

An afternoon with the Chief Justice

By Les Morison SC, Johannesburg Bar

Mogoeng wa Mogoeng was a colleague of mine. We had started a group of advocates at the Johannesburg Bar in July 1990, five months after the release of Nelson Mandela. It was a magically exciting time in the country and in our careers. We were setting up, driving off to distant courts and returning from the field with many a story about this or that magistrate's court. Over the intervening twenty-two years I have travelled my road at the Johannesburg Bar and Mogoeng, as he had his family in the North West, moving on from the Johannesburg Bar after a few years. He had been one of the top students in our pupillage class, having beaten in a fair contest from a standing start a Rhodes Scholar and a number of *summa cum laude*'s.

We felt his loss from the group when he left; we were pleased to hear after a number of years that he had attained the position of Judge President of the North West. On the odd occasion that I appeared in the North West I was always impressed by its efficiency and the business-like atmosphere which pervaded it. I would pop upstairs to pay my respects to the Judge President and would always enjoy reminiscing briefly about our early days in the profession. The court building was impeccable, the filing offices worked well, the courts started on time and judgements were produced promptly, although, as in all other courts, the quality of the judgments depended on the individual judge.

Then he really hit the limelight as the Chief Justice. I read about his gruelling interview before the Judicial Services Commission and felt for him. I remembered his abilities in the early days and the admirable administration of his courts in the North-West. Now here I was on a winter's day in May going to discuss the Bar's possible contribution to the Judicial Education Institute, created by the South African Judicial Education Institute Act 14 of 2008. The Bar has always been the primary source of South Africa's judges and clearly it must continue to play this role. No other branch of the profession puts its members into court as frequently and intensively as does the Bar and it must necessarily be part of judicial education; a fact which is recognised in that one of our members, Vincent Maleka SC, serves upon the Institute's board as a representative of the Bar.

This Act was passed in January 2009 to establish a South African Judicial Education Institute to promote, as part of an internationally accepted practice, the independence, impartiality, dignity, accessibility and effectiveness of the courts by providing judicial education for judicial officers whether aspirant, newly appointed or experienced. Section 180 (a) of the Constitution provides that national legislation may provide for training programmes for judicial officers. The preamble to the Act spells out that judicial education is needed in a quest for enhanced service delivery and the rapid transformation of the judiciary. It is particularly necessary as the law has, according to the legislature, become much more complex and varied. At this point I have to disagree. As far as I am concerned the law has always been

much more complex and varied than ever it was. At least, that's how I find it every morning when I come in to chambers. Still, I'm all for anything that is aimed at addressing that problem; it would make my trip to work much less stressful. The legislature points out in the preamble to the Act that the law develops rapidly and is increasingly influenced by the globalisation of legal systems, trade, technology, new insights and challenges. Once again, I am not sure that this is so. Especially the bit about 'new insights.' Those always seem to get me into trouble. And whenever I have one, they never seem to be new. Some unfortunate judge has always thought about my insight before and taken the care to record it in a minority judgement somewhere. But if Parliament says it is increasingly influenced by those things listed, at least I now understand why I miss the odd point. Fortunately, I nearly always have a considerate opponent to point out to the judge where I've slipped up. If the opponent is not too quick off the mark, sometimes the old Judge himself descends into the fray to help me out, bravely facing the risk of being blinded by the fog of battle to draw attention to my little gaffe. Where would one be without the old dears?

Then the Act goes on to mention that education and training of judicial officers is necessary to uphold judicial independence, on the one hand, and to facilitate judicial accountability, on the other. These strike me as rather irreconcilable objectives, the one hand pulling the other a bit out of joint here. Both judicial independence and accountability are indispensable requirements, we are told, of a judiciary in a functioning democracy.

It is, says the Act, desirable that the education and training of judicial officers should primarily be directed and controlled by the judiciary. Now we're back on solid ground. Directing and controlling is what judges do best, has been my experience. My musings on the profession and the Act were interrupted when another realisation dawned on me. This is my first time at the Constitutional Court in its current location. I had been to the old one, I consoled myself. I drove into the strange brick and concrete maze which lies just beyond the fringe of the foreboding and decrepit skyscrapers of Hillbrow on the Braamfontein Ridge.

The signage to Constitution Hill is clear and I got a sense of visiting an historic site as much as a court. I wandered up the gentle stairway and reflected on the strange narrowness of the structure. Being built on the site of the Old Fort Prison I supposed it had some constraints in the building. The art on the outside of the building is the modern metal stuff commonly artfully scattered about Moyos and other restaurants. It is not to my taste, though the architecturally literate and aesthetically informed are all agog at the building. I found a strange crocodile man wooden sculpture grimacing at the foot of the stairs and I wondered why such a grotesque creature should guard the entrance. Many glass doors are locked and heavily barred which I don't think was part of the artistic vision, but these too conveyed a certain message.



Photo: Les Morison SC

The entrance to the Constitutional Court, Johannesburg.



Photo: Les Morison SC

The cell of the Old Fort transformed to be part of Constitutional Hill.

Then you get to the big wooden door at the end, carved to a vast height. It opens onto the inevitable security check. I announced that I was there to see the Chief Justice. I was immediately awarded a gold sticker bearing the letters VIP and I was pleased that I did not have to draw that to anybody's attention any more. I made a mental note to wear it around the house so that my wife doesn't have those little lapses where she forgets just how important I am.

In the enclave of the justices' chambers one encounters incongruously casual bespectacled student-types. They wander around talking about conferences on judgments. They are the researchers. I learnt that the process of judgment-production in the Constitutional Court is a consultative one; much discussion does occur between the justices and their researchers at different times in the production of judgments.

The Chief Justice's friendly personal assistant, Khwezi, warmly showed me through to his office and suddenly all frivolity fell from me. This was an extraordinary honour that I was about to receive. For the Chief Justice to agree to receive one in the middle of a busy court day is no small thing, and the content of the meeting would need to be conveyed to the whole Bar if it was to be worth his while.

I found him tapping out a quick email, not letting a moment be wasted. Once again the beaming open cheerful face of my

old colleague – now sitting in the office of the Chief Justice – welcomed me. His slightly hoarse voice carries a hint of the dust of the Kalahari, his eyes sparkle above broad high cheekbones with lively humour. I conveyed my congratulations and those of many colleagues. Khwezi served ginseng herbal tea in fine china. We sat in the comfortable chairs away from the conference table and smiled at life's incredible ways.

Then the smiles were gone and I was swept up into a conversation with a man who very plainly means business. Those sparkling eyes now glazed over as they fixed on a distant point and the inner focus was intense. He has a message for the Bar. He wants to communicate with all participants in the justice system and extends an invitation to others in law to communicate with his office. He has made a close study of case management and has observed it in practice in some of the largest court systems in the world, including California. He would very much like the Bar to communicate more readily with the Judicial Services Commission through the representatives of the Bar on that body, such as Izak Smuts, Ishmael Semenya and Dumisa Ntsebeza.

He explained that postponements and the delays in the writings of judgments, the inefficiencies of the filing systems, the courtrooms sitting empty when cases are waiting for hearing, the promise of the efficiencies of electronic filing, the promotion of alternative dispute resolution and judicial education including

getting retired judges to teach and mentor, are all on his agenda. He is enthusiastic about introducing the e-filing system in courts and wants members of the Bar to acquaint themselves with the available information regarding case management so that the dialogue with his office and his committee may be well informed. The pilot project in the Western Cape is receiving his personal attention. He explains that in large cases involving a number of accused in a criminal matter or a number of litigants in a civil matter, case-management is normally initiated by the parties approaching the court head who then designates a judicial officer to bring the matter to ripeness – otherwise the matter can carry on indefinitely.

Hold on, I am thinking, there is no politics in this conversation. None of the stuff that the media says about him comes up, the controversy, and all that. He has no time for that. He is all about getting his vision realised. Disciplined, focussed and effective, he wants it done in the shortest possible time. He would like to engage in a constructive discussion with practitioners about how his case management ideas can be implemented and to receive robust feedback on his views. He is in regular contact with retired Chief Justices Chaskalson, Langa and Ngcobo; the Chief Justice explains that he is merely taking forward the work of his predecessors.

On the subject of increasing the independence of the judiciary, about which he is passionate, the Chief Justice mentioned that pursuant to a Memorandum of Understanding with the Department of Justice the Office of the Chief Justice has acquired a number of functions previously administered by the Department of Justice, but that more work can be done on achieving greater autonomy for the judiciary. He is eager to acquire the same independence of budget and administrative control as enjoyed by, for example, the NPA. To this end, the Chief Justice is making his views on the independence of the judiciary and its capacity to administer its own affairs bluntly known to the Department of Justice and the Minister, whose understanding and cooperation he enjoys.

Critical of procrastination on the Bench and eager to facilitate access to management information that equips the heads of courts with performance assessment and enhancement tools, the Chief Justice is unstintingly committed to improving the quality and performance of the justice system. The Chief Justice is interested in using retired judges to contribute to the success of the Judicial Education Institute. Retired judges are in many instances keen to utilise what they have learnt on the Bench and to pass those lessons on to those who are still on the Bench and those who aspire to judicial office or judicial promotion. The accumulated wisdom of the retired judges makes them an ideal resource and they are potentially a relatively economical resource because if they are not employed full-time to teach or mentor but contribute on a part-time or ad hoc basis, they may be satisfied with a negotiated stipend, transport and accommodation costs being covered.

The Chief Justice presides over the Judicial Services Commission. He made it plain that the legal qualifications, track record and performance of the candidates, together with questions of temperament and commitment to a constitutional democracy's underlying principles were foremost amongst the criteria that he wanted the Judicial Services Commission to apply, together with the capacity to manage a court.

It is clear that the Chief Justice is an exemplar of consultative

leadership; he is inviting the Bar and all other stakeholders to cooperate with him in bringing about sweeping changes to the way in which our courts are run so that the independence of the judiciary, the efficiency of the courts and the quality and promptness of judgments are improved. The Chief Justice is reluctant to see internal processes debated in the media when much more can be achieved and positions can be prevented from hardening if the communication between those involved is not run to the media.

The sun shone clearly through one of the coldest days of the year as I emerged from the inner sanctum. Khwezi, the Chief Justice's warm and cheerful personal assistant, had bade me goodbye 'Hope to see you again soon,' and his bright young research assistant smiled from behind her computer. I passed a few more of the glasses-and-jeans types talking earnestly in phrases like 'He wants another review conference,' and, 'She needs more work on the Canadian law' as I headed for the exit.

I stepped onto the open space between the cells that had formed part of the Old Fort building in which Mandela and many others had been incarcerated. I looked up at the strange glass rectangles that had been constructed above them in an architectural attempt to illustrate some elevation by glass and light over bricks and mortar, slotted doors and barred windows. Two American tourists were coming through the security system and to my indignation they were also given VIP stickers. Still, the sense of awe and respect that was coming off them matched my own, so I resisted the temptation to rip their stickers off.

Coming back to the business of the day, I was struck by how distant was the man I had just spent the afternoon with from the media-created perception of him. My heart was lifted for the man at the head of this august body, who is all about getting the job done, getting those involved to buy-in to his vision and to communicate with them, to draw in their comments, criticisms and contributions and simply make our courts work better.

I hope that I have in this piece conveyed something of his vision and my very privileged interaction with an old colleague who has taken a remarkable journey, who is embracing the challenges of this responsible position. A relatively young man, he is communicating actively with his predecessors and enjoys their co-operation in building our constitutional democratic legal system. The members of the Bar should, I venture, be following the example of our previous Chief Justices, of making ourselves available to support our new Chief Justice. **A**

Erratum: Ngalwana 'When expedience trumps the rule of law'

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In a footnote of his piece 'When Expedience Trumps the Rule of Law: ...' published in the August 2012 issue, the author said one of the justices of the SCA asked rhetorically whether the Cape Judge President was a crook. The author now says the justice in question was not referring personally to the Judge President when making that remark. The justice was making that remark in general terms and in relation to *any* judge, the context being whether the courts may not review a decision of the JSC even if a judge to whom a decision of the JSC relates is a crook. The author says he considers it his duty to correct the perception and has not been directed by anyone to do so.