

Tribute to Johan Froneman

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It is a privilege and an honour to tender this personal tribute to Johan Froneman, who retired from the Bench, after more than 25 years' service, at the end of 2019.

Justice Froneman served as a judge of the High Court in the Eastern Cape from 1993. The interim ANC-transitional government appointed him to the Bench in early 1994 at the dawn of our country's transition to democratic constitutionalism.

He soon achieved renown as a phenomenon of the High Court. His judgments on constitutional issues were noted for their erudition and penetration, and became widely cited.

Qozoleni v Minister of Law and Order 1994 (3) SA 625 (E) was so lucid in its understanding and exposition of the Constitution, that the Constitutional Court cited it in its first ever judgment, *S v Zuma* 1995 (2) SA 642. Kentridge AJ commended Froneman J for adding "value in its approach to constitutional interpretation". He proceeded to quote Froneman J's view on how the Constitution ought to be interpreted "to give clear expression to the values it seeks to nurture for a future South Africa".

This set Froneman J on a path to becoming one of the most productive, reflective and insightful judges of the democratic era.

Many more influential and impressive judgments followed.

For a short while after I started in the Supreme Court of Appeal in Bloemfontein, Justice Froneman served there in an acting capacity. But to me it seemed that the powers in that Court found his deep-going, democratic, constitutionally visionary approach too unsettling to encourage his appointment.

In the ensuing years, this proved to be a great loss to the SCA, for Froneman was an experienced lawyer and a profound judge, and that Court needed both.

Instead, a bigger, more important and more influential opportunity beckoned. On 11 October 2009, the fifteen-year terms of office of the last of President Mandela's appointees to the Constitutional Court came to an end. Chief Justice Pius Langa, together with Justices Yvonne Mokgoro, Kate O'Regan and Albie Sachs were constitutionally obliged to retire. Replacements were sought.

Justice Froneman was hesitant to apply. He was personally diffident, but also anxious about the brutal process that applicants for judicial office were being put through. But those who knew his jurisprudential and constitutional powers urged him to allow his nomination to go ahead, despite his doubts. Reluctantly, he put in an application.

The Judicial Service Commission (JSC) hearings, though not as acridly unpleasant and discourteous as many that followed, were rocky. Excellent candidates made themselves available, but were unfairly cut down by crude questioning.

Amidst this dismal process, one candidate stood out. He managed hectoring challenges from commissioners with calm and depth and insight. It was Justice Johan Froneman. His interview earned wide admiration. It culminated in his appointment to the Court from 11 October 2009, together with Justices Chris Jafta, Sisi Khampepe and Mogoeng Mogoeng.

Just days thereafter, all four new Justices took their seats for the November term.

Immediately, Justice Froneman made an impact. The profundity of his thinking and the depth with which he grappled with meaning were evident: meaning not just of the words in the Constitution, but with the vision towards which they pointed our country.

During his time on the Constitutional Court, Justice Froneman penned about 70 judgments. Of these, around 23 evoked unanimous support; 11 more were by a majority. There was also a rich store of outspoken, smart and respectful dissents and concurrences.

All of his judgments were swiftly written, produced with the integrity, humility and respect for the Constitution that came from deep within.

It was clear to all his colleagues that Justice Froneman grappled painfully with the cases that came before us.

For him, no case was ever "easy". Instead, every case elicited anxious application and delicate consideration, together with rigorous research.

I highlight only two.

In *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC) a thoughtful judgment from the President of the Supreme Court of Appeal, Mpati P, a respected colleague, had turned down anguished pleas from the Bengwenyama community – claiming that corrupt skulduggery had tainted the award of Genorah's prospecting license over their traditional land.

Initially, the Court was disinclined to take up the case. The community had already enjoyed a first-instance hearing, plus a full and careful appeal.

But Justice Froneman insisted that we grant a further hearing. Deputy Chief Justice Moseneke joined him. Eventually the case was set down for argument. Rightly so. From the outset, Justice Froneman had seen to the heart of the issues. His profound analysis set mining rights and applications on a new path, even though, grievously, corruption and inefficiency in government continue to plague mining communities.

And in *AllPay Consolidated Investment Holdings (Pty) Ltd v CEO, SASSA* 2014 1 SA 604 (CC), he led the Court in reversing a Supreme Court of Appeal judgment that had refused to intervene in the largest tender award in democratic South Africa, for distributing social grants: one worth R10 billion.

His judgment set a new standard for approaching suspiciously-awarded public contracts. In particular, the lower court's suggestion that "inconsequential irregularities" are of no moment conflated the test for irregularities and their impact.

Instead, the fairness and lawfulness of the procurement process had to be assessed independently of who was awarded the tender. And what legal requirements and formalities are "material"? This depends, the judgment held, on whether the purpose of the requirements is attained.

This signalled a new beginning for tenders – though, again, grievously, malpractice, criminality and corruption in government have not been successfully contained.

Bengwenyama and *AllPay* were vast public law judgments. Together with them, Justice Froneman's rich experience as a lawyer, and his ten years as an advocate, plus four further years as senior counsel in practice, counted heavily. They helped a Court lacking in commercial experience when it had to deal with specialised questions of labour law, contract law, company law, insolvency law and commercial dealings – as the Court increasingly had to do.

When Justice Froneman was persuaded to apply to the Constitutional Court in 2009, the Zuma era of menace and corruption had just begun. The Zuma appointments to the JSC signalled that a sharp change in tone and scrutiny. When Froneman went before the JSC, I harboured a secret. This was that I had known him for many long years, since 1972. Nearly four decades before, he and I had been first-years together in the same University of Stellenbosch men's residence.

After three years, he left Stellenbosch, to complete his LLB at UNISA, and we lost touch.

Nevertheless, I did not want there to be any misimpressions about his associations and friendships that might mar his ascent to the Court.

Our long-nascent friendship resumed when, unexpectedly, we became colleagues in the Constitutional Court. It was an enriching privilege to be able to work with him.

Justice Froneman had always struck me, even at Stellenbosch, as a profound thinker, and I was excited by the possibility of his contributing his deep thought to the country.

The residence in which we were housed, Wilgenhof, had a vibrant discussion group. A controversial party-hopping white politician, Marais Steyn, was invited to address our group one Sunday afternoon.

Hoping, no doubt, to impress the assembled students, Steyn's speech loftily invoked "English philosophers like John Hobbes and Thomas Locke".

I was impressed. I had never heard of these English philosophers before. Yet here was a derided politician invoking them with familiarity!

After the address, we walked down the steps of the meeting room. The 18-year-old Johan Froneman was chuckling. "Why are you laughing," I asked. "Oh" he said "nothing much, the politician got the philosophers' names the wrong way round. It is Thomas Hobbes and John Locke."

Even at 18 years old, Johan Froneman had read philosophy beyond his peers – and beyond any pretentious politician.

That depth of reading, of insight, understanding and of vision, enriched the courts and enriched our country.

His jurisprudential contributions were deep. They have had a profound impact on our country's law and constitutional practice. They will continue to shape our constitutional future. It is a privilege to pay tribute to him.

E Cameron (Justice)

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