the Supreme Court, the Attorney-General and the personnel of the State Attorney. Over the years the space in the building became limited and the non-court personnel moved out.

The building was expanded in 1992 when the number of court rooms increased from 15 to 19.

Although the unification of South Africa in 1910 under the banner of the Union of South Africa had important implications for the future development of the State and the law in South Africa, it seems hardly to have been noticed. A publisher's note in Juta's Law Reports (XXVII) contains this dry entry:

'This part is the last volume of volume XXVII of the Supreme Court Reports, and with this volume the present series of Reports comes to an end.

Consequent on the formation of the Union of South Africa on May 31st 1910, the Supreme Court of the Colony of the Cape of Good Hope became a provincial division of the Supreme Court of South Africa under the style of Cape of Good Hope Provincial Division.

The new series of Reports will be known as Juta's Cape Provincial Reports, and each volume will be distinguished by the date of the year instead of by a number as heretofore.'

The unification of South Africa indirectly led to one of the great scandals of the South African constitutional law, which directly involved the Cape Provincial Division (CPD) and unfolded in the course of the century to follow. The South Africa Act (the then constitution of South Africa) originally required a two-thirds majority in a joint session of both Houses of Parliament for the recall or amendment of certain entrenched sections of that Act, one of which gave coloured people the vote. The enactment of the Statute of Westminster gave rise to an argument that its effect was that the two-thirds majority rule was 'as dead as the proverbial dodo' (HJ May in *The South African Constitution* 1949).

In 1951 the NP-majority Parliament in separate sessions removed coloured voters in the Cape Province to a separate voters roll. In the matter of *Harris and Others v Minister of the Interior and Another* (unreported), the CPD led by De Villiers CJ held that the Act was lawful and enforceable. On appeal the Appellate Division (AD) under Centlivres CJ overturned the decision and set aside the entire Act (*Harris and Others v Minister of the Interior* 1952 (2) SA 428 AD).

In order to overcome the effect of this decision, Parliament then legislated for a 'High Court of Parliament' which, on application by a Minister, could review the declaration of invalidity of the Act by the AD. The High Court of Parliament overturned the decision of the AD (the first *Harris* decision) and held that the entrenched sections could be amended by means of an ordinary majority. Again the matter went to the CPD when Harris and his co-applicants asked for

The Cape High Court in Keerom Street, Cape Town – then and now

an order declaring Act 35 of 1952 to be null and void and of no legal force and effect. The CPD agreed with the applicants, and so did the AD (*Minister of the Interior v Harris and Others* 1952 (4) SA 769 AD).

Whilst the Harris saga is easily the most prominent series of legal decisions coming out of the CPD, it is impossible to do justice to all the historical and significant cases that passed through the portals of the CPD in the space available. One is forced to nail one's colours to the mast of a number of beacons on the judicial landscape. *Conradie v Rossouw* 1919 AD 279 is one of the most fundamental decisions of civil law in South Africa, and laid down the principle that a just promise is sufficient to establish a contract, and the English principle of consideration does not apply in our law.

Conradie's case started in the CPD, whose decision was overturned by the AD.

About halfway during the century another beacon appears on the landscape in the form of the case of *George v Fairmead (Pty) Ltd*_ 1958(2) SA 465 AD. This time the decision of the CPD was vindicated on appeal, in a leading decision on *justus error* in the law of contract, and the signing of documents with contractual implications.

To date both buildings still stand, as is apparent from the accompanying photographs, which suggest that only the mode of transport in Queen Victoria Street changed significantly over the last century.

Towards the latter half of the century, the administrative law decision of *Theron en Andere v Ring van Wellington van die NG Sendingkerk en Andere* 1976 (2) SA 1 (AD) established the critical dividing line between a review of jurisdictional facts and the merits of a functionary's decision. To this day, this is a critical distinction in administrative law.

A number of other cases will undoubtedly ring familiar with our legal fraternity and legal students, some of which did not go on appeal and still serve as leading cases in their respective areas of law. These include *Arend and Another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) (contracts induced by threats); *Dibley v Furter* 1951 (4) SA 73 (C) (redhibitory relief and latent defects); *Trotman and Another v Edwick* 1950 (1) SA 376 (C) (contracts induced by fraud); and *OK Bazaars (1929) Ltd v Universal Stores Ltd* 1972 (3) SA 175 (C); 1972 (3) SA 281 (C); 1973 (4) SA 747 (A) (cheques crossed and marked 'not-negotiable').

But courts are nothing without the personalities who grace their halls over years, and again the Cape has no shortage of great names, also names which reverberated in other areas of the law besides the judiciary, such as publishing. These names include Buchanan, Searle,

Judge President John Hlophe, Cape High Court

Juta, Kotzé and Menzies who were either judges of the court or members of families of judges of the court.

Perhaps the most well-known advocate ever to practise in the Cape was Harry Snitcher QC, who also acted for appellants in the *Harris* decision, and many another similar *cause celebre*.

Of the Judges President of the court, several stand out purely because of the long duration of their tenure. These were Van Zyl CJ (who took the court through the difficult years of the aftermath of the depression and the Second World War, namely from 1936-1946), De Villiers CJ (who presided over the turbulent times of National Party rule from 1949-1959), and Munnik CJ (from 1981-1992). Hlophe CJ, the first black JP of the division, is perhaps the best-known of the current group of Judges President in the country. Amongst other things, he was responsible for the controversial decision in the dispute between the Pharmaceutical Society of South Africa, New Clicks South Africa (Pty) Ltd and the Minister of Health *(New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang and Another NNO; Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO* 2005 (2) SA 530 (C)).

The CPD also made important contributions to the development of the new constitutional law in cases such as the *Grootboom* decision that enforced the right to housing (*Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC)) and the *Metrorail* decision which enforced the right to life (*Rail Commuters Action_Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC)).

In this way the division has contributed to a process of constitutional development - from Slave Lodge to beacon of Good Hope. Perhaps more than the mode of transport has changed in Queen Victoria Street.

One hundred years of the KwaZulu-Natal Bench

By LB Broster SC, A Coutsoudis and AJ Boulle, Kwazulu-Natal Bar

Introduction

Our focus is on one period in the last hundred years and three judges who graced the Natal Bench at that time. There is little argument as to their eminence, dedication to the law and contribution to the jurisprudence of this country at a time of political, social and judicial upheaval.

Those judges are Alexander John Milne, John Mowbray Didcott and David Bertil Friedman, and the period is the 1980s.

All three served on the Natal Bench when successive states of emergency placed the Bench in the eye of the political storm. Their commitment to the rule of law and the sanctity of individual rights at a time when these rights were often actively trampled by the government, has been vindicated by history and the transition to a constitutional democracy. At the time these judges faced much opposition. Their decisions were often viewed unfavourably, at times struck down by the Appellate Division and even overruled by their colleagues on the Natal Bench.

The 1980s

The division had a justifiable reputation during the eighties as a driving force of judicial activism in opposition to some of the harshest of apartheid legislation.

Cora Hoexter noted in the 1980s that the 'Natal Judges do seem to have a particular propensity for overcoming the apparent legislative will' (1986 *SALJ* at 446). Of course, some commentators have pointed out that the judges of the division at the time did not necessarily see themselves as activists. Van Blerk quotes Didcott J as saying that 'judicial endeavours have been made to keep the process [of executive power] under some sort of control … and this has been attempted by no wild unorthodoxy, by no splurge of adventurism …' (1992 October *Consultus* at 138).