World Bar Conference - London 2012

"Advocacy in the highest court: do's and dont's in London, Canberra and Johannesburg"

Opening session, Friday 29 June 2012
15:30 – 17:00
Supreme Court, Parliament Square

Rt Hon Lord Phillips of Worth Matravers KG, President of the Supreme Court (Chair)
The Hon Robert French AC, Chief Justice of Australia
The Rt Hon The Baroness Hale of Richmond

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* I am indebted to my law clerks Michael Mbikiwa and Claire Avidon for their help.

1. I hope to keep my remarks short. After all, one of the most important "dont's" of litigation is not to bore your listeners.
2. We benefited from a practical illustration of the importance of this rule in our own Court in August last year.[1] A member of the public in the gallery had obviously had enough of counsel's droning. He not only fell asleep, but rolled out of his chair and tumbled down some stairs before being rescued. Perhaps I needn't add that counsel who caused the somnolence was nowise nonplussed, and simply rambled on.
3. Our Chief Justice always instructs counsel at the start of oral argument to give the Court a "roadmap". So let me do so myself:
   - First, I make a few introductory remarks about our Constitution;
   - Then I speak about the three ways in which having a Constitution has has changed appellate advocacy in South Africa.

Advocacy under a Constitution

4. Eighteen years ago, South Africa became a democratic state under a Constitution.
5. The change from apartheid was dramatic. From a legal regime that enforced racial oppression, subordination and injustice, we moved to the tender promise of constitutional aspiration.
6. The change presented itself vividly in three primary features of the new constitutional order.

[1] The incident happened during oral argument in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and the Occupiers of Saratoga Avenue*, heard on 11 August 2011

7. First, the Constitution is the supreme law. Article 1 provides that a founding value of the new democratic state is "supremacy of the constitution and the rule of law",[2] while Article 2, the operational clause, enacts that the Constitution is supreme, and adds that accordingly "law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled".
8. This swept away the hegemony the previous, whites-only, Parliament exercised. All too often, and too brutally, that supremacy had been employed to undo unpalatable court rulings, and to whip officials and institutions into line.
9. Instead, the Constitution gives the Constitutional Court power to determine whether legislation accords with the Constitution, and to declare it invalid to the extent of its inconsistency. The Court also has ultimate power to declare presidential conduct unconstitutional.
10. In its first eighteen years, the Court has declared about sixty legislative provisions – just over three a year – invalid.[3] (Many of the statutes struck down were apartheid overhangs.)

11. Second, the Constitution encodes a Bill of Rights.[4] This is both lavishly generous and very powerful.
12. The Bill of Rights "applies to all law, and binds the legislature, the executive, the judiciary and all organs of state".[5] It also binds natural and juristic persons depending on "the nature of the right and the nature of any duty imposed by the right".[6]
13. The equality and non-discrimination promises in the Bill of Rights are particularly encompassing. So much so that the South African government's own website rightly boasts that "South Africa's Constitution is one of the most progressive in the world and enjoys high acclaim internationally".[7]
14. This promise of equality sweeps broadly indeed. I have myself been a direct beneficiary of it. In the 1980s and early 1990s, I was an anti-

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[2] Constitution, section 1(c).
[3] Delivering the 2011 Helen Suzman Memorial Lecture in August 2011, my former colleague Justice Kate O'Regan calculated that the Court had struck down 57 statutes in its first seventeen years. Available at http://www.hsf.org.za/resource-centre/lectures/HSF%20Memorial%20Lecture%202011.pdf (last accessed 25 June 2012).
[4] Constitution, chapter 2.
[5] Constitution, section 8(1).
[6] Constitution, section 8(2).
[7] http://www.info.gov.za/documents/constitution/index.htm (last accessed 25 June 2012).

apartheid lawyer, but, as a gay man, I campaigned also for gay and lesbian equality.

15. We secured a world-first when South Africa's Constitution became the first anywhere expressly to bar discrimination on the ground of "sexual orientation".[8] It was thus the improbable fulfilment of a life ideal when President Mandela at the end of 1994 appointed me a Judge under the new Constitution.
16. The impact of the Court's equality jurisprudence has travelled far. Before I was appointed to the Court, it issued a judgment in 2006 declaring that equality entails full access to marriage for same-sex couples – making South Africa only the fifth country worldwide, and the only in Africa, to grant same-sex couples marriage rights. (I should perhaps add, whether by warning or invitation, that this is a right I have yet to exercise.)

17. Third, and perhaps most importantly, the South African Constitution contains not only what in old-fashioned parlance are called "first-order" rights – rights that embody freedom from government interference – but "third-generation" rights. These are rights that require government to take practical steps to improve people's lives.
18. The social and economic rights in our Constitution include rights of access to education, water, social security, health and food.
19. This may indeed be the Constitution's most radical feature: the recognition that without the material means to exercise them, constitutional liberties may in significant measure be illusory.

20. All this radically changed the setting within which the courts and the legal profession function.
21. And this brings me to my main theme, for constitutionalism has dramatically changed South Africa's legal system – and, with it, the business of cause-pleading.

22. There are three ways in which constitutionalism has influenced how advocacy is practised in South Africa.

    - The first is the management of what a justly famous and liberal South African judge, Chief Justice Innes, called "miserable, pettifogging points" – or technicalities. They are given scant regard in our Court.

[8] Constitution, section 9(3).

- The second is in the role of counsel and the impact of argument – which has greatly increased in importance under the Constitution.
- The third is about the court hearing itself, which no longer is an insiders' colloquium for advocates – but has instead become an important expository and explanatory forum for constitutionalism itself.

Technicalities

23. First, our Court pays much less heed to technicalities than pre-constitutional courts did.
24. If a constitutional injustice has been perpetrated, or a constitutionally invalid act is discerned, the substance of the matter is quickly reached.
25. A good instance was a recent case where a much-disgruntled litigant sought to set aside High Court proceedings on the ground that the judge was biased against him.[9] The allegation arose mainly because in a testy interchange the judge told the litigant that his attorney had been lying – when there was some ground for inferring that there was a muddle rather than deliberate untruthfulness.
26. Because the litigant was black, and the judge white, there were some racial overtones.
27. In fact, a tenable argument could be made, and was advanced by the opposing side, that the bias point was irrelevant in outcome, and should not be reached, since the order being challenged had long been superseded by events.[10]
28. Despite that, we considered the bias question. We found in effect that a bias claim, put forward with some semblance of plausibility, should always be properly considered, rather than dismissed on technicalities.[11]
29. Hence we reached the litigant's main complaint – and concluded that, despite the judge's grumpy interchanges, the charge of bias could not survive scrutiny.
30. This approach to the case, which focused on the issues of substance rather than only on whether their technical arrangement was exact, caught the respondent off-guard. The case concerned intellectual

[9] *Stainbank v South African Apartheid Museum* [2011] ZACC 20; 2011 (10) BCLR 1058 (CC).

[10] The order sought to be set aside was the dismissal of an application to stay the taxation of a bill of costs which had, in the meantime, proceeded.

[11] On behalf of the Court, Khampepe J found that although bias is "generally a serious allegation as it impinges upon the proper administration of justice, its mere assertion will not, without more, warrant a hearing by this Court". What is required is "an arguable assertion demonstrating that a complaint about the judge's alleged bias has reasonable prospects of success". She concluded that the allegation of bias, in all the circumstances, was "sufficiently plausible to warrant further investigation" (para 30).

property – more particularly, the question whether the term "apartheid museum" could be registered as a trade mark – and the respondent, who denied that it could (and whose stand was ultimately vindicated), hoped to knock out the claim quickly.

31. But our approach left the disgruntled litigant in no doubt that his complaint was lacking.
32. One may argue that constitutional substance was thus served over form, though it must be conceded that the line may be very hard to draw. (And, indeed, at times form is a most tempting cudgel with which to beat undeserving cases down.)
33. But litigating in the Constitutional Court is not about smart technicalities. It is about understanding the substance – dare I say, the heart – of the matter.
34. That being said – I am reminded of an exchange between counsel and one of my colleagues when we heard a case last year about whether the Constitution permitted the President or the legislature to single out the Chief Justice and extend his term of office alone, without including all the members of the Court:

    Court: Mr. Katz, why do you say a delineation of the [position of] Chief Justice would be irrational?

    Mr Katz: Well, it just doesn't feel right!

    At which my colleague, Justice Skweyiya, smartly interspersed:

    The law has no feelings.

Role of counsel and of creative lawyering

35. Second, though much of the Court's work concerns objections to the exercise of presidential and governmental power, and challenges to statutes, a great deal of it is about enforcing the social and economic rights the Constitution promises.
36. For despite the Constitution's high aspirations – equality, dignity, access to basic rights – South Africa remains a country of pronounced inequality, widespread poverty, corruption and crime.
37. More even than political threats, corruption and material inequality in my view are the greatest threats to constitutionalism and the rule of law in South Africa.
38. The weight of these issues bears directly on the urgency of the work in our Court – and hence also the nature of the argument advocates advance before it.

39. For engaged, principled and courageous lawyers are indispensible to realising the heady promises of our Constitution.
40. And the legal profession's most noble and ambitious task in a vulnerable society that is seeking to consolidate law and legal culture is to defend, explain and expand this new constitutionalism.
41. But there is a fine balance to be struck.
42. Recognising the limits of the law is important. But so too is understanding its enormous potential.
43. This means lawyers must know how strongly judges rely on counsel for novel legal arguments.
44. For without creative lawyers, courts are seldom able to give creative judgments.
45. But with the help of creative lawyers, the Constitutional Court has given a number of strong, innovative judgments that have advanced social justice and the role of the law in achieving it.
46. In a recent case,[12] the private owner of a building in inner-city Johannesburg sought to evict its indigent occupiers.
47. The occupiers brought the City of Johannesburg into the dispute. They argued that the eviction would render them homeless, and that the City was obliged to afford them emergency temporary accommodation.
48. And indeed, our Constitution affords every person "the right of access to adequate housing" – and it demands that national, provincial and local government must take "reasonable legislative and other measures, within [...] available resources, to achieve the progressive realisation of this right".[13]
49. The Court held that the City had to provide temporary emergency accommodation not only to people it evicted on its own initiative from city buildings, or from buildings it declared unsafe, but also to those evicted by private owners.
50. This ruling represented a considerable extension of housing rights, and a considerable improvement in the position of evictees. (And, of course, a considerable burden on local government finances.)
51. It was made possible by fresh, brave and ingenious arguments the occupiers' lawyers advanced.
52. Innovative lawyering has played a central role in another dramatic recent decision. Much of it has come from *amici curiae*.

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[12] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33; 2012 (2) SA 104 (CC).
[13] Constitution section 27(1) and (2).

53. In *Glenister v President*,[14] the applicant challenged the constitutional validity of the statutes that abolished the country's elite corruption-fighting unit, popularly known as the Scorpions,[15] and created the "Hawks" in its stead.[16]
54. The applicant invoked a wide variety of arguments, ranging from irrationality and unreasonableness to labour relations.
55. These arguments were not persuasive.
56. Instead, the Court found, by a narrow majority, that the Constitution obliged the state to create an anti-corruption unit that was sufficiently independent. This obligation was sourced in international treaties South Africa had signed, including the UN Convention against Corruption.
57. This argument was advanced only at a relatively late stage. And it was an *amicus*, the Helen Suzman Foundation, that did so, drawing on the requirements of independence and accountability found in our international law obligations as well as in the Constitution.
58. We held by a majority that the Hawks unit was not sufficiently independent, and on this basis that the legislation was constitutionally invalid.
59. The decision has been variously hailed as bold and brave, or over-reaching judicial power.
60. What is certain is that it has set the importance of independent institutions at the heart of the debate about South Africa's democratic functioning.

61. A second vivid instance concerned the law of defamation, and the impact on it of our truth and reconciliation (TRC) process.
62. In *Citizen Newspaper v McBride*,[17] the question was whether a person convicted of murder, but granted amnesty under the TRC,[18] could later be denounced as a murderer and a criminal by those who opposed his elevation to public office.
63. This case was deeply contentious, cutting into the meaning of the compact that ended apartheid, and the contesting weight to be given to the values of free speech and dignity and reputation.
64. Again, counsel's argument, forthcoming from friends of the court, was pivotal.

[14] Glenister v President of the RSA [2011] ZACC 6; 2011 (3) SA 347 (CC).
[15] Directorate of Special Operations (DSO).
[16] Directorate for Priority Crime Investigation (DPCI).
[17] *The Citizen 1978 (Pty) Ltd v McBride* [2011] ZACC 11; 2011 (4) SA 191 (CC).
[18] In terms of the Promotion of National Unity and Reconciliation Act, 34 of 1995.

65. In addition to free speech and editors' organisations, two families who suffered at the hands of of apartheid "goon squads" joined the proceedings.
66. One was Ms Joyce Mbizana, the sister of Justice Mbizana, who was tortured and murdered in 1987 by the apartheid security branch.
67. Another was Mbasa Mxenge, the son of Griffiths and Victoria Mxenge, both prominent human rights lawyers in Durban who were murdered by apartheid operatives.
68. The intervention of these amici was crucial in that it took some of the political sting out of the newspaper's free speech claims. The newspaper was right-wing and generally sceptical of the democratic transition, and its campaign against the plaintiff was tinged with rancorous bile because the murders he had committed, and received amnesty for, were on behalf of the ANC.
69. The intervention of the amici meant that, in the public perception, the case was not exclusively about whether an ANC operative granted amnesty could be called a murderer, but whether operatives who had committed murder on behalf of either the ANC or apartheid could still be called by that name.
70. The primary submission made by the families' counsel was that they had the right to speak freely about the crimes their families had suffered.
71. They argued that to be prevented from speaking the truth – that is, to be barred from calling the people who killed their loved ones "murderers" by fear of a defamation suit – stripped them of their dignity as survivors of apartheid crimes.
72. We concluded by a majority, reversing the Supreme Court of Appeal, that the TRC process did not render the fact that Mr McBride had committed murder untrue, and that to call him a murderer was thus not defamatory.
73. The intervention of the amici may well have been crucial to securing this outcome.

Court hearings and process and substance in constitutional change

74. But the biggest change the Constitution has wrought to advocacy in our Court is that the hearing itself is now pivotal to public understanding of the law and its role in social change.
75. Much of public debate about government's role and responsibilities, and contesting entitlements, is couched in claims about the Constitution.

76. That means our hearings are usually very well attended, and on occasion packed.
77. The hearing sometimes seems to take the form of what one waspish senior counsel derisively called "an academic seminar". More accurately, and historically poignantly, it may resemble a traditional African community meeting or court sitting (lekgotla) – and in fact the Court's architecture is expressly designed to incorporate the light, openness and trees of a lekgotla.
78. What argument in this form does is to underline the court hearing as a form of accountability – accountability in the sense of being held to account, not only by the Court, and to the Court, but by the Constitution, and to the Constitution.
79. That constitutional litigation underscores accountability was feelingfully illustrated in a dispute we heard in September 2009.[19]
80. The case concerned the means of life available to the inhabitants of an informal settlement about an hour east of Johannesburg, the Harry Gwala settlement.
81. The case was about water, lighting and ablutions. But the most contentious issue before us was whether the provincial government was obliged to provide the inhabitants with VIP toilets – ventilated improved pit latrines – while they were waiting for their housing to be upgraded.
82. The outcome of the litigation mattered very much to the practical comfort of many thousands of people's lives – and when we entered, we found the public benches packed with hundreds of residents of the settlement.
83. Under the legislation adopted to give effect to the right to housing, the community was entitled to a housing upgrade. The only question was whether it would take place on-site, or at a new location.
84. This question, too, had momentous practical consequences for the community.
85. But provincial bureaucrats had taken shamefully long – three years – to make up their minds about where the upgrade should take place.
86. If it was on-site, the community's claim to VIP latrines until it happened seemed strong.
87. But if the community was to be relocated, and its new housing provided elsewhere, it would be a waste of scarce resources to construct the VIP latrines for them.
88. In the end we decided that the case was less about the right to housing than about bureaucratic inefficiency. It seemed clear that the provincial

[19] *Nokotyana v Ekurhuleni Metropolitan Municipality* [2009] ZACC 33; 2010 (4) BCLR 312 (CC).

bureaucrats should be put on short terms to deal properly and efficiently with the community's housing needs.

89. So when counsel for government rose to make his argument, several of us, including my colleague Dikgang Moseneke, the Deputy Chief Justice, who was presiding, excoriated him for his client's tardiness.
90. In response, he offered an apology for government's sloth.
91. But he offered the apology to the Court, standing with his back to the public.
92. This prompted the DCJ to ask him to repeat his apology in Zulu or Sotho to the massed public gallery. He did so in isiXhosa, richly and at length (inferring as best I can as a non-Xhosa-speaker), but manifesting the effort by afterwards wiping his face and head with the long tail of his gown's silken sleeve.
93. The DCJ then asked the gallery whether they accepted the apology. To this there was muted assent – "Ehhh".
94. At the end of the hearing, the DCJ explained to the gallery – through his Zulu-speaking law clerk[20] – what had happened in court. He told them the judges would now "retire to their chambers, every one of us, to thoroughly consider the right outcome of the case".
95. We then adjourned.
96. It was a moving and humbling incident. It is inconceivable that it could have happened twenty years ago.
97. It encapsulates the change in advocacy wrought by constitutionalism – away from technicalities, in search of legal substance and in pursuit of outcomes that advance social justice.
98. If that sounds loftily aspirational, it is. But it is the form and shape we have to give to the law if it is to survive in the southern tip of Africa, or perhaps anywhere.

[20] Sbu Radebe.