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).

Milne, Didcott and Friedman

John Milne was the son of Alexander Milne, who was Judge President from 1962 to 1969, and was admitted to the Bar in 1953, after completing his studies at Rhodes University and thereafter at Exeter College, Oxford (the same college that his father attended). He took silk in 1967 and was appointed to the Bench in 1971. He became Judge President in 1982 (the only father and son both to have been Judge President of the same division) and was appointed to the Appellate Division in 1988. Milne J's contribution to individual liberty and freedom went beyond his many impressive judgments.

Kwazulu-Natal Judge President Vuka Tshabalala

Like Milne, David Friedman's father, Joseph Jacob Friedman, had been a judge of the NPD. David Friedman, who was Dux in matric at Durban High School, had a long career at the Bar, and having taken silk in 1971, was appointed to the Bench in 1977. He surprised many when in 1990 he resigned, stating publicly that he did so for personal reasons.

John Didcott's father, John Leonard Didcott, studied at the University of Natal before going on to Oxford as a Rhodes Scholar. He returned to Pietermaritzburg where he practised as a dual practitioner. He died in 1942 at a very young age.

Didcott J was educated at University of Cape Town and became president of the National Union of South African Students. He was a founding member of the Liberal Party. He brought this background in politics to the Durban Bar, taking silk in 1967 and serving as chairman from 1973 to 1975. He was appointed a judge of the NPD in June 1975.

Didcott J served on the Natal Bench until 1994 when he was appointed to the Constitutional Court; he was the only nominee to receive the support of all the members of the Judicial Services Commission. He died in 1998 while still serving as a judge of the Constitutional Court.

The judges through their cases

During the 1980s there were a number of landmark decisions in Natal which sought to protect civil liberties in the face of incursions by the state purportedly in the interests of national security.

Milne J presided in *S v Ramgobin & Others* 1986 (4) 117 (N) where leaders of the UDF were tried for treason. He adopted an activist approach leading to the State withdrawing the charges after he excluded videotaped and recorded evidence. Four of his decisions in this case are reported and it was the first time a judge sat with one black and one Indian assessor.

Two cases that illustrate the tension in the eighties between executive-minded and pro-democratic members of the Natal Bench are *State President and Others v Tsenoli ; Kerchhoff and Another v Minister of Law and Order and Others* 1986 (4) SA 1150 (A).

Both cases dealt with regulation 3(1) of the Emergency Regulations, which were promulgated in terms of section 3(1)(a) of the Public Safety Act 3 of 1953.

In *Tsenoli*, Leon, Friedman, and Wilson JJ, considered section 3(1)(a) of the enabling legislation and found that it did not envisage or grant the broad powers that regulation 3(1) gave to arresting officers. Consequently, the court found that it was *ultra vires* the empowering section.

Startlingly, a few days later another full Bench convened to deal with the same matter in *Kerchhoff*. Kriek, Thirion and Law JJ decided with unseemly haste that the decision in *Tsenoli* was clearly wrong, holding that regulation 3(1) was *intra vires* the enabling statute. The two matters were consolidated on appeal. Rabie CJ, pronouncing the court's judgment, upheld the decision in *Kerchhoff*.

In *S v Ramgobin and Others* 1985 (3) 587 (N), Friedman J, in dealing with sections of the Internal Security Act, boldly declared that those provisions of the Act that make inroads into individual liberty should be strictly construed so as to limit their impact to the extent that the language would reasonably permit. This type of interpretive technique can rightly be seen as a forerunner to the constitutional interpretation that the courts are today enjoined to adopt in terms of section 36 of the Constitution. Cora Hoexter in a 1986 article in the *South African Law Journal*, referring to the decision of Friedman J, specifically noted that the interpretive technique was a 'revolutionary technique' because it constitutes an example of interpretation that did not necessarily proceed from vagueness, uncertainty or ambiguity in the language of the statute. This meant that 'the principle of legislative sovereignty is forced to compete on unequal footing with that of protection of fundamental rights (1986 *SALJ* at 448).

In *S v Khanyile and Another* 1988 (3) SA 795 (N), Didcott J (sitting with Friedman J) considered the rights of an accused to legal representation and emphasised the role of the Bench in assessing the totality of circumstances to decide if gross unfairness would result if an accused is not represented. The judgment went as far as to say that if the judge concluded that a trial without representation would be grossly unfair, he should refer the case at once to those administering the legal aid scheme or similar organisation and should refuse to proceed with the trial until representation was procured. In *S v Mthwana* 1989 (4) SA 361 (N) a full Bench (consisting of Howard JP, Booysen and JH Combrink JJ) of the division criticised and effectively overruled the decision in *Khanyile* which had already been criticised in other divisions. The Appellate Division sided with *Mthwana*. Perhaps ironically, Didcott J, sitting in the Constitutional Court in *S v Vermaas; S v Du Plessis* 1995 (3) SA 292 (CC), had the last word in holding that the controversy 'has been settled decisively by our new Constitution, the Constitution of the Republic of South Africa Act 200 of 1993, s 25(3)(e)' that essentially codified the principles advanced in *Khanyile*.

Friedman J, writing three months before his resignation in *Natal Indian Congress v the State President and Others* 1989 (3) SA 588 (D), which concerned the validity of emergency regulations, made a finding that he could not enquire into the validity of the regulations because he was bound by the majority in *Staatspresident en Andere*

The KwaZulu-Natal High Court, Durban.

v United Democratic Front en Andere 1988 (4) SA 830 (A). He said 'In the result, I regret that the application must fail. I use the word "regret" advisedly. In general, one of the traditional roles of the Court is to act as a watch-dog against what I might term Executive excesses in the field of subordinate legislation. It fulfils its role by measuring that legislation against long and well-established legal principles. It is therefore a matter of regret that, in the field of security legislation, the Legislature should have seen fit to remove from the Court the role which, as I have said, is traditionally one entrusted to it, of fairly and without favour or prejudice, safeguarding the interests both of the State and its officers on the one hand and those of its citizens on the other.'

Reading these cases twenty years later, the ferocity with which the more liberal views were judicially attacked at the time is surprising but it makes the advances in the case law since 1994 all the more satisfying.

Post-1994 and the new judicial era

Other more recent members of the Natal Bench worthy of mention include Judges Hassan Mall and Thembile Lewis Skweyiya: each a campaigner for a better society in his own right.

Mall was a member of the Durban Bar from 1952, and became the first person of colour to take silk in Natal in 1976. He had to suffer the indignity of being banned from 1962 to 1967 under the Suppression of Communism Act. He went on to become the first person of colour to be appointed as an acting judge to the Bench in 1987. He was permanently appointed to the Bench in February 1995, but retired a few years later in 1997 at the age of 75.

Skweyiya was also a member of the Durban Bar and took silk in 1989, becoming the first black (African) silk in the country. He was later appointed to the Natal Bench in 2001 and then to the Constitutional Court permanently from 2004. While still a junior member of the Bar Skweyiya defended an accused in a political trial in the Umtata Regional Court. Due to his effective defence the accused was acquitted. The State, clearly unhappy with the result, had him arrested as he was leaving the court on the grounds that in arguing the case and securing the acquittal he was attempting to defeat the ends of justice. The charges were dropped but Skweyiya spent ten days in jail before being released.

Recently, there have been a number of judges of the Natal Bench who have gone on to serve on the Supreme Court of Appeal, including Ken Mthiyane JA and PC Combrinck JA.

The current Judge President of the KwaZulu-Natal High Court is Justice Vuka Eliakim Maswazi Tshabalala. He was the first black (African) member of the Durban Bar, taking silk in 1994. He was appointed to the Ciskei High Court Bench in 1995 and made Deputy Judge President four years later. In December 2000 he was appointed Judge President and will be retiring this year.

We cannot conclude without mentioning that both the current Chief Justice, Sandile Ngcobo, and the former Chief Justice, Pius Langa, were members of and practised at the Durban Bar although they never sat on the Natal Bench. Similarly Zak Yacoob practised at the Durban Bar and was appointed directly to the Constitutional Court in 1998, taking the seat vacated by Didcott J.