

Award to the late Chief Justice Ismail Mahomed

Speech by Sir Sydney Kentridge QC at the posthumous handing over of the Sydney and Felicia Kentridge Award to the late Chief Justice Ismail Mahomed on 28 July 2000.

In August of last year Felicia and I were at a conference in Salzburg, Austria. It was an international conference on the independence of the judiciary. A great majority of those invited were chief justices and other judges of the highest courts of many countries – the House of Lords, the United States Supreme Court, the Supreme Court of Canada, the constitutional courts of many European countries and courts in Asia and Africa. The South African judge invited to the conference was Chief Justice Ismail Mahomed. The opening address was given by the president of a distinguished European court, who spoke appropriately on the importance of judicial independence and the way in which that should and could be safeguarded. Ismail, who was not known to most of those present, was down on the programme to speak on the following morning. He took up a different and unexpected theme. He spoke not on the rights and powers of the judges but on the obligations of the judge – above all the obligation to the litigants, to counsel who appeared before the court, and to the society in which the judge lived. His theme was developed with systematic logic but he spoke with a passionate eloquence which astonished and electrified the other delegates. It was his speech which, by its own force, became the keynote speech of the conference.

Eloquence

That passion and that eloquence, combined with legal logic, were the hallmarks of Ismail Mahomed both as advocate and as judge. Some 25 or more years ago, when I was a delegate to the annual meeting of the General Council of the Bar, the then chief justice in his speech to the conference said that eloquence no longer had any place in modern advocacy. For most of us this is true; logic and lucidity are the best we can aim at. Nor has eloquence much place

in the modern style of judgment. But there have been exceptions on both sides of the court. Some of us can still remember the persuasive eloquence of forensic heroes of old such as Oswald Pirow, Harold Hanson and Isie Maisels. As for the Bench, one recalls the stylistic felicities of a Denning, a Cardozo and of our own James Rose Innes. Ismail was an eloquent advocate and an eloquent judge. His eloquence was not mere facility with words – although he was a master of the English language; rather it was part of his deep commitment to individual rights and his real feeling for the law. His life-long goals were freedom and equality, but he always believed that the way to those goals, and their best protection when achieved, were law and the judicial process. The recent history of this country has shown that he was entirely right. Law for Ismail Mahomed was not simply a draft. He truly loved the law and its distortions under the apartheid regime were a matter not only of justified indignation, but of real pain for him. The law was his life. It is not surprising that he was a founding trustee of The Legal Resources Centre.

Professional relationship

My professional relationship with Ismail was fourfold. First, he was my junior in several cases and frequently kept me from error. Then, after he had taken silk, we appeared together in a number of cases. It was always comforting to be on the same side as Ismail. One of these cases was the judicial review of the Medical Council's refusal to take action against the doctors in the Biko case. As it happened there were three of us who addressed the court for the applicants. The third, whom I am very glad to see here this evening, was David De Villiers QC. Between us we won the case, or at least managed not to lose it. My third professional encounter was when Ismail was Chief Justice of

Namibia. I appeared before him as counsel in a constitutional appeal. We had what I might describe as a pleasant colloquy. Best of all, from my point of view, for a short time I sat with him on the Constitutional Court. As a Constitutional Court judge he was at his very best. He had a vast knowledge of international constitutional law, and a sensitive appreciation of the balance to be struck between individual rights and the needs of society as a whole. If there is any single judgment which exemplifies that sensitivity, as well as his eloquence and his passionate commitment to the law, it is his judgment in the case on the constitutionality of the Truth and Reconciliation Commission. That case should be compulsory reading for all students of constitutional law.

It is a great sadness that the award this evening has had to be a posthumous one. But at least Ismail did know of it before his all too early death. There could have been no more appropriate candidate for this first award. Has there ever been a more remarkable legal career than his? The appalling obstacles which he had to overcome, and the humiliations which he had to suffer in his early years at the Bar are well known. He was a sensitive man and felt them deeply. Yet he built up a practice as the country's leading administrative lawyer. Against all the odds he was given silk in 1974, became a judge of the High Court in 1991 and was elevated to the Supreme Court of Appeal two years later. Then, after the new constitution had come into force, he became successively Deputy-President of the Constitutional Court and Chief Justice of South Africa. Add to this his judicial appointments in Botswana, Lesotho, Swaziland and Namibia, and one may surely say that there has been no comparable career in the law anywhere in the world.

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GCB papers

GCB committees during the past year have prepared papers, adopted by the GCB, on the following issues:

- Trengove SC and Marcus SC on the merger of the Constitutional Court and Supreme Court of Appeal;
- Solomon SC, Derksen SC and Laubscher SC on the incorporation of advocates' practices into close corporations;
- Van der Linde SC and Singh SC's response for the GCB to the White Paper on the Judicial System;
- Grobler SC on the proposed amendments to the Judicial Service Commission Act 9 of 1994 (introducing a judicial complaints committee and misconduct proceedings against judges);
- Snyckers and Spitz on the constitutionality of the defaulters' list;
- Nesor SC, Ancer SC, Schwartz and Mullins prepared submissions to the Satchwell Commission on the Road Accident Fund.

National Bar Conference

A national Bar conference was scheduled for Cape Town for April 2001. Peter Hodes SC led a particularly able and dedicated team who were far advanced in their plans for this conference, and who had attracted the attendance of internationally recognised participants on the selected topic of e-law. Unfortunately the renewed withdrawal of members of Advocates for Transformation in Cape Town from participation in Bar and GCB affairs called into question the viability of continuing with the conference (particularly one involving international attendance, the judiciary and financial sponsorship) in circumstances which would suggest a racial boycott. For that reason, the decision was reluctantly taken – in conjunction with all Bar chairs – that the conference would have to be cancelled.

General

Other things I have done during the past year include the following:

- Submission prepared on behalf of the GCB on the Discussion Paper on the Transformation of the Legal Profession;


- An initiative (with the Director of Public Prosecutions : Western Cape) regarding participation by the Bar in prosecutions;
- Endeavours which have resulted in setting up the Pius Langa Scholarship and the Sir Sydney and Felicia Kentridge Award for service to law in Southern Africa (sponsored by the Nedcor Group of Companies);
- Informal discussions with representatives of Nadel on 8 February 2000;
- Informal discussions with chair of LSSA during July 1999 in Pietermaritzburg;
- Informal discussions with AFT members on transformation issues;
- Meeting with UN Rapporteur to discuss the independence of judges and lawyers on 10 May 2000;
- Informal discussions with representatives of the Criminal Law Bar on 6 June;
- Service on Editorial Committee, and contributions to *Advocate*;
- Competition Commission in finalising with the assistance of Burger SC the application for exemption of certain Rules of the GCB and its constituent Bars;
- Served on both the GCB Bar Conference and Human Rights Committees;
- Informal discussions with Bar chairs and Bar members in Grahamstown, Port Elizabeth, Cape Town, Pretoria, Johannesburg and Durban.

The heart of the GCB is its very small office and loyal staff. I record here my

deep appreciation to Elize van den Heever, our executive secretary, and her colleagues Marietjie Horn and Susan Molefe. They have dealt with voluminous and only partially legible faxes, my flow of mangled e-mails, and all the pressures of running an office with executive members in other cities with unfailing good cheer. Elize in particular has been a tower of strength to all of us, as she has battled to elicit material from various Bar chairs and secretaries, and to cope with the crises which have emerged.

I am also particularly grateful to Nirmal Singh (who not only accompanied me to Malaysia but more parochially to important meetings domestically), and who was always available to discuss issues and offer advice. He has had to deal with problems relating to matters from bursaries to advocacy training. Likewise Roland Sutherland found time to meet with me frequently during visits to Johannesburg to discuss problems. He has also stood in for me at a number of important meetings, and borne much of the brunt of the Legal Aid issue. My predecessor, Peter Hodes, was also always available to offer assistance, as was his predecessor, Malcolm Wallis.

I would also record my gratitude to the chairs of the constituent Bars and their secretaries, and to all those involved in GCB committees, for their hard work during the past year.

The Bar, both as an institution and a way of life, is difficult but fundamentally worthwhile. We owe it both to each other and to those who need our services to continue to strive to make it better. 

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Where Ismail first came to the Bar he suffered many slights – some unfortunately from those whom he should have been able to look upon as colleagues. But he also made lasting friendships at the Bar and the Bar meant much to him. He understood its continuing importance as an independent profession. Ismail had many honours in his lifetime.

It is fitting that the General Council of the Bar is tonight honouring his achievements and his memory. Ismail's widow is in deep mourning and cannot be present. His brother, his sister-in-law and his niece are present tonight and I ask his brother to come forward and to receive the scroll on which the award is recorded. 