



A singular colleague

Judge Louis Harms retired as Deputy President of the Supreme Court of Appeal in October this year after serving as a judge for 25 years. In this profile his former colleague, Judge Robert Nugent, judge of the SCA, pays tribute to his impact on the law and on the functioning of the court.

In the course of a long conversation we had recently, on the eve of his retirement after twenty five years on the Bench, Judge Louis Harms told me, I thought rather ruefully, that he did not consider himself a ‘textbook’ judge. I don’t know that there is indeed a textbook for safely navigating the many, often contradictory, expectations practitioners and litigants have of a judge, but there are nonetheless books from which one can glean some do’s and don’ts. An example is *Judges* by David Pannick QC, which cautions against emulating the English judge who is said to have ‘irritated some counsel by practising his hobby of knitting while on the Bench’. I don’t think that is a vice that could be attributed to Louis. On the contrary, I suspect that many counsel who appeared before him over the years would have been relieved if he had taken his knitting onto the Bench.

What Louis invariably took with him instead was an intimate knowledge of the facts of the case, familiarity with the authorities in the heads of argument, and with other authorities besides, a deep understanding of the fundamental principles underlying our law, learning in the law of other jurisdictions, a quick and formidable intellect, and a capacity for seeing things in a different way. When taken together with his view that it is through adversarial debate that answers are to be found (‘when counsel succeeded it was not so much that he had persuaded me he was right – it was rather that his opponent had convinced me he (the opponent) was wrong’), appearing before him could be daunting, and

at times even painful to counsel who were not similarly prepared.

What that combination of qualities produced over the years was a body of work that will be his legacy long after the occasional bruises have healed. I have counted in the law reports some two hundred judgments written by Louis, and there are many others to which he was party and played an influential role. Off the Bench, as well, his work is prolific. Early in his judicial career he rewrote Amler’s *Principles of Pleading*, he authored the chapter on ‘Interdicts’ in the *Law of South Africa* (and has been an editor of that publication for many years), he produced *Civil Practice of the Superior Courts*, and, more recently, he wrote *The Enforcement*

of *Intellectual Property Rights: a Case Book*, a work of such international reach that it is currently being translated into Mandarin. In addition there is the plethora of scholarly articles in numerous journals, and he has spoken on international platforms countless times, both on intellectual property and on more general aspects of the law. If amongst all this there was a failing it was that Louis was always unaware that few counsel were endowed with his energy and talents.

But if that paints a picture of an intellectual machine then the picture is incomplete. I was privileged to have benefitted from other qualities in the decade we were colleagues at the Supreme Court of Appeal: his keen sense of collegiality, self-deprecating humour, unstinting support and advice when it was needed, and his generosity in sharing his knowledge and experience. Louis was usually to be found working at his computer, with his back to the door, whenever approached for advice, or for no more than a chat. He would swivel round in his chair when he heard the knock at the door, and immediately put aside what he was doing and engage attentively, whatever the reason for the visit might be. Always I left with some new perspective, even if we disagreed. Then there was the generous hospitality he and Irene made a point of extending to veteran and novice colleagues alike at their home in Bloemfontein. In short, dare I say it to readers who might be sceptical, the quality of simple kindness. There was no better counsellor, mentor, and in the end, friend, that a new colleague could have had.

Over the years I came to know something about his life. Louis was born in Pretoria, of German, Afrikaans and English ancestry. (His paternal ancestors were the founders of the Hermannsburg mission.) German and Afrikaans were spoken at home, and at first he attended the German School, but his later education was in Afrikaans, and that was the culture he embraced. He completed his schooling at Afrikaanse Hoër Seunskool in Pretoria, with many distinctions. With an inclination towards the sciences (he even took physics as an additional subject) it is curious that Louis went on to study law. I have asked him how that came about but I think it is not altogether clear even to him. (An aptitude test taken in his first year at university predicted he would fail in the law and ought to become an actuary instead, because, so he told me with a mischievous smile, his ability to communicate with people was found to be weak).

His father worked at Iscor as a foreman engineer (and was also, for a time, a member of the Transvaal Provincial Council). It was with a loan from Iscor that he studied at Pretoria University, with which he has kept a close association (at one time he was chairman of its governing council). Needless to say, he was an outstanding student, and graduated BA (law) *cum laude*, and LLB *cum laude*.

After graduating he was appointed senior lecturer in commercial law. In his characteristically self-deprecating way, Louis discounted his teaching ability in a keynote address he delivered to the Congress of the Society of Law Teachers in 2009. He recalled a United Nations sponsored master's course in intellectual property law he had presented to students from various African countries. Only one student passed the examination, so he said, a student from the Sudan, and that was because he could not decipher her writing.

I very much doubt that Louis' brief academic career was dismal. Although he left for the Pretoria Bar after only a year, Judge Peet Nienaber, who was one of his early lecturers, and later a colleague at the Bar and on the Bench, tells me that Louis was offered a professorship by the university some years later, but he declined

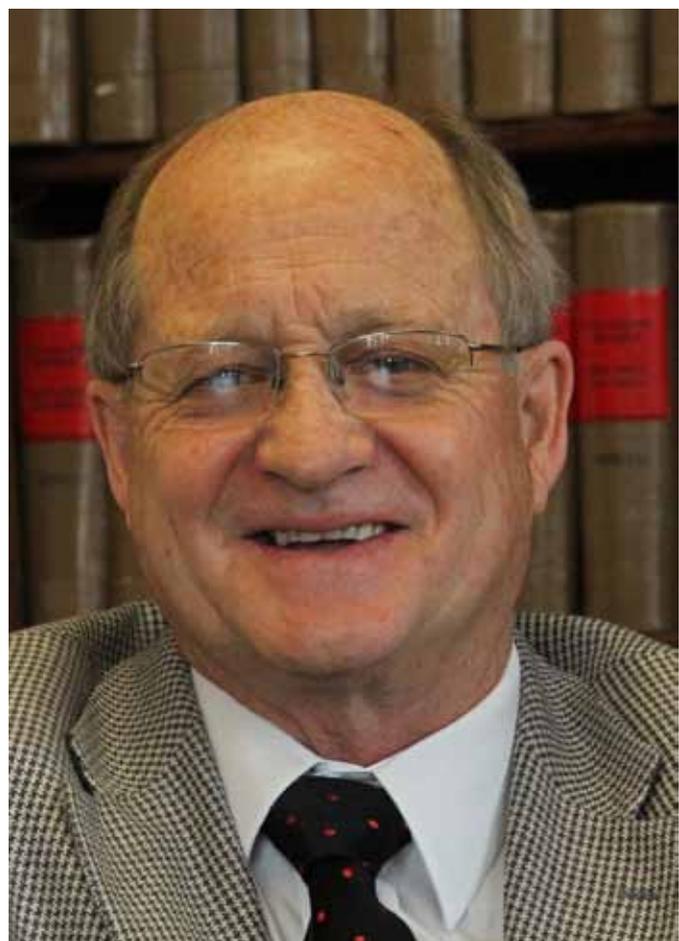


Photo credit: F. Leach

JUDGE LOUIS HARMS SCA DP

it to remain at the Bar. Much later, however, he was to become a Professor Extraordinary at the University of the Free State.

Meanwhile, the first of many articles written by Louis had already been published in the *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, a publication with which he was closely associated for many years, which earned the prize for the best article by a first-time author.

By then he had married Irene, his university sweetheart, who had also studied law, and it is apparent to all that they have remained sweethearts ever since. Perhaps it is because she was the daughter of Chief Justice Rumpff that Irene has the measure of Louis. Irene is a person of considerable account herself, and is his pillar of loyal support, even while she relentlessly pursues her work for the physically disabled, and ensures that judges nostal-

What that combination of qualities produced over the years was a body of work that will be his legacy long after the occasional bruises have healed.

gic for home-comforts receive a meal at their Bloemfontein home on a Sunday night. They are parents to three sons, two of whom followed their father's footsteps to the Bar (the sensible one, says Louis, chose a career in information technology), and the adoring grandparents to seven grandchildren.

Louis served on the Bar Council, and the General Council of the Bar, in various capacities, for many years. Peet reminds me that it

was Louis, seconded by Chris Botha (later to become a judge) who, in 1977, proposed the removal of the ignominious race clause from the constitution of the Pretoria Bar. It took some three years of rancorous campaigning before the required two-thirds majority for its removal was secured.

Peet recalls that as an advocate, and later as a judge, Louis proved himself to be fearless. 'Despite his youthful appearance he is in every respect an old hand. As an advocate he was short and to the point and not afraid to lose and hence not disposed to settle too soon, and as a judge (and commissioner) he was not afraid to be unpopular'. Lest that be thought to gild the lily, Peet adds, candidly, that 'he could, as we all know, sometimes be sharp and brutally frank, but his barbed and unflattering comments were never undeserved, and he was eventually respected by all those who dealt with him professionally and personally. But he nonetheless has the knack of getting on with, and being liked by, everyone he meets.'

The minds of briefing attorneys will forever remain a mystery to me. There are those advocates who have joined the ranks of the Bar in the expectation of making a career in their field of expertise, only to find that briefs are forthcoming in every field but that one. Then there are those who find themselves unaccountably being briefed in a field where they have no expertise at all. Louis fell into the latter category so far as intellectual property was concerned. He became one of the country's leading experts but he came to the field quite fortuitously. Upon joining the Bar he at first received

Five years after taking silk, at the relatively young age of forty five, Louis was appointed to the Bench in the then Transvaal Provincial Division.

the humdrum, but welcome, work that is the lot of the rank junior, but soon found himself, unexpectedly, with a brief as junior counsel, led by Van Reenen SC, in the leading case of *Gentiruco A.G. v Firestone SA (Pty) Ltd* (reported on appeal at 1972 (1) SA 589 (A)), with the legendary Hanson QC leading Schreiner SC and Plewman on the other side, and then only because he was fluent in German.

Even after that illustrious entry, intellectual property briefs came in only gradually, and he developed a varied practice, but by the time he took silk, in 1981, his reputation in the esoteric world of patents, copyright and trademarks had been well established, and by the time he left the Bar he was a leading exponent.

Five years after taking silk, at the relatively young age of forty five, Louis was appointed to the Bench in the then Transvaal Provincial Division. Louis tells me that he had never had ambitions to be a judge: that he has never had what he calls a 'road map of my life': but that he took the decision when he had run out of excuses for not capitulating to the entreaties of the Minister of Justice.

Louis was not the first, and will not be the last, busy practitioner to find the transition unexpectedly traumatic. After living with the demands, and at times exhilaration, of a busy senior practice, it can be bewildering to have time weighing on one's hands, as cases set for trial are postponed, or when hours go by while counsel languidly discuss settlement, or when no cases are allocated at all, and there is just so much tending the garden can take. And then when there is work to be done, to be allocated cases that turn

on the colour of a traffic light, or how the pots and pans are to be divided, or the interminable enquiries as to whether the summons was properly served, can soon numb the mind. Louis says that for many years he regretted his choice, and gave thought to leaving the Bench. But for Louis, whose commitment to the conventions of judicial life is uncompromising, that would never have been a real option. Instead, he grasped the opportunity that is denied by a busy practice to commence his prodigious writing, and when cases of particular moment did come his way, he devoted himself to researching and writing the judgments with thoroughness. His earliest reported judgment I have found concerned the extension of a patent (for improvements to tumble dryers, described in the judgment as 'a household appliance which has become fairly popular in recent times'), which reflects the depth of knowledge, clarity, and comprehensiveness, that was to become his hallmark.

Much of his time at the provincial division was taken up with various commissions of enquiry, mainly into what were then quaintly called 'cross border financial irregularities'. Then there was the commission that was to be his albatross for many years. My wife reminds me occasionally that my memory of my own fulminations when returning from a day before that commission has become dimmed, but if that is so, then it is because so many years of unblemished public service by Louis in the new order have passed since then.

Louis remained on the Transvaal Bench for five years before being appointed to what was then the Appellate Division. Amongst his new colleagues was Judge Joos Hefer. As did we all when we came to work with Joos, Louis soon came to admire his down-to-earth manner, his quick mind, and his generous welcome to the court, and they served together for many years. Joos says of Louis that his colleagues ('or at least some of them') welcomed his elevation on account of his expertise in intellectual property, but soon came to respect his contribution to the wider jurisprudence of the court. Joos recalls the many judgments in the law reports that, he says, reveal a trait familiar to those who know him – 'his natural ability, after assimilating and evaluating the factual and legal issues, to form a clear view of their effect on the case, and then to express his view in unequivocal terms, even though at times that entailed treading heavily on some toes'.

It would be invidious to attempt to extract from that massive body of reported judgments any one more significant than others. Even a random selection reveals in each case an incisive and comprehensive account of the issues at hand and deep learning in the law. Indeed, there are few cases that are argued today without reliance, in at least some way, upon one of his judgments. Louis himself had difficulty choosing when I asked him to recall judgments he remembered with special pride. His answer was that he considered every judgment no less important and he wrote each accordingly. But there is one that he did pick out, modestly, but with evident pride: *Erasmus v Galago Publishers (Pty) Ltd* 227 JOC (T) (confirmed on appeal in *Galago Publishers (Pty) Ltd and Another v Erasmus* 1989 (1) SA 276 (A)) . He added, rather bashfully, that on reflection he thought it was rather pretentious, but on reading it again I have found only that the grammar is correct.

There is one judgment, however - *Modderfontein Squatters, Greater Benoni CC v Modderklip Boerdery (Pty) Ltd (Agri SA & Legal Resources Centre, Amici Curiae); President of the RSA v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 (SCA) – that I think best illustrates his ability to see behind the conventional when the problems at first seem to be intractable. Of course, there are judgments

that were overturned by the Constitutional Court, but that is inevitable when jurisprudence develops on untrodden ground.

Judge Michael Corbett was Chief Justice when Louis joined the Appellate Division, and there were other renowned judges then on the Bench, but Louis picks out for special admiration Judge ‘Nick’ Nicholas, whose ability to cut to the quick would have appealed to his own style. Judge Craig Howie, later President of that court as the Supreme Court of Appeal, joined its ranks at about the same time. He recounts the pleasure that he found working with Louis for sixteen years: ‘Never the remotest irritation, much less a cross word, and in a disparate group of sometimes edgy high deliverers, that was quite something. The presidency of the court was rendered so much more manageable knowing one could call in on him at any time with any question and you could expect valuable advice.’

‘A legal polymath,’ is how Louis is described by Justice Edwin Cameron, now on the Constitutional Court, but before that a colleague on the Supreme Court of Appeal for eight years. ‘Procedure, contract, delict, commercial law, trusts and the Constitution – nothing eluded his capacious grasp of principle.’ What he admired most about Louis was not merely the generous collegiality, in time and hospitality, but the incisive mind that would shift aside the clutter, and reduce the problem to its essence. He recalls how Louis would say drily, after yet another revealing exposition: ‘Nou ja. As mens die saak so sien, dan word die probleem eintlik heel eenvoudig.’

Louis expresses some frustration at the lack of development in the procedures of the courts, an area always close to his heart. Many things might have been done to improve efficiency and access to the courts, and could have been done easily, so he says, but remained forever bogged down in countless committees and task teams. Those observations point to an unfortunate, indeed, lamentable, feature of his legal career.

Louis is internationally renowned in his field. Although not officially associated with the World Intellectual Property Organisation (an agency of the United Nations) Louis is called upon regularly by that body to share his expertise. To list the occasions on which he has done so, and has also shared his expertise in other fields, would take considerable space, but here is a selection.

He was the keynote speaker at the third Conference of Counterfeiting in Geneva; he has provided judicial training in intellectual property law for judges of the SADC countries, and of the Far East, Japan, Bangladesh, and Ghana. He has presented papers at colloquia on the protection of intellectual property for judges in Nigeria, judges of the Arab League in Sudan, and in Dominica; he has presented papers at the WIPO Arab Regional Conference of Judges in Amman, papers at a national workshop in Kenya, papers in Mauritius and Mocambique; he has spoken on extradition at the 9th International Judicial Conference of Courts of Ultimate Appeal in Budapest, and at the United Nations Educational Conference for judges from African countries; he has presented papers on aspects of criminal law and procedure at international conferences at the Hague and Edinburgh; he presented a paper on transparency and accountability in judicial appointment in Bucharest; he has spoken on the protection of intellectual property rights in Washington and Vancouver; he prepared a study for WIPO on the criminal enforcement of intellectual property rights; he presented the prestigious Dame Ann Ebsworth Memorial Lecture for the London Bar in 2007, and so the list goes on.

Lamentable is the conspicuous absence of his own country from that list. Louis was replaced as Chairman of the Standing Committee on Intellectual Property in 1995 and has not served on it since, nor, indeed, in any other similar capacity. His expertise has not been sought out to develop skills in that field that are sorely deficient on the Bench. Notwithstanding his authorship of one of the standard texts on civil procedure, and the undoubted need for modernisation of the civil rules, he was never appointed even to the Rules Board. Task teams on much-needed systems of case-flow management (coupled with tours of the world to examine systems in place in other jurisdictions, albeit that they are readily available on the internet) have come and gone with nothing to show, when there can be little doubt that Louis’ experience and energy could have addressed the issue in short order. It is the international community that has chosen to reap the field for the benefit of his expertise and experience and not his own.

I asked Louis whether he felt disappointed. Characteristically, he shrugged his shoulders and said: ‘that’s life’: leaving one to reflect upon the missed opportunities for the practice of our courts.

Even so, his energy could not be repressed. It is more than a decade since Louis recognised the need for a written Code of Judicial Conduct, and, at first with the assistance of a colleague,

In one of its wiser moments the Judicial Service Commission nonetheless recommended his appointment as Deputy President of the Supreme Court of Appeal in 2008, and his energy in that position is a reminder of what more could have been done.

took the initiative to compile one, and then to pursue its adoption with vigour. His work formed the basis for the Bangalore Principles of Judicial Conduct agreed by Chief Justices across the world in November 2002. The Code was recently adopted by the National Assembly with no acknowledgment of its authorship.

In one of its wiser moments the Judicial Service Commission nonetheless recommended his appointment as Deputy President of the Supreme Court of Appeal in 2008, and his energy in that position is a reminder of what more could have been done. It is fitting that his last day in the judiciary will be spent as Acting President of that court.

But this is not an epitaph to a spent life. Louis is not capable of fading away in retirement. His perpetual curiosity about, and dedication to, the law, will continue to fuel his boundless energy, whatever course that might take him on. He leaves the judiciary, I am sure, with some sadness, but as he told me, sagely, the continuity of the judicial enterprise calls for a judge, however high his or her office, graciously to accept the expiry of his or her constitutional term.

Reflecting on what might best sum up his judicial life, as pithily as Judge Louis Harms might have done, I recalled overhearing from a respected former member of the Constitutional Court: ‘Louis has been a great servant to his country’; and that seems to me to say it all. His departure from the Bench will be a loss to the Supreme Court of Appeal, and to the judiciary at large, and I, for one, will miss his wise guidance and generous collegiality. 