

# A short history of the North and South Gauteng High Courts

By Pat Ellis SC, Pretoria Bar



The Palace of Justice, Pretoria, in 1900. During the Anglo-Boer War it served as a hospital (known as the Irish Hospital).

Although the Transvaal Provincial Division (as it was known until recently) was established in 1910, its origins date back to 1877. Since then it has survived two periods of British colonial rule, a period of frontier independence, and the Union and Republican Constitutions, before being recognised under the present Constitution as the High Court for Gauteng, Mpumalanga, Limpopo and (part of) the North West Province.

On 7 March 1877, President Burgers of the South African Republic signed a constitutional amendment in terms of which the administration of justice would reside in a high court, consisting of three judges, a circuit court and magistrates' courts. JG Kotzé, an up and coming Grahamstown advocate, then aged 27 years, was appointed as chief justice. On his way to Pretoria, he was informed that the British had annexed the Transvaal. Determined as he was, he proceeded to Pretoria, and, after an interview with Sir Theophilus Shepstone, the British governor, secured his appointment, but with the proviso that Shepstone's friend, (later Sir) Rider Haggard, be appointed as his clerk. The first session of the Transvaal High Court, presided over by Kotzé J, took place on 23 May 1877. Despite his youth, Kotzé displayed fiercely independent judgment, which ultimately led to his resignation as a judge in 1890. The first court building was known as the 'Goewermentsgebou', a disused school, situated more or less where the High Court Chambers are presently situated. An official court building was later built on the corner of Andries Street and Bureau Lane. Shortly before the outbreak of the Anglo-Boer War, the Palace of Justice, having been recently con-

structed, was converted into a hospital, and served that purpose for the duration of the war.

The three, later six, appointed judges sat in Pretoria, whilst Johannesburg, at the time still in its infancy as a mining town, had to be content with a circuit court. After the war, Johannesburg got its own court, known as the High Court of the Witwatersrand.

The Supreme Court of Transvaal was re-established after the end of the Anglo-Boer War in 1902. It has been described as the strongest provincial Bench in the history of South Africa, presided over by Sir James Rose Innes as Chief Justice, Sir William Henry Solomon, Sir John Wessels and JS Curlewis (affectionately referred to in these parts as 'Oupa', as his grandson, the late DJ Curlewis, taught us). Its seat was the Palace of Justice on Church Square. This building is perhaps the most important landmark in Pretoria, and continues to represent justice in Gauteng.

In 1910, upon the formation of the Union of South Africa, the Transvaal Provincial Division was established. Its first Judge President was JAJ de Villiers, the first of four De Villiers' to grace the Bench in this division. The Witwatersrand Local Division was also established, with concurrent jurisdiction, over Johannesburg and surrounds. The Judge President of Transvaal presided over both courts, judges rotated between Pretoria and Johannesburg, and the history of those courts became inextricably interlinked. That remained the position for close to a century: today the rotation is less than it was, and the respective courts are presided over by their own Deputy Judge President. In the 99<sup>th</sup> year of their existence, the courts' names changed to the North and South Gauteng High Courts respectively. Certain parts of the North West Province were excised from their jurisdiction and added to that of the erstwhile Bophutatswana Provincial Division, now known as the North West High Court, Mafikeng.



Bust of Gauteng High Court Judge President Bernard Ngoepe.

Over the years, the face of these courts remained remarkably constant. Judges were (with one or two notable exceptions) appointed from the ranks of practising advocates, who were all white, male members of the Bars of Pretoria and Johannesburg. It was only with the advent of the new Constitutional dispensation, that the first black judge, Ismail Mahomed (later CJ), and the first female judge, Lucy Mailula, were appointed in 1991 and 1995 respectively. Since then, the racial and gender composition of the courts has been changed dramatically: of the 63 judges

in this division, 32 are black, and nine are female.

The Transvaal Bench has also produced a formidable array of Appellate Division and later Supreme Court of Appeal judges. Eleven of eighteen current Supreme Court of Appeal and three of 11 current Constitutional Court judges previously served on the Bench of this division. Of the 21 chief justices appointed since 1910, 11 previously served in this division.

The jurisdiction of these courts has remained virtually unchanged since 1910, despite the geographical rearrangement that the country experienced in 1994. Most notably, part of the North West Province was excised from its jurisdiction and added to that of the North West High Court. A refurbished court building to house the (future) Limpopo Division, was recently officially opened in Polokwane by Ngoepe JP. At present it houses a circuit court. Also, within the area of jurisdiction of this division is another anomalous constitutional remnant from the past, the Limpopo High Court, Thohoyandou. Despite 16 years of democracy, it still exists as a solitary island, serving only the people of the erstwhile Republic of Venda whilst people living in neighbouring Polokwane have to travel to Pretoria to obtain judicial audience. It is hoped that the legislature will soon decide the fate of these areas' jurisdiction, so that practitioners may settle down to serious practice, serving the people at their closest High Court seat.

Any assessment of history of the Bench of this division, as is the case with all other divisions of the High Court, will be controversial. Whilst it undoubtedly correct that some

judges in this division can be criticised for their uncritical application of racially-biased laws in the past, sight must not be lost of the excellent work done in the development of our common law. Even the most vociferous critics of the Bench were driven to concede that judgments of the erstwhile Supreme Court bear eloquent testimony to the adaptability of the Roman-Dutch legal heritage that infuses the system. This is especially evident from the remarkably smooth transformation that the division has experienced since 1994, and its judgments upholding the Constitution.

Examples of decisions arising from the division that changed the law and the way we look at things include: *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid Afrika en Andere* [2003] 1 All SA 465 (T), by De Villiers J; *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* 1998 (6) BCLR 726 (W) by Heher J as he then was; *High School Ermelo and Others v Head of Department of Education, Mpumalanga and Others* (unreported, case no 3062/2007), by Prinsloo J; and *Nyathi v MEC for the Department of Health, Gauteng and Another* (unreported, case no 26014/2005) by Davis AJ. There are many others, too many to include in this short article.

Probably the biggest challenge facing the division today is the work-load and the fact that practitioners sometimes have to wait inordinately long for reserved judgments to be given. Numerous vacancies on the Bench are not filled, which places undue pressure on senior members of the Pretoria and Johannesburg Bars to take up acting appointments for short periods of time. It is to be hoped that this issue will receive prompt attention. 

## More on the South Gauteng High Court

By Dirk R van Zyl, Johannesburg Bar

The South Gauteng High Court, or as it is often referred to, the Johannesburg High Court, may be described as a court of some irony. Irony in the sense that despite its new name and being located in the heart of South Africa's busiest cbd, despite being one of the busiest courts in the country and despite having its largest Bar, the South Gauteng High Court remains to this day a local division which shares its jurisdiction with the North Gauteng High Court.

It was created by the same proclamation that created the North Gauteng High Court<sup>1</sup> and thereafter called 'The Witwatersrand District Court', its area of jurisdiction practically comprising what was known as the Witwatersrand Gold Fields.<sup>2</sup> Although the opening of the court was anticipated for 20 May 1902, the High Court building was only inaugurated in 1910.

The High Court building was designed by Gordon Leith at a time when Lord Milner wished to impose the idea of the supremacy of the British Empire and the order and rationale of Victorian 'enlightenment' upon all aspects of post-Anglo-Boer War Johannesburg.

For avid conspiracy theorists a closer inspection of the exterior of the building provided interesting examples of freemasonry symbols, including the square and compasses and other hidden clues.

The entrance to the High Court was supposed to be directly opposite Kruis Street. However, the story goes that when the outlay for the streets were measured out, it was done from Von Wielligh Street (in the west) using raw hide thongs ('rieme'). The *rieme* were left out in the open on a typical Highveld evening and became soaked with dew. The next morning the opposite side of the street was measured and the *rieme*, which had stretched overnight, gave a different measurement from the previous day. This went unnoticed at the time and it may be observed that Kruis Street does not sit opposite the entrance of the High Court. The streets only align again at Rissik Street.

The statue of Carl von Brandis stands on the south-western corner of the court precinct as the High Court building was built on Von Brandis Plain. Von Brandis Street, which runs on the western side of the court building, was so named because Von Brandis dispersed justice from his tent somewhere on that street. Ironically, Von Brandis himself was never a judge. A Prussian officer of the old school, he was a special landdrost of the Witwatersrand, who had endeared himself to everyone and was regarded more as a father than a law-giver.<sup>3</sup> The legendary Harry Morris KC, he of Daisy de Melcker fame, said of Von Brandis that 'he knew no law, but was strong on equity'.<sup>4</sup>

Visitors to the South Gauteng High Court are generally oblivious