



# *The Judiciary*

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### Special Thanks to

De Rebus, Daily Dispatch, and the University of the Free State



Dear Colleagues and Stakeholders,

It is our pleasure to present to you the winter Issue of the Judiciary newsletter.

Many of our colleagues participate in extrajudicial endeavours where they contribute towards many causes to advance the rule of law, constitutionalism, develop jurisprudence and promote the independence of the Judiciary, to name a few. Not least of these has been Chief Justice Mogoeng Mogoeng's work in the Conference of Constitutional Jurisdictions of Africa (CCJA). For the past two years Chief Justice Mogoeng Mogoeng has been the President of this continental body, which among others aims to promote constitutionalism in Africa. His term of office as President ended in June 2019 and he has handed over the Presidency to the President of the Constitutional Tribunal of Angola, Justice Manuel da Costa Aragão. This Issue reflects on the contribution of the Chief Justice to the continent during his term of office.

The value contributed by our Judges in society is not only recognized by their appointment to key positions like the one the Chief Justice has stepped down from. Our Judges are also honoured in different ways to acknowledge their works. My colleagues, President Mandisa Maya of the Supreme Court of Appeal and Justice Mahube Molemela, also of the Supreme Court of Appeal, were recently honoured with honorary doctorates by the Walter Sisulu University and the University of Free State, respectively. Yours truly also received an honorary doctorate from the University of Fort Hare. Read more about this from page twelve of the newsletter.

A historical moment took place recently when the Mpumalanga Division of the High Court sat to hear its first case in its newly built court building. Further than completing a milestone by opening the court building for business, the event marked an important achievement with regards to access to justice in our country. With the operationalization of the Mpumalanga High Court building, every province now has a seat of the High Court. We thank all the stakeholders who have worked with the Judiciary to realize this important milestone.

The Judiciary and country lost one of its most committed servants on May 20. When we woke up on that day to the news of the sudden passing of Labour Court Judge, Anton Steenkamp, it was a very sad day in our country. Judge President of the Labour and Labour Appeal Court, Basheer Waglay, aptly described Judge Steenkamp an able and conscientious Judge while speaking during a memorial service held in remembrance of Judge Steenkamp on May 29. Our heartfelt condolences go to Judge Steenkamp's family. He will be sorely missed by the legal fraternity. May his soul rest in peace.

I hope that you will enjoy this Issue of the Judiciary Newsletter. I also extend our gratitude to my colleagues who have contributed to the content of this publication. Ningadinwa nangomuso!

Until next time...

**Judge President Dunstan Mlambo**

*Chairperson: Judicial Communications Committee*



# Chief Justice Mogoeng Mogoeng hands over the Presidency of the CCJA

On 12 June 2019, the Chief Justice of the Republic of South Africa, Chief Justice Mogoeng Mogoeng, stepped down as President of the Conference of Constitutional Jurisdictions of Africa (CCJA) at the end of his two year term. He handed over the reins of the Presidency of the CCJA to the President of the Constitutional Tribunal of Angola, Justice Manuel da Costa Aragão, who was elected for a period of two years. The handing over also marked the conclusion of the Fifth Congress of the CCJA which commenced on 10 June 2019 in Luanda, Angola under the theme: “The Constitutional courts and Councils as Guarantors of the Constitution and the Fundamental Rights and Freedoms.”

During his term of office as President of the CCJA, Chief Justice Mogoeng Mogoeng, amongst others, oversaw the rapid growth of the CCJA as a continental body as well as its critical role on constitutional issues in the global arena. This can be attested by the growth in membership of the CCJA during Chief Justice Mogoeng Mogoeng’s tenure. When he took over as President in April 2017, the CCJA comprised of 35 full members

and one member with observer status. To date, the CCJA comprises of 46 full members and 3 members with observer status. The sharp increase in membership was due to Chief Justice Mogoeng Mogoeng’s rigorous work in the continent in which he actively pursued jurisdictions that were not members by urging them to join the CCJA. He did this in commitment to the broader vision of the CCJA of bringing together, in a common African framework, African jurisdictions responsible for ensuring compliance with the Constitution; and the promotion of constitutional justice in Africa through dialogue and consultation. He remains steadfast to continue this drive beyond his role as the President of the CCJA.

Chief Justice Mogoeng Mogoeng did not only ensure the increment in membership but also elevated the status of the CCJA in the global stage. He did this by ensuring that the CCJA participates in the Conferences of all other continental bodies from around the world thereby ensuring that the Africa’s voice is heard on constitutional justice matters. This culminated in the CCJA entering into co-operation agreements with three regional



bodies, namely with the

Association of Asian Constitutional Courts and Equivalent Institutions (AACC), the Conference of the Constitutional Control Organs of the Countries of New Democracy (CCCOCND), and the Union of Arab Constitutional Courts and Councils (UACCC).

Additionally, during his tenure as President of the CCJA, Chief Justice Mogoeng Mogoeng also served as the President of the Bureau of the World Conference on Constitutional Justice (WCCJ), for a year. And it was during his term as the President of the Bureau of the WCCJ that he convinced the global body to consider awarding the hosting of the Fifth Congress of the WCCJ in Africa. Indeed, the leaders of the world body agreed and awarded the rights to host the Fifth Congress of the WCCJ in Algeria in 2020.

It was through Chief Justice Mogoeng Mogoeng's visionary leadership and commitment to judicial independence as well as the ideal to promote solidarity and mutual aid among its members that saw the CCJA pledging solidarity with Judiciaries that were under threat from the Executive branches of their respective states. This was done through penning statements that were published widely in the media in support of Judiciaries that were under

attack in their respective jurisdictions. He also ensured that these statements also formed part of the agenda of the WCCJ, resulting in the WCCJ endorsing the need for the continental bodies and the world body to speak out against leaders who tend to attack the Judiciary for exercising its constitutional responsibility.

It was also during Chief Justice Mogoeng Mogoeng's tenure as President of the CCJA that for the very first time since its inception the organisation participated in the Summit of the Heads of States convened by the African Union. This milestone was achieved in January 2018 when Chief Justice Mogoeng Mogoeng had an opportunity to share the central role that Judiciaries play within Africa with the Heads of States. It is envisaged that the CCJA will continue to take part in such events as part of ensuring cooperation between the African Union and the CCJA.

Chief Justice Mogoeng Mogoeng will remain part of the Executive Bureau of the CCJA for the next two years as per Article 20 of the CCJA statute which makes provision for the outgoing President to remain a member of the Executive Bureau for two years.

"During his term of office as President of the CCJA, Chief Justice Mogoeng Mogoeng, amongst others, oversaw the rapid growth of the CCJA as a continental body as well as its critical role on constitutional issues in the global arena."



## Conference of the Constitutional Jurisdictions of Africa (CCJA) 5TH Congress

Luanda, Angola – 09 to 13 June 2019



Speech delivered by Chief Justice Mogoeng Mogoeng, President of the CCJA  
*"The Courts/Constitutional Councils as Guarantees of the Constitution and the Fundamental Rights and Freedoms"*

His Excellency President Lourenço, President of the Republic of Angola, The Honourable President of the Constitutional Tribunal of Angola, President Aragão, fellow Presidents and Chief Justices, Members of the Executive and Legislative Arms of the State, distinguished guests, good morning.

The theme for this Congress may be paraphrased to read: "The Judiciary or Courts as guarantors of constitutionalism, the rule of law and fundamental human rights"

And the fulfilment of the expectations held out by this theme depends on answers to these questions:

- What fundamental rights and freedoms does your country's Constitution guarantee?
- What obligations does the Constitution assign to each Arm of the State, to breathe life into the national vision or the shared aspirations of the people?
- Are the three Arms of the State, namely, the Executive, Parliament and the Judiciary constitutionally designed to be co-equal and functionally independent?
- Are the teeth that your Judiciary has been given full, strong and appropriately sharp to bite constitutional and rule of law delinquency as deeply and as excruciatingly as is necessary?
- Does competence or meritocracy really

matter in identifying those to be appointed, especially to high judicial office?

- Recently, when almost everybody in my country emphasized the need for those to be appointed to high office to be competent, one intellectual who is also a traditional doctor said but beware:

"incompetent people lie"

"competent people lie"

"and the devil is competent"

This means that the capacity to do the job alone is not enough. For it may otherwise be used for personal or sectional benefit to the detriment of all others and that leads me to the next question.

- Is there an insistence on and are there mechanisms for, the appointment to high judicial office men and women of integrity – people of solid character who uphold high ethical standards
- fair-minded people whose souls are not for sale to the highest bidder?
- Is there a proper check on or vigilance against lovers of power, positions, fame, publicity or money who are easy victims or preys of corruption practitioners?
- Is there an insistence on appointing only those



who would rather lose their jobs or even die than pursue corrupt personal or sectional interests at the expense of the best interests or legitimate expectations of the hungry, deceased, and dying masses?

To have African Judiciaries that are incorruptible and that can therefore guarantee constitutionalism, the observance of the rule of law, human rights and freedoms, the following are necessary:

- Fairly long but non-renewable terms of office;
- Genuine independence and an institutional disdain for undue interference with, intimidation or undermining of, the Judiciary. And a Judiciary that is courteous, humble and yet not sycophantic;
- Effective avenues for principled engagement amongst the three Arms of the State at a national, regional, continental and global level.
- The Judiciary must be understood and treated as an equal but not a JUNIOR PARTNER, or an impostor in the running of State affairs. (The fact that they were not elected into office is no justification for treating them with any less respect than their counterparts in the political arms of the State).
- Remuneration and retirement packages must be acceptable; with due regard to the economic muscle of a given nation, the status and role of the Judiciary. This would reinforce the Judiciary's capacity to resist the temptation to be corrupt. This I say mindful of the fact that underpayment can never be an excuse for corruption.
- The capacities and resources necessary for efficiency and effectiveness must be made available to the Judiciary. These should never be withheld as a way of "putting them in their

place" or forcing them to come begging for access to what is in effect the people's resources.

- Court orders must be complied with by all.

### Conclusion

When citizens are killed by crime and by those who are paid to protect them, when the right to life is easily snuffed out by hunger or disease in a continent so wealthy, when some of the rich are able to corrupt governance because they fund political parties and their electoral campaigns, when accountability is compromised and the critical mass of our people don't benefit from the natural and mineral resources that our continent is so well endowed with, then the three Arms of the State, including the Judiciary, are failing in their duty to protect and advance constitutionalism, good governance, accountability, the rule of law and fundamental rights and freedoms.

President Abraham Lincoln defined democracy as a government of the people, and by the people and for the people. But since there is no free lunch, leaving "successful electioneering" at the mercy of rich connections, will in reality usher in a radical definitional change to democracy as a government of the rich, by the rich and for the rich. Treasury must set aside a budget for funding political parties on the criteria to be agreed to, however difficult it may be to achieve this.

We, as the Judiciary of Africa, need to fully embrace our inherent mandate of contributing towards the realisation of a corruption-free, well governed, constitutionally-inclined and prosperous Africa. And only a truly independent Judiciary, uncaptured by any force, internal or external, can make the theme of this congress a practical reality.

*I thank you all!*



# TWO YEARS OF THE CCJA: THE HIGHLIGHTS



FOURTH CONGRESS OF THE CCJA IN CAPE TOWN, APRIL 2017



Chief Justice Mogoeng Mogoeng delivers a keynote address at the 4th Congress of the CCJA.



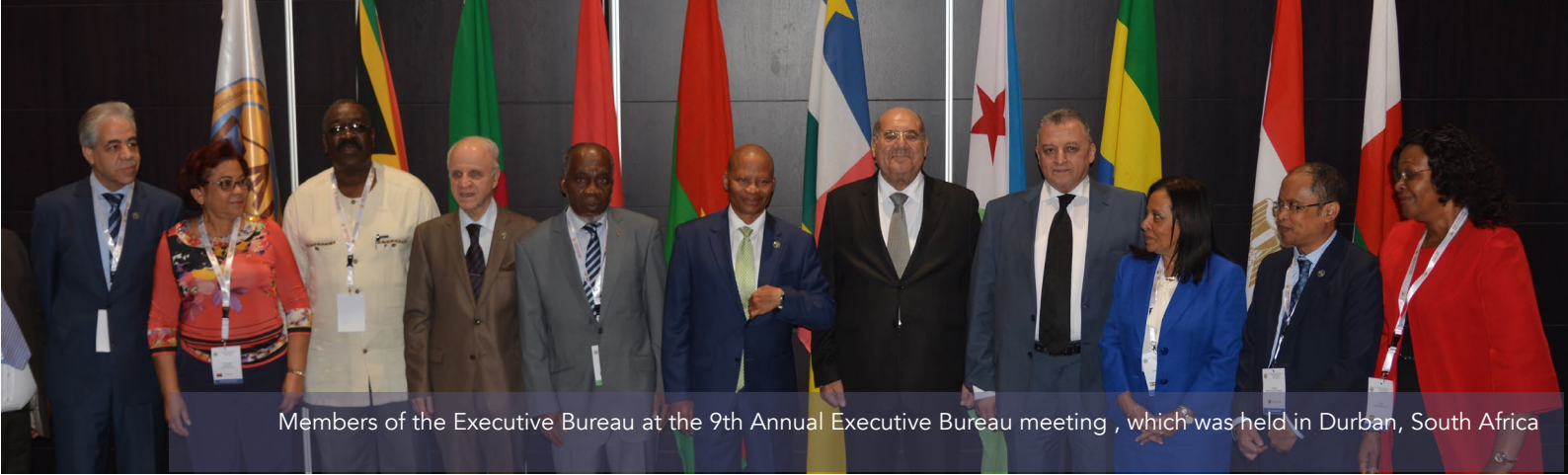
Deputy Chief Justice Zondo was the programme director at the 4th Congress of the CCJA, which took place in Cape Town in 2017.



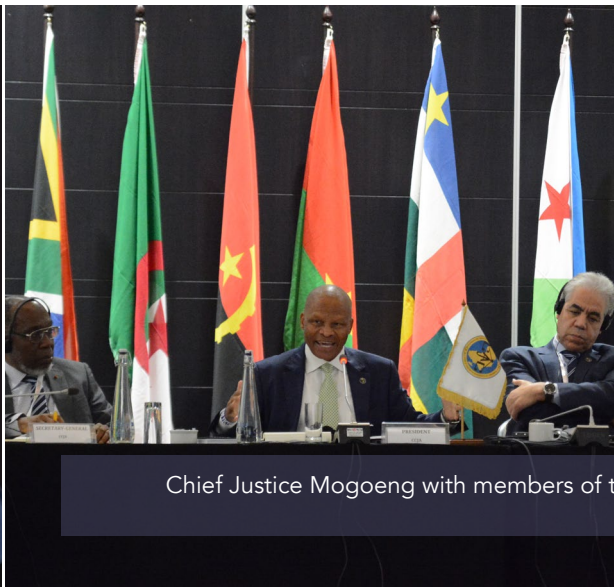
Over 100 delegates from 45 member countries attended the 4th Congress of the CCJA in Cape Town.







Members of the Executive Bureau at the 9th Annual Executive Bureau meeting , which was held in Durban, South Africa



Chief Justice Mogoeng with members of the Executive Bureau in Durban, South Africa



## 10TH ANNUAL EXECUTIVE BUREAU MEETING OF THE CCJA JOHANNESBURG, JANUARY 2019



The Executive Bureau took time out for a group picture at the 10th Annual Executive Bureau meeting.

## FIFTH CONGRESS OF THE CCJA IN ANGOLA, JUNE 2019



Chief Justice Mogoeng Mogoeng hands over the CCJA flag to the new president of the CCJA, President of the Constitutional Tribunal of Angola, Justice Manuel da Costa Araújo,







# A day dedicated to Deputy Chief Justice Zondo

May 4, 2019, will always be a memorable day for Deputy Chief Justice Raymond Zondo. More than being his birthday, this year the day took on a more special meaning as he celebrated it with his hometown community of Ixopo. The community had organized a celebration to honour Deputy Chief Justice Zondo for his achievements as well as the contribution he has made in the life of the community.

The celebration took place at Deputy Chief Justice Zondo's former school, Amazabeko Primary School in Ixopo, where he has donated water tanks to enable the school to have flushing toilets. He has also assisted in the completion of Amazebeko High School Hall, also located in Ixopo. In addition, Deputy Chief Justice Zondo has in partnership with Al Baraka Bank established a trust called the Zondo-Bux

Trust that offers bursaries to the less fortunate.

With all of this in mind, the community of Ixopo saw it fit to thank him for giving back to his community and for being an inspiration and setting a good example to the young generation through his achievements.

Despite the cold and rainy weather, Deputy Chief Justice Zondo was honoured with performances by locals. The celebration was attended by the local Chieftaincy, members of Parliament, the Gift of the Givers as well as the Muslim Charity Trust.

During the celebration, the Muslim Charity Trust donated R500 000 to both Amazebeko Primary School and Amazebeko High School for the upkeep of the schools, whilst the Gift of the Givers gave away food parcels to the elderly in the community.

Deputy Chief Justice Zondo addressing the community of Ixopo, in his hometown. The Deputy Chief Justice was joined by his family to mark this wonderful occasion.





# Establishment of the *6th Parliament*

The Constitution of the Republic of South Africa enjoins the Chief Justice of the Republic of South Africa, to establish the National Assembly following general elections.

The Chief Justice presides over the first sitting of the National Assembly to administer the oath or solemn affirmation to members of the National Assembly in terms of section 48 read with Schedule 2: 4(1) to the Constitution.

In line with these duties, Chief Justice Mogoeng Mogoeng on 15 May 2019, officially received from

the Independent Electoral Commission (IEC) the lists of designated members of Parliament (MPs) and members of Provincial Legislatures (MPLs).

The Chief Justice, on 21 May 2019 presided over the first sitting of the National Assembly where all new and returning members of parliament were sworn in.

Similarly, Judges President who have been designated by the Chief Justice presided over the first sittings of the Provincial Legislatures.

**Chief Justice received the list of National Assembly and provincial legislatures, 15 May 2019.**



IEC Chairperson Mr Glen Mashinini, Judge President of the North West Division of the High Court Monica Leeuw, Chief Justice Mogoeng Mogoeng, National Assembly Speaker Ms Thandi Modise and Acting Secretary of Parliament Ms Baby Tyawa



Chief Justice Mogoeng Mogoeng held a media briefing after the handover ceremony



IEC Chairperson Mr Glen Mashinini, Chief Justice Mogoeng Mogoeng, and Acting Secretary of Parliament Ms Baby Tyawa



First sitting of the 6th Parliament, 22 May 2019.



Chief Justice Mogoeng Mogoeng at the first sitting of the National Assembly and the National Council of Provinces on 22 May 2019, in Cape Town.

Presidential Inauguration 2019, Loftus Versfeld, Pretoria, 25 May 2019

Chief Justice Mogoeng Mogoeng at the the Presidential Inauguration held on 25 May 2019, in Pretoria.





## Members of the South African Judiciary at the Presidential Inaugura-



Chief Justice Mogoeng Mogoeng and Mrs Mogoeng at the the Presidential Inauguration held on 25 May 2019, in Pretoria.





# President Mandisa Maya

*Honoured by her alma mater*

**HOMEcoming:** Tsolo-born Judge Mandisa Maya, who is the first female President of the Supreme Court of Appeal, receives an honorary doctorate from Walter Sisulu University, her alma mater, in Mthatha on 20 May 2019.

A delighted Supreme Court of Appeal (SCA) President Justice Mandisa Maya received an honorary law doctorate honoris causa from her alma mater, the Walter Sisulu University.

The Judge graduated with her law degree from WSU, then Unitra, 33 years ago.

President Maya, 55, addressed a crowd of graduands, parents, friends and members of the law fraternity who packed the WSU Nelson Mandela Drive campus Great Hall.

She said: "I have received many accolades from many institutions, but this one makes me shed tears of joy. It is closest to my heart.

"Preparing for today has been a grand event in my head, a sweet, sentimental trip down memory lane. When I sat down to think about what I would say to you a flood of memories and emotions washed over me. My reflections took me back to the university's early days, its humble beginnings as the former University of Transkei [Unitra] and its odyssey over the years."

She said the accolade was special because it

recognised a woman working in a maledominated and conservative field. "Despite greater numbers of women graduating from institutions of higher learning than men, the professions, including the judiciary, are populated and controlled by men," said President Maya.

She said the debate today was why tertiary institutions had so few black professors.

"I ask myself how many female professors do we have? The pace to diversify our institutions and make them representative of our society has been painfully slow. Women in the workplace in this country and across the world still have the odds stacked high against them. Sexism and patriarchy remain firmly entrenched in society. The majority of working women across the world still suffer the unfairness and indignity of being paid far less than their male counterparts for the same work. Two billion women are legally restricted from having the same jobs as men. Women must still fight to be taken seriously and acknowledged as equals to their male colleagues.

"Many lack legal protection from sexual violence and sexual harassment in the domestic and public spheres," President Maya said.

She said South African men bear the ignominious mantle of leading the world in perpetrating violence against women and children.



“So it remains a particularly big deal, in this day and age, for a woman to be recognised for her achievements in society. And even though I am an interested party in this matter, I dare say that WSU must be commended for its courage and prudence in recognising the ability of women to participate competently in all spheres of society, the societal benefits attaching to the empowerment of women and the celebration of feminine achievement.”

Maya earned her BProc at WSU, an LLB at the University of Natal and an LLM from Duke University in the US.

She began her legal career in 1991 and was appointed to the high court bench in 1999. In 2017, she became the first woman president of the SCA and is now President of the SA Chapter of the International Association of Women Judges.

***Published with permission from the Daily Dispatch. Article first published on 21 May 2019, written by Lulamile Feni.***





# Judge President Dunstan Mlambo

## *Conferred Doctor of Laws Degree*

It is a singular honour to accept the conferral on me of the Honorary Doctor of Laws Degree – *Honoris Causa*. I thank the Council of the University of Fort Hare for bestowing me with this honour. I must also acknowledge the presence of my parents, my children, my siblings and Justice Moses Mavundla who have all accompanied me to this ceremony. Judge Mavundla's late father was a colleague and a very close friend of my father.

History tells us that the University of Fort Hare was the melting pot of African Nationalism in times gone by. Fort Hare was the place to go to

for young African Leaders and yes, for us in this country, I must acknowledge former President and Dr Nelson Rolihlahla Mandela and Prof Mangaliso Robert Sobukwe, being two of many illustrious alumni of this university. Fort Hare then rightly became the cradle and springboard for African Nationalist movements whose aim was to remove the yoke of domination and subjugation, oppression and racial segregation underpinned by colonialism and apartheid.

I am therefore honoured to receive this award from such an illustrious bastion of learning and progressive thinking. At no time did I ever dream,

no matter how wild, that I would on this day be conferred with such an honour.

I obtained my law degree in the early 80s at Turfloop University now the University of Limpopo. As law students the names in law reports we read then were – Ramsbottom; Holmes; Fagan; Rabie; Rumpff, Wessels

to name a few. African names were conspicuous by their absence in all those law reports. This was a white male Judiciary judging Africans who were considered an inferior race. As law students in the early 80s we openly expressed a commitment to change that status quo in our lifetime especially the prioritisation of the development of African law jurisprudence by African jurists. I must, at this juncture, acknowledge the leading role played in this regard by yet another of Fort Hare's products - Justice John Mandlakayise Hlophe, the JP of the Western Cape Division of the High Court. He has always been very vocal on this subject. We have today a totally transformed Judiciary but that evolution continues.

Your graduation today, what does it mean to you and your families. Yes joy and happiness and for good reason, it's been a journey of hardship and sacrifice and now you are rewarded.

But make no mistake about one fact - You have been favoured by circumstances to achieve this goal where many others have fallen by the

wayside. You should be grateful for your fortune and I also add my voice to the many others in congratulating you. Well done!!

What reality awaits you therefore as graduates outside the academic world. The aim of these brief remarks is to put the correct perspective and meaning to your graduation.

Context, as they say, is everything and it is the convenient starting point. In the Education sector, we



see the emergence of troubling challenges -

- A restless and demoralised youth with the larger majority living in and surrounded by poverty and marginalisation;
- growing violence in places of learning sometimes resulting in the death of learners and educators;
- a youth confronted by and gravitating towards the wrong role models, role models that underplay and relegate the value of education, role models that promote greed and elevate the pursuit of wealth at all costs especially through less honourable means;
- we are daily confronted by allegations of full-scale looting of public funds in the main where service delivery has been totally removed from the agenda.

The victims of these trends are ordinary members of society.

The challenge you have to confront with your qualifications is to reverse this moral decay in our midst. With your newly acquired qualifications, you can and it is the responsibility of each one of you to do so. You can put your qualifications to good use by instilling confidence in the youth

about the value of education. The 4th Industrial Revolution is upon us and you can help our youth to embrace this era correctly, to ensure beneficial development in our societies. It can be done and you have no option but to rise to this challenge.

In the legal field – you are entering an environment of shrinking opportunities and the diminishing fees cake for legal professionals. The legal profession is experiencing rising levels of professional malfeasance driven by greed reliant on the targeting of

unsuspecting vulnerable litigants e.g. RAF claimants. We have to contend with unabating striking offs of deviant legal professionals.

The Profession is confronted by stubborn racist and sexist briefing patterns. Yes African practitioners and women in general continue to be excluded from business and commercial work. Is that what our Constitution envisages. I say not and I know you agree with me and you must do your bit to debunk the myth that African lawyers and women are incapable of handling commercial legal work.

The Profession is facing a society expressing growing despondency and diminishing confidence in our Constitutional dispensation.

Why do I talk about these challenges – to make sure you are alive to the reality that awaits you.

You can use your qualifications to full effect in addressing these challenges and in further reversing the moral decay in our society and redirecting development in the correct direction. Your theatre of action is public administration – as educators, lecturers, professors, Government officials, lawyers, advocates etc.

You will be on the right track to demand and instil accountability in all spheres of public administration. In the April 2019 edition of the New African magazine, the editor, Enver Versi, says of the public service *"Their one and only responsibility while they hold office is to do everything in the considerable power vested in them to fulfil the wishes of the people and employ the state's resources, to alleviate problems faced by citizens and improve their standards of living. They have no other function."* So true and you will be within your rights to demand this of the public service.

A continental perspective is not out of place - what have our leaders adopted by way of continental instruments and programmes, to address our situation as Africans, on the governance front but more directly regarding accountable governance for the benefit the African citizenry.

Let me mention a few – they have adopted the OAU Revised constitutive document which established the African Union, the African Peer Review Mechanism, the New Partnership for African Development and last but not least, Agenda 2063.

You will agree with me that these instruments were adopted with the best of intentions for African. The question is, have they achieved their

objectives and if not, will they in some future time?. These are the questions you should be asking yourselves as you celebrate achieving your educational success and preparing to leave the academic.

In this country our Constitution is the beacon that you should always seek to uphold in your endeavours.

A key right enshrined in the Constitution is the right to education. It is scandalous that in this day and age we should have innocent children

dying horribly in school pit latrines, watch rising illiteracy and school dropout levels, witness the African citizenry being hoodwinked by religious charlatans. Serious educational empowerment programmes are needed to address this scourge and eradicate this vulnerability. You can and must use your qualifications to engage in and support community based initiatives targeting these perennial scourges.

Another key right in our Bill of Rights is access to justice – contained in a number of provisions. Use your qualifications to debunk the myth that

you need money to enjoy this right. There are many community based initiatives at grass roots levels where you can use your qualifications to societal beneficial effect. Embrace pro bono initiatives, partake in public interest initiatives to ensure service delivery for the community and this will surely rekindle confidence and faith in our Constitution.

Access to Justice was identified as one of the reasons for the failure of the Millennium Development Goals. We now have the Sustainable Development Goals which incorporate human rights and justice in general. Embrace the objectives of the SDGs and you will find so much resonance with our Constitution on all levels.

Use your qualifications to debunk the myth that the gateway to individual wealth is political and public office. You are proof that this is not correct.

All your endeavours in education, in law, in public service, in the community space should be aimed at upholding the cornerstone of any democracy – the rule of law. We are doomed without the rule of law and many examples abound around us to confirm this.

We in the Judiciary look forward to your contribution to ensuring accountability by public officials for the good of society.

We in the Judiciary are acutely aware of our responsibilities in the governing scheme of this country. We have as the Judiciary in the

recent past been called upon to consider and adjudicate issues traditionally not brought to Courts before. This has meant that at times we read the riot act to the other arms of government where we found that they had strayed away from what the Constitution envisages.



We have done and will continue to do what the Constitution enjoins us to do, no more no less and we apologise to no one for doing our work. We fear no one, we favour no one and we are not prejudiced against anyone.

You can in your spheres do this as well.

I want to leave you with the words of a wise African leader who said - *"Even the most benevolent of governments are made up of people with*

*all the propensities for human failings. The rule of law as we understand it consists in the set of conventions and arrangements that ensure that it is not left to the whims of individual rulers to decide on what is*

*good for the populace. The administrative conduct of government and authorities is subject to scrutiny of independent organs. This is an essential element of good governance that we have sought to have built into our new constitutional order...It was to me, never the reason for irritation but rather a source of comfort when these bodies were asked to adjudicate on actions of my Government and my office and judged against me."* These are the words uttered by former President Nelson Rolihlahla Mandela.

I once more congratulate you and wish you well going forward.

**Thank you.**





# What an honour!

## Justice Molemela receives an honorary doctorate



Justice Molemela receiving her honorary doctorate.



Madam Justice Mahube Molemela received a Doctor of Laws honorary doctorate from the UFS Faculty of Law on 28 June 2019, during their 2019 June graduation ceremonies.

After graduating from her first general, and first law degree, Mahube Betty Molemela, returned to the Free State in service to the state as a prosecutor. She later obtained LLB and LLM degrees from the UFS and a number of post-graduate diplomas from various institutions of higher learning. Moreover, Molemela lectured on part time basis at the Faculty of Law between 2001 and 2003.

Her career as an attorney commenced at a local attorney's firm where she completed her contract of articles. She practiced as an attorney in the Free State and later as a director at various private law firms.

Justice Molemela's professional career culminated

in her being appointed as the first female Judge President of the Free State Division of the High Court, and the second female to be appointed in this capacity in South Africa. In 2018, Justice Molemela was appointed to the Supreme Court of Appeal of South Africa. She has acted as Judge in both the High Court as well as the Labour Appeal Court in the period 2005 to 2008 before she was appointed to the Free State bench in 2008.

Her direct involvement with the University of the Free State includes her active support of the annual Kopsie Moot Court Competition which is a competition for first year law students from various South African university law faculties. In 2016, she received the Chancellor's Distinguished Alumnus Award. She presently serves as the Chancellor of the Central University of Technology.

**Text and pictures used courtesy of the [University of the Free State](#)**



# SUPREME COURT OF APPEAL JUSTICES APPOINTED

The six Judges recommended for vacant positions at the Supreme Court of Appeal (SCA) have been appointed, Justice Xola Mlungisi Petse; Justice Daniel Vuminkosi Dlodlo; Justice Caroline Elizabeth Heaton Nicholls; Justice Fikile Eunice Mokgohloa; Justice Yvonne Thokozile Mbatha, and Justice Clive Michael Plasket, were recommended for appointment by the Judicial Service Commission following judicial interviews in April 2019.

Justice Xola Mlungisi Petse, has been appointed as Deputy President of the Supreme Court of Appeal.

The appointments include 3 female Justices, furthering commitment in the transformation the Judiciary to be representative of race and gender. The OCJ takes this opportunity to congratulate all the Justices on their appointment. We wish them all the best in their new position.



Justice Xola Mlungisi  
Petse

Deputy President of the  
Supreme Court of Appeal



Justice Fikile Eunice  
Mokgohloa



Justice Daniel Vuminkosi  
Dlodlo



Justice Caroline Elizabeth  
Heaton Nicholls



Justice Yvonne Thokozile  
Mbatha



Justice Clive Michael  
Plasket

# Judicial appointments during 2018/19

Supreme Court of Appeal



Judge T Makgoka



Judge M Molemela



Judge A Schippers

Judge President: Free State  
Division of the High Court



Judge C J Musi

Competition Appeal Court



Judge B J Mnguni



Judge B Valley



Judge M Victor

Electoral Court



Ms S Pather

Free State Division of the  
High Court



Ms S Chesiwe



Mr P E Molitsoane

Electoral Court  
(Chairperson)



Judge H B Mbha

KwaZulu-Natal Division of  
the High Court



Ms K Q Hadebe



Mr S B Mngadi

Gauteng Division of the  
High Court



Ms I Opperman



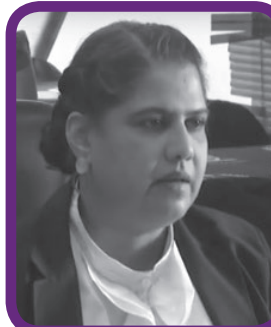
Adv E F Dippenaar SC



Adv M J Mosopa



Adv B Neukircher SC



Adv S Yacoob SC



Ms S N I Mokose



# Historical moment as Mpumalanga Division of the High Court holds its first sitting



On 13 May, the Mpumalanga Division of the High Court held its first sitting of the permanent seats of the Division in Mbombela and Middleburg. Judge President of the Mpumalanga Division of the High Court, Francis Legodi, gave a speech and presided over the first sitting of the newly built High Court, in Mbombela. In his speech, Judge President Legodi said the event was not the official opening of the Mpumalanga Division, as the court will officially be opened by President Cyril Ramaphosa later this year.

Judge President Legodi, said the wait for the building of the new court was a long one. 'There was a time when I thought this building would be opened when I am retired. But today dear guests we can confidently say that the outside and inside of the building is going to reflect the inside and outside beauty of people who will be working in this building. These are men and women who will know no status, no title and no position. This will be men and women who will see each other as equals and every person as important,' Judge President Legodi added.

Judge President Legodi pointed out that the oath that judicial officers take, remains to be an undertaking that they have made to the people of South Africa (SA) in which judicial officers will exercise their judicial functions without fear, favour or prejudice, and they are guided only by the facts of each case and the applicable law. 'We will do this to protect our own integrity as judicial officers, but most importantly we will do this to protect the integrity of the institution that we are representing,' Judge President Legodi said.

Judge President Legodi added: 'As for today's function, we have invited you to join us in a walk about through and around the court, so that when you go back to your villages you can tell others

that access to justice is now being delivered in this wonderful building of ours. In that way we hope that the building is officially opened and handed over to the end users, these people will take pride and ownership in the building.'

Former Minister of Justice and Correctional Services, Michael Masutha said that in 2013 Parliament passed the Superior Courts Act 10 of 2013 in terms of which each of the nine provinces in SA must have a High Court. He said since the Act was implemented the Department of Justice had been hard at work in the last administration to establish the two divisions that were remaining, namely, the Limpopo Division that was opened in 2016 and the Mpumalanga Division, which was still under construction. On 1 May the Minister of Justice issued a proclamation in terms of which the operationalisation of the Mpumalanga High Court could come into effect and since then the necessary work was completed, which led up to the day of the first sitting of the court.

Mr Masutha said the people of Mpumalanga will no longer have to take their matters to the Gauteng Division in Pretoria to be heard there. 'The Judge President did mention that there are matters already on the roll at both Mbombela and the Middleburg court. My coming here was to satisfy myself that everything is in place for this court to function properly,' Mr Masutha said. He noted that subsequent to the Superior Courts Act being implemented the president had the responsibility to create the establishment of the court and to declare positions for judges open, so that those positions can be filled.

'At this stage the President declared nine judge positions, in addition to having that happen, I wrote to Chief Justice Mogoeng Mogoeng, requesting that he invites all members of the judiciary in SA to



volunteer to constitute the first block of judges who would come here by way of transfer and so far, only four judges volunteered to be transferred to the Mbombela court. These judges are acting until the president formally appoints them in that position. He added that on 2 May he appointed the acting Deputy Provincial Prosecutor of Mpumalanga, to enable the National Prosecuting Authority to operate under the Mpumalanga Division of the High Court. He said the Department of Justice will be conferring with Judge President Legodi about any other challenges he

might be facing, because the role of the Department of Justice is to distribute administrative support to the court to make sure it functions optimally.

Invited guests and media, joined Mr Masutha and Judge President Legodi on a tour of the court. After the tour Judge President Legodi presided over two criminal matters.

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Judge President Frans Legodi addressing attendees



Judge President Frans Legodi joined by Judges of the Division



PRESENTATION MADE BY  
**JUSTICE M.G.PHATUDI**  
AT THE TURFLOOP LAW CONFERENCE  
20 MAY 2019

*"LAW AND INDIGENT COMMUNITIES "(LAW AND COMMUNITY ENGAGEMENT)"*

[1]. **INTRODUCTION:**

1.1. One of the basic tenets of our constitutional democracy, in particular, our legal system is the recognition and equal treatment or placement of African customary law on an equal footing with our common law as it obtained prior to 1996.

1.2. One can therefore accept without further ado, that the Constitution Act of the Republic of South Africa, 1996 which is the Supreme law of the land, is designed to curb further penetration of imperial or colonial legacy bequeathed by the outlawed system of "Separate development" and "Apartheid", where equality of access to justice and the courts within the context of pure customary law was subjugated. The consequence was that traditional law and custom and its principles as practised within our traditional communities, was not promoted or developed side by side with other legal systems that are applicable in our courts.

1.3. The advent of the Constitutional state and democracy in our country had for the first time since 1996, brought about constitutional recognition of the system of customary law as an independent source of traditional law which is, of course, subject to the constitution. It therefore paved a clear path for new innovative ways in adjudication and resolution of disputes emanating from traditional law and custom.

1.4. It is upon a consideration of our understanding that the Bill of rights which are entrenched in the Constitution, apply to all law and binds the three(3) arms of the state and all Organs of State.

It is accordingly necessary for courts when applying the Bill of Rights, to either natural or juristic person, if and to the extent that it is applicable, to give effect to that right, to apply or if necessary to develop the common law to the extent that legislation does not give effect to that fundamental right.

[2]. Consistent with the foregoing view, is the inherent power which the Constitution bestows in courts of a higher status as the ConCourt, the SCA and the High Court, to protect their own process, and to develop the common law, taking into account the interests of justice

[3]. **RECOGNITION OF TRADITIONAL LEADERSHIP AND CUSTOMARY LAW:**

Furthermore, and most importantly, in support of the recognition accorded to customary law that obtains within indigent traditional communities, the constitution accords recognition to traditional leadership as an institution and confirms its status and its role **according to customary law** and subject to the constitution and the Rule of law. The **courts are engendered to apply customary law when it is applicable, subject to the constitution and any legislation.**

[4]. In order to achieve this objective and for proper application and administration of African Law to our communities, it becomes imperative for the government to expedite adoption of national legislation that seeks to establish the Traditional Courts were communities would have access to such courts or any other court with competent jurisdiction.



[5]. I remark though orbiter that the Traditional Courts Bill 2017 ("the Bill") has now been referred to the NCOP for consideration, with Parliament having passed the Bill recently on 12 March 2019. (G/Gazette No.40487-09.12.2016 date of Introduction) .This Bill has as one of its objectives to increase access to justice services by enhancing effectiveness, efficiency and integrity of Traditional Courts in resolving disputes emanating from our Traditional communities who are more often than not, indigent and cannot even bear the high costs of protracted civil litigation in the conventional courts and whose legal principles are, worst still, foreign to ordinary citizens.

[6]. The introduction of Traditional Courts, even though their proposal was not met with some resistance from certain quarters, will in my opinion, enable even indigeneous litigants to have free access to those courts, as no legal representation is permissible.

[7]. The Bill repeals all the remnants of the Black Administration Act 1927 and all outlawed legislation of the former homelands which continued to regulate traditional law.

[8]. With this Bill introduced and finally assented to by the President into law, it will certainly give credence to the very basic precept that "everyone has the right to have any dispute that can be resolved by the application of law decided in a fair hearing before a court, or where appropriate another independent and impartial tribunal or forum". (own underlining)

[9]. A closer examination of Section 34 (constitution) in fact means that everyone has an inherent right to refer his/her dispute for resolution either before a court of law, or before "another independent and impartial tribunal or forum." Traditional courts as envisaged by the Bill referred to, will in terms of the intended legislation, be functioning as yet "another independent, impartial tribunal or forum" within the

meaning of the Bill to be an Act of Parliament.

## OBJECTS OF THE TRADITIONAL COURTS BILL

[10]. The main object of the Bill, when ordained as legislation, will be to affirm the values of customary law and customs in the resolution of disputes based on restorative justice and reconciliation, and mainly to align them with ethos and dictates of the constitution. The Preamble to the Bill is clearly set out as being to provide "a uniform legislative framework for the structure (rationalization) and functioning of traditional courts in line with the constitutional imperatives and values."

[11]. Furthermore, the Bill is intended to affirm the role of traditional courts in terms of customary law, enhancing access to justice (Section 34, Ibid p4) by providing a forum for dispute resolution in accordance with the principle of **voluntary participation by all parties**, and preserving and promoting those traditions, customs and cultural practices that are mutually beneficial to traditional communities in accordance with constitutional imperatives.

[12]. In applying the Bill (when adopted) the need to align Traditional Courts with the Constitution document is required to underpin dispute resolution mechanisms so as to embrace the values enshrined in the Constitution as an instrument to reflect basic human rights and dignity. Closely associated with this salutary approach, is the fundamental principle to the achievement of equality and advancement of human rights and freedoms. The application of human rights and dignity are, in the main, an indispensable prerequisite in the administration of justice by the Traditional Courts contemplated.

## HOW WILL THE TRADITIONAL COURTS FUNCTION IN PRACTISE AND WHO SHOULD HAVE ACCESS TO SUCH COURTS?

[13]. Section 4(1)(a) provides that:-

"Any person may subject to subsection (3), institute proceedings in respect of a dispute in any traditional court" (own emphasis)

A Traditional Leader or any person designated by him/her may convene sessions of a Traditional Court ("Kgoro") at any place other than where the cause had arisen.

### GUIDING PRINCIPLES:

13.1. Section 3(1)(a)-(d) provides guiding principles when a Traditional Court may entertain disputes before it.

13.2. Section 3(2)(a)-(e) ensures that Traditional courts when applying the

Act, should recognise and take into account, basic constitutional imperatives as espoused both in the Act and the Constitutions' Bill of Rights. Subsection 3(2)(b), in particular, enjoins Traditional Courts to recognise and consider "the existence of systematic unfair discrimination and inequalities or attitudes which are contrary to constitutional values..."

or has a propensity to undermine meaningful and voluntary participation in such courts.

1.3.3. That said, I find no merit in arguments advanced in the public discourse that seem to contend that the envisaged courts will be adverse to existing guaranteed human rights and liberties of individuals seeking recourse in courts. Such contentions are, in my view, speculative conjecture.

1.3.4. The foregoing observation finds refuge in the restrictive jurisdictional factors found in section 4(2)(i) – (ii) of the Act that curtail jurisdiction of a Traditional Court ("TC") e.g. where a dispute is a subject of SAPS' investigation or the matter is pending before another TC or Court (lis pendens) or that the dispute is res iudicata (finalised by a court of law).

### COMPOSITION OF AND PARTICIPATION IN TRADITIONAL COURTS:

(Section 5 of the Act)

[14]. The TC is convened by a Traditional Leader recognised as such by statute.

14.1. A TC consist of men and women pursuant to the equality clause in Section 9 of the Bill of Rights attached to the constitution. The Act, therefore guarantees equality on issues of gender balance.

14.2. Compliance with the equality clause and women representation is something that will be monitored and managed by The Commission for Gender Equality established in Chapter 9 of the Constitution.

[15]. TC are "Courts of law" under customary law whose objects are intended to **"promote the equitable and fair resolution of certain disputes in a manner under pinned by the value system applicable in customary law and custom"**, and subject to the constitution.

In doing so, TC are obliged to promote access to justice and restorative justice (Section 6(1))

### PROCEDURE IN TRADITIONAL COURTS:

[16]. Although the right to legal representation is not always unfettered, for the purposes of this Act, legal representation by either attorney or advocate is excluded. (Section 7(4)(b) of the Act).

16.1. The TC is required to apply the rules of natural justice (audi alteram partem) and not seek to be a judge in own cause, thereby demonstrating impartiality.

16.2. The TC is also obliged to apply the system of traditional law that predominantly obtain in the



area of jurisdiction of the court and the traditional community concerned, to the exclusion of foreign traditional law and custom not applicable to the parties.

16.3. The hearings of a TC must be open to the public and the parties to the dispute.

16.4. Nothing precludes a TC to offer ADR in an attempt to resolve a dispute, subject to the consent of the disputants.

16.5. The court hearing a dispute shall allow full participation of “all interested parties” without discrimination.

16.6. Hearings of a TC must apply the customary law of procedure and evidence, and the language of the record should be one most widely spoken in its area of jurisdiction.

16.7. A TC’s punitive jurisdiction is set out in the Act.

16.8. An order of a TC not complied with may in terms of Section 9 be referred to the Clerk of Court to inquire into the reasons for non-compliance, and if after intervention the contempt persists, the matter may be referred to the local Magistrate’s Court for adjudication.

### **SOME PECULIAR FEATURES OF THE PROCEEDINGS OF TRADITIONAL COURTS:**

[17]. Unlike in conventional so-called Western Courts, proceedings in Traditional Courts (Kgoro/Kgotla) have notable features as:-

17.1. That, disputes /cases are heard normally in the open where senior members of the community (originally initiated elderly male members) who have vast experience in traditional law and custom

participates. Females and children below the age of puberty and uninitiated were barred from attending such hearings or to participate.

17.2. The original position has now been drastically altered by the new Act. (Section 5)(1) to 5(5) of which the latter impels the presiding officer to pledge the prescribed oral ritual that he/she will “promote the values enshrined in the constitution and this Act.”

17.3. In contrast to the civil courts which are usually technical and full of formulae, Traditional Courts were “quiet casual” with no rules prescribed who could attend and who could address the Court”. They are inquisitorial in character.

17.4. In the traditional Kgoro system women could only address the court on invitation, and where a woman was party to a dispute, she had to be assisted by a senior male relative. (Section 9 constitution r/w. Section 5 of the Act, now abrogated this disparity).

17.5. The Plaintiff would present his/her case, and call witnesses, thereafter the defendant would follow suit with own version. Quiet interestingly, no cross-examination took place. Members of the public made no comment during the litigant’s oral submissions, although occasionally might “interject with a question.”

17.6. At the close of the parties’ respective presentations the matter was thrown open to general debate for members of the public present at the hearing to express their views on the matter after questioning the parties and their respective witnesses in a procedure akin to formal civil cross-examination.

17.7. Hearsay evidence, and character evidence seems quiet permissible in the Kgoro proceedings as the rationale was to go to the bottom of the inquiry and where feasible, to restore strained personal relations between the disputants and achieve

restorative justice, after the presiding officer had summed up the issues and general sentiments.

17.8. In these courts, the weight of opinion prevailing at the gathering carried substance and thus had a material influence on the discretion of the decision of the Senior Traditional Leader or his nominee.

The proceedings in the Headman's Kgoro was, however regarded as a court of first instance, and if one of the parties is aggrieved by its decision, he/she could escalate the matter to a court of higher hierarchy ( in civil parlance, appeal court in casu full Kgoro of a Kgosi (" STL") where the matter was heard de novo.

## CONCLUSION

[18]

18.1. From the foregoing, it can now be safely inferred that the TC as envisaged, will be operating within the prism of the Constitution and the Rule of law.

18.2. Contrary to misconceived popular view, TC will have no room to violate basic human rights and the values enshrined in the Bill of Rights.

18.3. Unfair discrimination is outlawed and equality and equal protection of its participants and protagonists is secured by the Constitution and the Act.

18.4. On a conspectus of the general objectives of the Act and what it seeks to achieve in relation to the application of customary law that often obtains in our indigent communities, the TC as viewed in their wider structural and operational context will, in my view, be utilized much more efficiently to the benefit of our traditional communities to which they shall have easy and free access, and shall acquire, in the process, the right of audience.

[19]. Again I must reiterate that courts or tribunals/ forums are obliged to "promote the values that underlie an open and democratic society based on human dignity, equality and freedom." when called upon to interpret the Bill of Rights.

[20]. Finally, allow me to borrow with deference from the dictum echoed by the ConCourt in **ALEXKOR LTD v THE RICHTERSVELD COMMUNITY** to the effect that:-

"[52] "It is important to note that indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life."

"[53] In applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that was known to the community, practised and passed on from generation to generation. It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community. And, it will continue to evolve within the context of its values and norms consistently with the Constitution."

[21]. It is upon a consideration of these venerated principles, that courts of the land must promote the spirit, purport and objects of the Bill of Rights as this salutary legal instrument does not deny the existence of any other rights conferred by either the common law, customary law or legislation, to the extent that they are consistent with the Bill of rights.

***I thank you all.***





*R.I.P*

21 June 1965 -20 May 2019

# **Judge Steenkamp**

## described as a courteous man at his memorial service

The Labour and Labour Appeal Court in Johannesburg held a memorial service, for Labour Court Judge, Anton Steenkamp, who died on 20 May. Judge Steenkamp passed away while he was touring Africa with his wife Catherine. He died after he was bitten by a black mamba in Zambia. Speaking at the memorial service on 29 May, Judge President of the Labour and Labour Appeal Court, Basheer Waglay, said that Judge Steenkamp was an able and conscientious judge.

Judge President Waglay pointed out that Judge Steenkamp was a valued colleague, friend, and in all accounts a devoted husband and father. He added that the floods of tributes through the media since Judge Steenkamp's passing is testimony that he was a remarkable person. He said that the organisations and people who paid tribute to Judge Steenkamp indicates the esteem he was held in by society. Judge President Waglay noted the family of Judge Steenkamp could not attend the memorial service

held in Johannesburg, as the family found it difficult to travel at the time.

Judge President of the Gauteng Division of the High Court in Pretoria, Dunstan Mlambo, said he met Judge Steenkamp when they were youngsters entering the legal profession. 'What struck me about Judge Steenkamp was the fact that he was a white man who was stepping out of his position of privilege to practice public interest law,' Judge President Mlambo said.

Judge President Mlambo added that Judge Steenkamp was planning to serve in the Gauteng Division from the third term onwards. He said when he heard about Judge Steenkamp's death he was saddened by the news, as he and the other judges of the Gauteng Division were looking forward to working with him. Judge President Mlambo sent his condolences to the Steenkamp family.

Member of the Johannesburg Society of Advocates, advocate Andrew Snider, recalled the experiences he had with Judge Steenkamp. He said that Judge Steenkamp was a man one could rely on to be friendly and courteous. It was a pleasure to appear before him in court and he added that one had a sense that there was not any animosity towards legal practitioners from the Bench at all.

Black Lawyers Association (BLA) representative in Gauteng, Chris Mamathuntsha said Judge Steenkamp made a good contribution to the labour jurisprudence in the country, especially to the Labour and Labour Appeal Court. He added that the manner in which Judge Steenkamp carried himself, represented what the BLA stands for. Mr Mamathuntsha said he hoped that the legacy of Judge Steenkamp will live on through his judgments.

House of Constituents member of the Law Society of South Africa, Denise Lenyai, said Judge Steenkamp played a role in the legal practitioner she is today. She pointed out that she first met Judge Steenkamp, when she was a young candidate legal practitioner

and shared the story of her first encounter with Judge Steenkamp.

Ms Lenyai said she was meeting a friend who was a candidate legal practitioner at Cheadle Thompson and Haysom where Judge Steenkamp worked. One day during her lunch she went to meet her friend for coffee when, Judge Steenkamp found her outside the building. Judge Steenkamp asked her what she was doing waiting outside, and she told him she was waiting for a friend. She added that she had forgotten her friend's name because of how nervous she was at the time. She said Judge Steenkamp invited her for coffee since she had forgotten her friend's name and was waiting outside. She noted that while they were having coffee, Judge Steenkamp gave her words of encouragement and told her to find her passion in law and pursue it and be the best she can be. 'He told me to make a difference, so that wherever I go, when people remember me, they will smile,' she said.

Another memorial service for Judge Steenkamp was held at the Labour Court in Cape Town on 3 June.

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Judge Steenkamp's loss will be deeply felt by his colleagues and the staff in the Labour Courts. We extend our heartfelt condolences to Judge Steenkamp's wife Catherine and his two children Stewart and Marion. May his soul rest in peace.

**Judge President Waglay**  
Labour and Labour Appeal Court





OFFICE OF THE CHIEF JUSTICE  
REPUBLIC OF SOUTH AFRICA

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