

Constitutional Court bids farewell to Justice Thembile Skweyiya

Constitutional Court judge Justice Thembile Skweyiya delivered his final judgment on 6 May at a ceremonial court session to bid him farewell as he retired from the Bench.

Education and legal career

Justice Skweyiya was born in Worcester in the Western Cape. He has a legal career spanning almost 50 years. He attended primary school in Cape Town, but in 1959 he matriculated at the Healdtown Institution in the Eastern Cape. He was awarded a Bachelor of Social Science degree by the University of Natal in 1963 and an LLB by the same university in 1967.

From 1968 to 1970 Justice Skweyiya served his articles and in 1970 he was admitted as an advocate of the Supreme Court of South Africa. Justice Skweyiya then practiced as an advocate in Durban where he dealt mostly with commercial and civil matters. According to the Constitutional Court's website, during the 1980s, the bulk of his work concentrated on human rights and civil liberties cases. He took silk in 1989 and his focus shifted back to commercial and civil work (www.constitutionalcourt.org.za/site/judges/justicethembileskweyiya/index1.html, accessed 13-5-2013).

Justice Skweyiya was also admitted as an advocate of the High Court of Lesotho in 1974. Between October 1995 and January 2001, Justice Skweyiya acted as a High Court Judge in the Natal and Eastern Cape divisions for various periods before taking up a permanent position in the KwaZulu-Natal Division of the High Court in 2001.

Justice Skweyiya acted as a judge of the Constitutional Court from August 2001 to the end of May 2002. Former President Thabo Mbeki appointed him as a permanent Constitutional Court judge in 2003. He retires after acting as the Deputy Chief Justice from November last year to March.

Tributes

The ceremony was open to the public and a number of bodies bid him farewell, namely the –

- Judiciary: Chief Justice Mogoeng Mogoeng;
 - Executive: Justice Minister Jeff Radebe;
 - Parliament: Member of parliament, Max Sisulu;
 - Law Society of South Africa: Ettienne Barnard, Co-chairperson;
 - General Council of the Bar: Advocate Ishmael Semanya, SC;
 - National Director of Public Prosecutions: Advocate Nomvula Mokhatla;
 - Black Lawyers Association: Busani Mabunda;
 - National Association of Democratic Lawyers (NADEL): Advocate Gcina Malindi, SC;
- and
- Advocates for Transformation: Advocate Dumisa Ntsebeza, SC.

Pleasant person to work with

In his farewell speech, Chief Justice Mogoeng described Justice Skweyiya as a 'pleasant person to work with and a very considerate, unmistakably humble and peaceable man.' He said that Justice Skweyiya was already well known when the Chief Justice enrolled for his BLUR degree in 1981. 'Bhuti, as I affectionately and respectfully call and address him, was the most senior African advocate in South Africa that time until he accepted appointment to the High Court Bench,' he said. He added that Justice Skweyiya was the first African advocate to be awarded silk status in the country. 'As a young African law student who knew how difficult it was for a black person to acquire a law degree, I drew a lot of inspiration from the very fact that Bhuti was a lawyer, and especially that he appeared in the Supreme Court and was thus permitted to engage in serious intellectual wrestling matches with his white -counterparts before the judges,' he said.

Chief Justice Mogoeng said that it was a big deal to be an advocate back then and that Justice Skweyiya motivated him and his peers to 'soldier on, knowing that just as they made it, so will we'.

Chief Justice Mogoeng said that South Africa was grateful to Justice Skweyiya for the role model that he has been to many as a lawyer and a judge.

The Chief Justice concluded by saying that it had been a struggle to attract a good number of candidates for the past two Constitutional Court vacancies, which had to be re-advertised. For this reason, he said: 'We will take some time before the post you vacate is advertised. This is intended to give us room to create a pool of possible candidates additional to those who would apply anyway, even if they had not acted in the Constitutional Court.'

He then appealed to Justice Skweyiya to use his free time to mobilise women and men who are suitably qualified to be considered for possible appointment, to apply. 'This is also a plea to the broader public. We all owe it to the nation to encourage people to apply so that we may be spoiled for choice,' he said.

Chief Justice Mogoeng added that he hoped the now vacant position in the court would be filled by a woman, but made it clear that no incompetent and unqualified woman would be appointed for the sake of gender balance. 'My preference would be to have a woman appointed, but even if 20 women apply, if they are not competent, we will not recommend anyone for appointment. You can criticise all you want,' he said.

Anti-apartheid lawyer

Minister Radebe said that such occasions invoke mixed feelings. 'On the one hand we are sad that we are losing from within the ranks of serving judges the impeccable experience and abilities of a judge of Justice Thembile Lewis Skweyiya's standing. On

the other we celebrate a journey well-travelled and as often we say, a mission accomplished. There is nothing as fulfilling as knowing you have fought a good fight and have kept the flame of faith burning, illuminating the injustices against which as society we must triumph to ensure a just order,' he said.

Minister Radebe said that Justice Skweyiya defended a number of political activists, including himself, who were charged under apartheid laws. 'When I was sentenced to 10 years on Robben Island, you represented me in court before Judge Goldstone, and my sentence was reduced to six years, thank you for that,' said Minister Radebe.

Minister Radebe expressed the executive's 'sincerest and highest gratitude' to Justice Skweyiya for 'having served our country with unquestionable dignity which has helped inspire more confidence in both our judiciary and our constitutional democracy as a whole.'

Mr Sisulu said that Justice Skweyiya had served South Africa with distinction and dedication 'from an anti-apartheid lawyer and human rights activist, to a member of our highest court and guardian of our Constitution ...'. He added that right from the very beginning, Justice Skweyiya was destined to play a leadership role in the country. 'It was not just fortuitous that he attended and matriculated at Healdtown High School in the Eastern Cape where many of those who became leaders in the struggle for democracy, including former President Nelson Mandela, Govan Mbeki, Raymond Mhlaba, Robert Sobukwe, Matthew Goniwe, Phyllis Ntantala and Victoria Mxenge, also went to school.'

Mr Sisulu said that after Justice Skweyiya obtained the status of silk or senior counsel in 1989, he could have made a far more lucrative career as senior counsel specialising in commercial law, but he chose to dedicate his life to public service and accepted appointment as judge in 2001.

Mr Sisulu described Justice Skweyiya as 'always soft spoken, thoughtful and humble'. He expressed parliament's 'sincerest gratitude for the many years of public service to our country as a judge and as a human rights activist and for legitimising the law in the eyes of ordinary South Africans.' Mr Sisulu added that it was a just irony that 'we come to pay tribute to someone who, as an activist in the apartheid, era used the law to undermine its cruel intention and in post democratic society he used the law to protect the vulnerable and undo the effects of the apartheid system.'

Shaping South Africa's justice system

Mr Barnard said that in the Constitutional Court's 20 year history, Justice Skweyiya has served on its bench for almost 13 years (of which two years were as an acting judge and 11 years were as a Justice of the Court). He added: 'His integrity and bravery in carrying out his duties independently without fear, favour or prejudice, has fostered respect from the profession and the broader population. After all, it is undeniable that in

a constitutional democracy, judicial independence is sacrosanct.'

On behalf of the attorneys' profession, Mr Barnard acknowledged and thanked Justice Skweyiya for his contribution to the law, the Constitutional Court, the legal profession and to the citizens of the country. 'We thank you for enriching all of our lives,' he concluded.

Mr Semenya said that Justice Skweyiya displayed patience throughout his legal and judicial career to help shape the jurisprudence of the country on the protection of human rights and justice. He added: 'Your ethics will remind us that ultimately the practice of law, if worth anything, must be about public service and righteousness. The judiciary going forward will entrench the right to human dignity whose content has been eloquently defined in your judicial pronouncements. Yours has been an indelible mark in the tapestry of our constitutional jurisprudence.'

Justice Skweyiya was praised for his contribution to the shaping of South Africa's justice system during his almost 50-year career in law.

Mr Ntsebeza described Justice Skweyiya as a pioneer and a man of all seasons and one of the earliest campaigners for human rights. He said that Justice Skweyiya was a role model who had the courage to take up cases most lawyers shied away from in the apartheid era because of the risks involved.

Mr Mabunda described Justice Skweyiya as 'one of the most renowned selfless sons of the soil'. He thanked him for representing South Africans across an ideological political spectrum that enhanced 'prospects for the journey towards the now attained democracy which we are currently both enjoying and grappling with.'

Mr Mabunda said: 'It is recorded in the history of this country though not by authors or historians that one Thembile Lewis Skweyiya has contributed to our nation enjoying the rights of universal suffrage as enjoyed by many in the global world.'

Ms Mokhatla said Justice Skweyiya's work had inspired her. She said that young lawyers admired his spirit of love and independence, as well as his spirit of standing his ground.

Ms Mokhatla added that the National Prosecuting Authority welcomes the judgment that Justice Skweyiya had delivered on the day, adding that there was no opposition received from any of the opponents on the matter for confirmation of the unconstitutionality of the s 50(2)(a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sexual Offences Act).

Ms Mokhatla concluded by saying that she looked up to Justice Skweyiya as her mentor.

Mr Malindi said that Justice Skweyiya has been an inspiration to NADEL as a legal practitioner and judge, adding that NADEL salutes him as one of the judges who are true to their oath or solemn affirmation of office as a judicial officer. 'His judgments in this court, whether writing for the majority or in dissention, show those qualities of independence, impartiality and integrity in the discharge of his duties and obligations to the Constitution,' he said.

As Justice Skweyiya vacated the seat he has occupied for 11 years, he paid tribute to former Chief Justices Pius Langa and Arthur Chaskalson who passed away in July 2013 and December 2012 respectively. He also thanked the Constitutional Court staff for its support and said that he was humbled by the 'kind words' in the tributes.

Justice Skweyiya told *De Rebus* that he felt elated, and that people come and go. 'You come and make a contribution and you go. And you must make allowance for others, that is the only way our society can progress. We have many young people who are aspiring to be in the same positions and when spaces do happen for them, it is a good thing,' he said.

When asked about his future plans, Justice Skweyiya said that he had not yet decided. 'One of the things I will do, my son insists, is to write a book about my experiences in my life, and in the law in particular. I am going to start doing that.'

His last judgment

Justice Skweyiya handed down his final judgment on the same day as his farewell ceremony at the Constitutional Court. It was a unanimous judgment in the matter *J v National Director of Public Prosecutions and Another* (CC) (unreported case no CCT114/13, 6-5-2014) where, Skweyiya ADCJ held that s 50(2)(a) of the Sexual Offences Act unconstitutional as it infringes on the right of child offenders to have their best interests considered important in terms of s 28(2) of the Constitution.

Section 50(2)(a) provides that when a person is convicted of a sexual offence against a child or person who is mentally disabled, a court must make an order to include the offender's particulars on the national register for sex offenders (the register).

The applicant, who was 14-years-old at the time of the offences, was convicted of sexual offences committed against children and was sentenced and an order made that he be added on the register.

On review, the Western Cape High Court declared s 50(2) of the Sexual Offences Act constitutionally invalid because it infringes on the rights of offenders, whether children or adults. The High Court suspended the declaration of invalidity for 18 months and ordered that, in the interim, certain words be read into the provision. The matter came before the Constitutional Court for confirmation. None of the parties opposed the confirmation of the declaration of invalidity.

In the judgment Justice Skweyiya said that the wording of s 50 of the Sexual Offences Act, read as a whole, indicates that a court has no discretion whether or not to include an offender's particulars on the register. Section 50(1) provides that the particulars of the offender 'must be included in the Register.' Section 50(2)(a) provides that the relevant court 'must make an order that the particulars of the person be included in the Register.'

The Constitutional Court suspended the declaration of invalidity for 15 months to give the legislature an opportunity to correct the constitutional defect. The respondents were further directed to provide a report to the Constitutional Court setting out the details of child offenders currently listed on the register.

Nomfundo Manyathi-Jele,
nomfundo@derebus.org.za