

LAW LETTER

September 2007

vennnemeth&hart
ATTORNEYS



The quality of leadership of our judiciary features in this special Spring edition of Law Letter, as we profile the Justices of our Constitutional Court, a key element of our democracy. Please remember that the contents of Law Letter do not constitute legal advice. For specific professional assistance, always ensure that you consult your attorney.



The Constitutional Court and its Judges

THE CONSTITUTIONAL COURT is the highest legal authority on constitutional matters, including the basic rights, of South Africans. The 11 judges of this court are, as a result, the guardians of the values upholding our multicultural society. As a body of law outside the political system, they are the final arbiters of public morality. Their president is South Africa's Chief Justice.

The court was established in 1994 in Johannesburg. Its first case, *S v. Makwanyane*, dealt with the constitutionality of the death penalty. The court held that this penalty violated the rights to life and dignity.

Being able to apply judicial statecraft in terms of the Constitution, the court has not considered itself bound to the rigid application of the law in the formalistic tradition of the Supreme Court of Appeal.

Various landmark decisions indicate that it has moved the centre of gravity of our law away from a legalistic approach to a more equitable interpretation of justice, based on the values and spirit embodied in the fundamental rights of the Constitution. For example, in the case of *Carmichele v. Minister of Safety and Security and another*, that dealt with the duty of the police and courts to prevent sexual violence against women, it held that the courts are "under a general duty to develop the common law when it deviates from the objectives of the country's Bill of Rights".

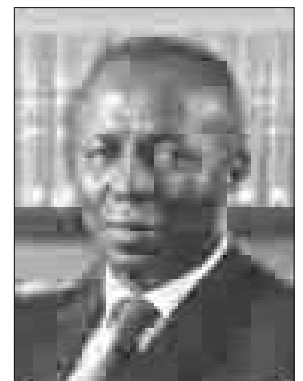
Personal details of the 11 judges are:

■ **CHIEF JUSTICE PIUS LANGA** was born in Eastern Transvaal on 25 March 1939. He matriculated through private study. He worked in a shirt factory before he became a

court interpreter and later a prosecutor and magistrate. He obtained his B Iuris and LLB degrees through extramural studies from the University of South Africa (UNISA). He was admitted as an advocate in Durban in 1977 and became Senior Counsel in January 1994.

He was appointed a judge of the Constitutional Court in October 1994 and became the Deputy President of the court in August 1997. He succeeded Arthur Chaskalson as Chief Justice on 1 June 2005. Judge Langa had been involved in various community related projects and political structures in the past and is still active in judicial developments nationally and internationally. He has been awarded various honours and awards in South Africa and overseas. He is married with five children.

■ **DEPUTY CHIEF JUSTICE DIKGANG MOSENEKE** was born in Pretoria in December 1947. At the age of 15 and while in standard eight, he was sentenced to 10 years imprisonment on Robben Island for partaking in anti-apartheid activities. He studied for his matric and the degrees BA and B Iuris while on the island.



He later obtained an LLB also through UNISA.

After qualifying as an attorney in 1978, he practiced as such for five years in Pretoria before joining the Bar. Ten years later he became Senior Counsel. In 1995 he left the Bar and followed a corporate career. He was a chairperson of banks, insurance and investment companies as well as of Telkom South Africa Limited. He resigned all these positions on being appointed a judge of the High Court in Pretoria in 2001. He has served in various community and non-governmental organisations and holds several honorary doctorates. He is the first chancellor of the Pretoria Technicon. He is married with three children.

■ **JUSTICE THOLIE MADALA** was born in Kokstad on 13 July 1937. He matriculated in Mthatha in 1956 and obtained a BA degree and teachers diploma at Fort Hare University. He taught in Alice and in Swaziland before he started studying law in Pietermaritzburg in 1972. He lectured at the University of Transkei, practiced as an

attorney and was admitted as an advocate in 1982 in Transkei. He took silk in 1993 and became the fourth black judge in South Africa.

In October 1994 he was appointed to the Constitutional Court. Judge Madala is involved in welfare programmes, serves on various councils and boards of educational institutions and is active in church matters. He is married with three children and two grandsons.

- **JUSTICE YVONNE MOKGORO** was born on 19 October 1950 near Kimberley where she matriculated in 1970. She started working as a nursing assistant and later as a salesperson before she became a clerk in the Department of Justice of Bophuthatswana. She obtained the B Juris and LLB degrees at the University of the North West.



After a stint as public prosecutor, she became a law lecturer at her alma mater in 1984. She completed her LLM in 1987 and became an associate professor. She obtained a second LLM degree at the University of Pennsylvania in the USA. She served as an associate professor at the University of the Western Cape, became a specialist Researcher (Human Rights) at the Human Science Research Council and lectured part time at the University of Pretoria before her appointment to the Constitutional Court in October 1994.

She has written extensively on the impact of law on society, served on non-governmental and community based organisations and is the current press ombudsperson. She is married with four children.

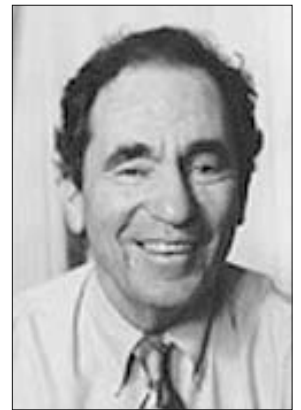
- **JUSTICE KATE O'REGAN** grew up in Cape Town. She obtained her LLB from the University of Cape Town in 1980 and an LLM from the University of Sydney in 1981. She holds a PhD from the University of London. She practiced as an attorney in Johannesburg before she was appointed as a senior researcher in labour law at the University of Cape Town.

She was promoted to associate professor in 1992, was involved in race and gender issues and acted as a trustee of the Legal Resources Centre. In 1994 she was appointed to the Constitutional Court. She has written on labour law, land and housing, race and gender equality and constitutional law.



She holds honorary professorships and degrees from various universities. She is married and has two children.

- **JUSTICE ALBIE SACHS** was born in 1935 and went to school and university in Cape Town. He was already a human rights activist as a student. He started practising as an advocate at the Cape Bar at the age of 21 and distinguished himself in the human rights sphere. After he had been detained twice without trial and placed in solitary confinement, he went into exile in 1966. He spent 11 years in England where he completed a PhD at the University of Sussex and taught law at the University of Southampton.



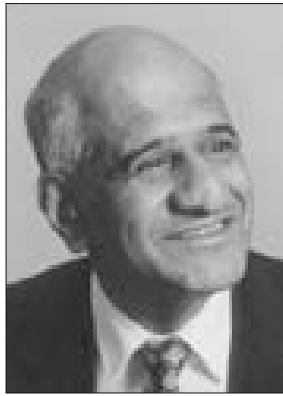
From 1977 he worked as a law professor and legal researcher in Mozambique. He wrote extensively on human rights and promoted constitutionalism effectively during his years in exile. In 1988 he was the victim of a car bomb planted by South African security agents in Maputo and lost his right arm and sight of one eye. He returned to South Africa in 1990 and took an active part in negotiations for a new constitution. He was appointed to the Constitutional Court in October 1994. Albie Sachs is a celebrated author and has won the Alan Paton Award. One of his books was dramatised for the Royal Shakespeare Company and broadcast by the BBC.

He has been invited to various countries as a speaker sharing South Africa's experience in healing divided societies. He has been keenly involved in the architectural aspects of the Constitutional Court building and in the selection of art for the display at Constitution Hill, having donated several of the art works from his own collection. He has been awarded various honours and awards including many honorary doctorates and an honorary professorship. He is married and became a father again in his seventies.

- **JUSTICE ZAK YACOOB** was born on 3 March 1948 and lived in Durban nearly all his life. At 16 months he became blind as a result of meningitis. He matriculated at Arthur Blaxall School for the Blind, and obtained his BA LLB at the University of Durban-Westville in 1972. He was admitted as an advocate in 1973 and became a senior counsel in 1991. He joined the Constitutional Court in 1998.

He was active in politics as a member of the Natal Indian Congress, organised and addressed many anti-apartheid mass meetings, was engaged in housing for the poor, support of detainees and in the underground structures

of the ANC. He has always supported the activities of the blind and deaf and is the chairperson of the South African National Council for the Blind. He was the chancellor of the University of Durban-Westville and participated in the negotiations for the Constitution. He is married and has two children.



■ **JUSTICE SANDILE NGCOBO** was born on 1 March 1953 in Durban. He obtained his BProc degree at the University of Zululand in 1975. He worked as a bank clerk before he was detained for political reasons in 1976. He was employed as a clerk of the court and prosecutor before he qualified as an attorney in 1981. He joined the Legal Resources Centre in Durban, obtained his LLB at the University of Natal and went to the University of Pennsylvania in the USA on a Fulbright Scholarship.

In 1986 he attended Harvard Law School on a Human Rights Fellowship where he obtained his LLM degree. He practiced as an advocate before he returned to the USA where he was an associate in a law firm in Philadelphia from 1989 to 1992.

In 1993 he was appointed as a judge in the Industrial Court, KwaZulu-Natal. Between 1996 and 1999 he served as judge in the Cape High Court, a judge and Acting Judge President of the Labour Appeal Court and as a judge of the Amnesty Committee of the Truth and Reconciliation Commission. He has lectured at Columbia, Harvard and Yale University Schools of Law. He became a judge of the Constitutional Court in 1999. He is married with three children.

■ **JUSTICE THEMBILE SKWEIYA** was born in Worcester, received his schooling in Cape Town and matriculated in the Eastern Cape in 1959. He obtained a BA degree in 1963 and an LLB in 1967 from the University of Natal. He qualified as an attorney before he became an advocate in 1970 in Durban. He became a senior counsel in 1989. He specialised in human rights and civil liberties cases including many political trials.

From 1995 he acted as a High Court judge and the appointment was made permanent in 2001. He acted as a Constitutional Court judge before being permanently appointed. He has been active in various community organisations. He has held positions in the world of business and participated in several local and international law conferences. He is married and has four children.

■ **JUSTICE JOHANN VAN DER WESTHUIZEN** was born in Windhoek and went to school there and in Pretoria. He received a BA LLB degree in 1975 and an LLD in 1980

from the University of Pretoria where he was a professor from 1980 to 1998. He also studied further in Germany and at Yale University in the USA. He became a High Court judge in 1999. He joined the Constitutional Court in February 2004.

As a professor, he became an expert on constitutional law, published various articles and organised several conferences from 1984 to 1994 on human rights and related matters. He was involved in the drafting of South Africa's Constitution. He remains an honorary professor at the University of Pretoria.

■ **JUSTICE BESS NKABINDE-MMONO** was born in Silwerkrans (North West Province) in 1959. She matriculated at Tweespruit in 1979, obtained a BProc degree at the University of Zululand in 1983 and an LLB from the University of the North West in 1986. From 1984 to 1988 she was a State Law Advisor in Bophuthatswana. From 1990 to 1999 she practised as an advocate at the North West Bar. In 1999 she became a High Court judge and also acted as a judge in the Labour Court in Johannesburg.

In 2004 she became Acting Judge of the Labour Appeal Court and in 2005 Acting Judge of the Supreme Court of Appeal before joining the Constitutional Court. She has been involved in women's rights, human rights, socio-economic justice and aids awareness initiatives and participated in various congresses locally and overseas. She is married and has four children.



FROM THE COURTS

Constitutional Law

■ The Wrath of Grapes

"I drink when I have occasion, and sometimes when I have no occasion."

– Miguel De Cervantes

ANTUS VAN NIEKERK was arrested on a Saturday afternoon outside a night club in Bethelsdorp, Port Elizabeth, being part of a group of people playing music and drinking. More than ten police vehicles arrived on

the scene and officers started taking fingerprints to verify whether those present had any outstanding warrants of arrest. When Van Niekerk resisted, he was arrested for being drunk and disorderly, thrown into a police van and locked up for four hours. He brought a successful action against the Minister of Safety and Security for assault and wrongful arrest and detention.

In an appeal, the Minister sought a ruling from the Constitutional Court on the power of police officers to effect arrests. The constitutional question in the case was whether a police officer who believes that a person has committed the offence of being drunk and disorderly in a public place, is entitled to summarily arrest and detain that person.

Judge Albie Sachs wrote the judgment questioning whether it is in the interests of justice for the Constitutional Court to articulate a blanket, all-purpose test for constitutionally acceptable arrests. He found that the lawfulness of an arrest is highly fact-specific. There are already nuanced guidelines in the **Criminal Procedure Act** and its Standing Orders, making it clear that arrest is a drastic procedure that should not be used if there are other effective means of ensuring that an alleged offender could be brought to court.

The guidelines themselves underline that the lawfulness of an arrest depends on the circumstances of the situation. This was not an appropriate matter for a test case and the court declined to provide the general guidance that the Minister required.

Minister of Safety and Security v. Van Niekerk, Case CCT 74/06, decided on 8 June 2007.



Freedom of Expression

■ Sub Judice RIP

"You can cage the singer but not the song."

– Harry Belafonte

A SIDE ISSUE in the sensational Baby Norton case raised important questions on aspects of press freedom, on which there is little legal authority. The courts' duty of protecting the integrity of the administration of justice, has to be balanced with the fundamental, but not absolute, right to freedom of expression. This judgment may help to curtail the spate of recent pre-publication interdicts of newspaper reports and cartoons on the basis of the *sub judice* rule.



Midi Television (e-tv) recorded interviews with witnesses to the murder. After the arrest of Dina Rodriguez and her four accomplices, e-tv scheduled its intended broadcast. The Director of Public Prosecutions then asked e-tv's permission to view the documentary beforehand, to satisfy itself that the conduct of a fair trial would not be compromised. This was refused. The Director then sought an order prohibiting e-tv from the broadcast, until he was provided with a copy and allowed sufficient time for a further order, if he considered it to be necessary.

This order was granted in the Cape High Court but e-tv successfully appealed against it in the Supreme Court of Appeal.

The court held that the Director did not prove a real risk of a potential demonstrable and substantial prejudice to the administration of justice. The court found that *"mere conjecture or speculation that prejudice might occur will not be enough"* and that *"publication will not be unlawful unless a court is satisfied that the disadvantage of curtailing the free flow of information outweighs its advantage"*.

The reasonableness of the request for disclosure of the documentary before it was broadcast, was not relevant. The court held that there is no general principle of our law that obliged e-tv to submit to any such request: *"The law generally allows freedom to publish and freedom is not subject to permission"*.

As to what the Director can be expected to do to ensure that an imminent publication does not compromise an impending trial, the court held: *"He must expect that freedom will not be abused until he has adequate grounds for believing the contrary"*.

The court also offered opinions about matters not directly related to the facts of this case, that will be relevant should such issues have to be decided in future. Firstly, if allegations are made that a publication is defamatory, but the unlawfulness thereof still has to be established, *"an award for damages is usually capable of vindicating the right to reputation if it is later found to have been infringed, and an anticipatory ban on publication will seldom be necessary for that purpose"*. Secondly, the court observed that its pre-constitutional decisions on the *sub judice* rule, are not *"consistent with what is to be expected in contemporary democracies"*.

Midi Television (Pty) Ltd v. Director of Public Prosecutions (2007) SCA 56 (RSA).

Trade Marks

■ Sparkle and Shine

"Elbow grease is the best polish."

– Proverb

THE FUNCTION of a trade mark and how far its monopoly extends were the main issues in a case about a television commercial, in which a random choice of motor car was used in a demonstration to advertise a car polish.

Verimark makes use of direct response television marketing. To advertise Diamond Guard car polish and kit, Verimark also used BMW cars. In one advertisement the hood of a BMW is first treated with Diamond Guard, an inflammable liquid is poured over it and set alight and no damage is caused to the car's paintwork. In the other advertisement, a dull coloured older BMW is polished with Diamond Guard, changing it into a shining model.

BMW had registered its logo for car polishes and claimed that this trade mark had been infringed, the logo being clearly visible on the TV ad and packaging material of Verimark.

The Supreme Court of Appeal's view was that *"it is trite that a trade mark serves as a badge of origin"* and its function is to indicate a trade connection between the source of the

goods and the proprietor of the mark. The court stated: *"If the use creates an impression of a material link between the product and the owner of the mark there is infringement; otherwise there is not"*.

The court was not prepared to simply isolate the logo on the bonnet of the car and ignore the context of use. The BMW logo could not serve as a source identifier of the Diamond Guard polish, as no one would perceive that there exists a material link between the car and the polish.

The well-known status of the BMW logo was common cause making trade mark dilution accessible as an alternative cause of action. It failed because BMW could not properly substantiate unfair advantage being taken of their mark, or that Verimark's use was detrimental to the reputation, character or advertising value of that mark. Even if Verimark took advantage of the logo, this was not done in an unfair manner and did not blur or tarnish its distinctiveness.

Verimark (Pty) Ltd v. BMW AG (2007) SCA 53 (RSA).

Electronic copies are available on request from:
mail@vnh.co.za

© Copyright 2007

Law Letter is produced jointly with other firms.

Faithful reproduction with acknowledgement welcomed.

vennemeth&hart

ATTORNEYS

CONTACT DETAILS

PO Box 600

Pietermaritzburg

3200

281 Pietermaritz Street

Pietermaritzburg

3201

Tel +27 (0) 33 355 3100

Fax +27 (0) 33 394 1947

E-mail mail@vnh.co.za

Docex DX10

ASSOCIATE FIRMS

Barry Botha Breytenbach Inc.

Port Shepstone

Truter James de Ridder Inc.

Empangeni and Richards Bay

De Jager Baqwa Maritz Inc.

Newcastle