bar news

Eastern Cape Bar Makhanda

Contributed by **Sovash Chetty**

FROM THE BAR TO THE BENCH

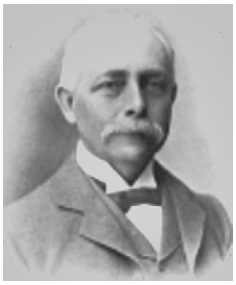
Celebrating 150 years of Judicial Excellence in the ECSA

by **Kerryn Watt** & **Sovash Chetty**

The Eastern Cape Society of Advocates has a history stretching back 150 years. It is a history filled with advocates whose skill, discipline and independence carried them from the Bar to the Bench.

To appreciate the Society's contribution to South African law, one must look beyond the chambers of Makhanda and Gqeberha, and to the judges who began their careers there before rising to some of the highest courts in the country. Their judgments helped shape our law andtheir precedent still ripples through to today.

This article focuses on six of these judges. It is not an exhaustive list. It is a brief tribute to six members of the Society whose careers and judgments reflect the calibre of advocacy that has passed through the Eastern Cape Bar.



SIR JOHN GILBERT KOTZÉ

The story of the Eastern Cape Society of Advocates properly begins with Sir John Gilbert Kotzé. In 1876, Kotzé arrived in Makhanda, then Grahamstown, and it is from that moment that the Society traces its earliest origins. His time at the Bar in Grahamstown was brief, but it was not insignificant. Within a year, he had left to become Chief Justice of the South African Republic, before later returning to judicial office in the Eastern Cape as a judge of the Eastern Districts Court and, thereafter, its Judge President.[1]

Kotzé therefore stands at the beginning of the Society's judicial story. He was not merely one of the early advocates associated with Grahamstown. He became one of the great judicial figures of the pre-Union period, serving as chief justice of the Transvaal, Judge President of the Eastern Districts Court, judge president of the Cape Provincial Division, and finally as a judge of the Appellate Division.[2]

His career is important not only because of the offices he held, but because of the principle with which his name became associated. Kotzé was a judge who, long before the language of constitutional supremacy became familiar to South African lawyers, was prepared to hold that public power was subject to legal limits. That principle came to the fore in *Brown v Leyds NO*,[3] the judgment for which he is now most remembered.

In *Brown*, Kotzé held that the courts of the Zuid-Afrikaansche Republiek could test legislation and resolutions of the Volksraad against the Grondwet. The judgment created immediate political conflict. President Paul Kruger rejected Kotzé's approach and ultimately dismissed him from office.[4]

Seen today, the importance of the judgment is plain. Kotzé's "testing right" did not succeed in its own time. But the idea behind it, that courts may hold public power to a higher law, now lies at the heart of the South African constitutional order. In that sense, Kotzé's judgment was ahead of its time. It spoke in the vocabulary of the 19th century, but it anticipated one of the defining principles of modern South African law.

For the Society, Kotzé is therefore more than a historical name. He represents the first great theme in the Eastern Cape Bar's contribution to the Bench: independence. His career reminds us that the advocate's craft is not only forensic skill. At its highest, it is the disciplined courage to insist that law must govern power, even when power resists.

> "HE REPRESENTS THE FIRST GREAT THEME IN THE EASTERN CAPE BAR'S CONTRIBUTION TO THE BENCH: INDEPENDENCE."

CHRISTIAN GEORGE MAASDORP

Christian George Maasdorp belongs near the beginning of this history, not merely because of the offices he came to hold, but because his career reflects the early connection between the Bar in Grahamstown and the formation of South African appellate law.

Maasdorp was admitted to the Cape Bar in 1871. After practising at Barkly West, he practised for a period at the Supreme Court of the Eastern Districts in Grahamstown, before being appointed Attorney-General of the Transvaal in 1877. He later returned to the Cape, and in 1885 was appointed as a judge of the Supreme Court of the Eastern Districts. He would go on to become Judge President of the Cape Provincial Division and, thereafter, a judge of appeal.[5]

Maasdorp's place in the Society's history is not incidental. He was formed at a Bar which, even in its earliest years, was already producing lawyers of national reach. Having made his mark in Grahamstown, Maasdorp carried the discipline of that practice onto the Cape Bench and, ultimately, into the Appellate Division.[6]

If Kotzé represents the dramatic assertion of judicial power, Maasdorp represents something different, but just as enduring: the careful development of legal principle. His contribution was not in a single constitutional confrontation, but in the quieter work of giving shape to the concepts by which litigation is still conducted.

The judgment through which Maasdorp's influence continues to be felt most clearly is *McKenzie v Farmers' Co-operative Meat Industries Ltd*.[7] There, Maasdorp JA gave enduring expression to the meaning of a "cause of action": the material facts which a plaintiff must establish, if disputed, in order to sustain the relief claimed. It is a formulation that has become part of the settled language of South African civil procedure, and one to which courts continue to return when questions of pleading, prescription and the proper characterisation of a claim arise.

There is a particular elegance in that legacy. Every practitioner knows how much can turn on the identification of the cause of action: in exceptions, pleas of prescription, questions of jurisdiction, amendments, res judicata and the proper framing of a case. Maasdorp's formulation has endured because it captures the point with precision. It is not decorative law. It is working law.

For that reason, Maasdorp's legacy is particularly fitting for the Society. It reminds us that law is a precise endeavour and that it must be practised with the same precision. The Eastern Cape Society of Advocates has long sought to maintain that discipline: the careful pleading, the exact formulation, the principled distinction, and the refusal to treat language as incidental. In Maasdorp, one sees an early expression of that tradition – a judge whose contribution endures because he understood that, in law, precision is not ornament. It is substance.

> "MAASDORP'S FORMULATION HAS ENDURED BECAUSE IT CAPTURES THE POINT WITH PRECISION. IT IS NOT DECORATIVE LAW. IT IS WORKING LAW."

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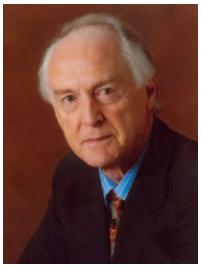


CRAIG TELFER HOWIE

Craig Telfer Howie's place in the Society's history lies not only in the height to which he rose, but in the manner in which he moved through the profession. He joined the Eastern Cape Society of Advocates in Grahamstown in October 1964, took silk in 1976, and was appointed to the Eastern Cape Division in 1978. From there, his judicial career carried him to the Cape Provincial Division, then to the Appellate Division, and ultimately to the presidency of the Supreme Court of Appeal.[8]

His years in Grahamstown were not a mere prelude to that later distinction. They formed the foundation of it. Howie P practised in the Eastern Cape for more than a decade, serving also as secretary and member of the bar council. His former colleagues remembered him as a formidable opponent, meticulously prepared, but also as a practitioner of the highest ethical standard.[9]

That combination matters. It is easy, when writing about judges, to look only at the final office held. But Howie's career reflects something deeper about the Eastern Cape Bar: the seriousness of preparation, the discipline of practice, and the insistence that excellence and courtesy are not opposites. The same qualities that made him respected in the courts of Grahamstown would later mark his work in the country's highest appellate structures.

The judgment through which Howie's influence is perhaps most clearly felt is *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*.[10] Writing with Nugent JA, Howie P dealt with the consequences of an unlawful administrative act which had not yet been set aside. The judgment gave enduring expression to the principle that such an act may exist in fact and may have legal consequences until properly reviewed and set aside.

The importance of *Oudekraal* is difficult to overstate. It brought discipline to an area of law where imprecision could have produced real instability. The case did not excuse unlawful administration. It explained how legality must operate in a legal system that also values certainty, order and institutional coherence. *Oudekraal* is recognised as a foundational administrative law judgment, particularly in relation to the status and force of defective administrative decisions pending review.

In *Oudekraal*, he took a problem which could easily have become abstract and unwieldy, and expressed it in a way that courts and practitioners could apply. Howie's legacy lies there: in the reminder that clarity is not the enemy of sophistication; it is often its highest form.

LORIMER ERIC LEACH

Andrew Hall

Lorimer Eric Leach is among the clearest examples of a judge whose career was deeply rooted in the Eastern Cape Bar. Born in Port Elizabeth and educated, in part, at Rhodes University, Leach was admitted as an advocate in 1976, took silk in 1990, and was appointed to the Eastern Cape Division in 1993. He later acted in the Supreme Court of Appeal in 2008 and was permanently appointed as a judge of appeal in 2009. Importantly for present purposes, he served on the bar council of the Eastern Cape Society of Advocates from 1978 until his elevation to the Bench in 1993.[11]

Leach was therefore not simply associated with the Society by geography or passing membership. His professional life was shaped within it. For nearly two decades he did not just practice at the Eastern Cape Bar but participated in its governance.

The judgment for which Leach JA is most publicly known is *Director of Public Prosecutions, Gauteng v Pistorius*.[12] In that matter, the Supreme Court of Appeal was required to consider whether the trial court had correctly applied the principles of *dolus eventualis*. Leach JA wrote the judgment which set aside the conviction of culpable homicide and substituted it with one of murder.

The significance of *Pistorius* does not lie in the spectacle that surrounded it. Its importance lies in the clarity with which Leach JA restored the proper enquiry. The question was not whether the accused knew the identity of the person behind the door. It was whether he foresaw the possibility that his conduct would cause death and proceeded regardless. In a case weighed down by public attention, Leach JA brought the matter back to principle. He separated the drama from the doctrine and in doing so gave renewed force to one of the central enquiries in the law of criminal intention.

For the Society, Leach's career is a reminder of what sustained practice

at the Bar can produce. It can produce judges who are careful without being timid, firm without being theatrical and precise without being inaccessible. From the Eastern Cape bar council to the Supreme Court of Appeal, Leach carried with him the discipline of the Society, and left in the law a body of work marked by clarity, restraint and focus.

LEX MPATI

Lex Mpati occupies a special place in the history of the Eastern Cape Society of Advocates. His career is one of the clearest examples of how the Society's influence has travelled from the chambers of Grahamstown to the highest levels of South African judicial life.

Mpati's connection to Grahamstown was not incidental. Although born in Durban, he grew up in the Eastern Cape, attended school in Fort Beaufort and Grahamstown and later studied law at Rhodes University. After completing his legal studies, he served articles in Grahamstown and was admitted as an attorney in 1985. In 1989, he was admitted as an advocate and became a member of the Eastern Cape Bar. He practised at the Bar in Grahamstown until 1993, when he joined the Legal Resources Centre as in-house counsel.[13]

That journey matters. Mpati's career was not a straight line of privilege into office. It was shaped by the Eastern Cape, by Grahamstown, by practice, by the LRC, and by the difficult legal work of a country in transition. He entered the profession as an attorney, crossed to the Bar, practised in the Society's chambers, and then took the discipline of that practice into public interest law. The result was not merely a lawyer of technical skill, but one whose professional formation was rooted in both advocacy and service.

In 1997, Mpati was appointed to the Eastern Cape Division. In 2000, he received permanent appointment to the Supreme Court of Appeal. He became deputy president of that court in 2003 and, in 2008, its President. His rise from the Bar in Grahamstown to the Presidency of the Supreme Court of Appeal is one of the great institutional stories associated with the Society. It reflects not only personal achievement, but the calibre of practitioner that the Eastern Cape Bar has been capable of producing.[14]

> "A PRACTITIONER FORMED IN THE EASTERN CAPE, WHO CARRIED ITS DISCIPLINE TO THE BENCH, AND FROM THERE HELPED SHAPE THE LAW OF THE COUNTRY."

One of the judgments through which Mpati JA's judicial voice firmly carries thorugh is *S v Mahomotsa*.[15] The matter concerned sentence in a rape case and required the court to consider the proper approach to substantial and compelling circumstances under the minimum-sentencing regime. Mpati JA's judgment is careful, restrained and firm. It recognises the gravity of rape, the invasion of dignity and bodily integrity which it entailed and the need for sentencing courts to avoid reasoning which trivialises that harm.

The importance of *Mahomotsa* lies in that balance. Mpati JA did not approach sentencing as a blunt exercise. Nor did he allow mitigation to be framed in a manner inconsistent with the seriousness of the offence. The judgment reflects a disciplined appellate approach to sentence: one alive to proportionality but unwilling to permit the dignity of complainants to be diminished by outdated or irrelevant considerations.

For the Society, Mpati's legacy is profound. He represents the movement from local practice to national judicial leadership; from the discipline of the Bar in Grahamstown to the Presidency of the Supreme Court of Appeal. But his legacy is not simply found in the title he held. It is found in the kind of law to which his career contributed: law that is careful in method, humane in effect and conscious of the people whose lives are altered by judgment.

That is the standard his career leaves behind. The advocate must be precise, but not cold; independent, but not detached from justice; ambitious in excellence, but grounded in service. In Lex Mpati, the Society sees one of its finest examples: a practitioner formed in the Eastern Cape, who carried its discipline to the Bench, and from there helped shape the law of the country.

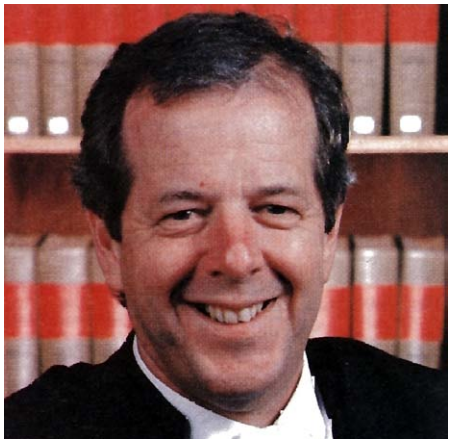
JOHAN FRONEMAN

Johan Froneman's place in this history is a natural one. He is one of the clearest examples of an advocate formed in Grahamstown who later helped shape the constitutional law of the country.

Froneman J grew up in the Eastern Cape and, after completing pupillage at the Pretoria Bar, commenced practice as an advocate at the Eastern Cape Bar in Grahamstown in 1980. He took silk in 1990 and was appointed to the Eastern Cape High Court in 1994. He later served as Deputy Judge President of the Labour Court and Labour Appeal Court, acted in the Supreme Court of Appeal and was appointed to the Constitutional Court in 2009.[16]

That career gives Froneman a particular place in the Society's story. He practised at the Eastern Cape Bar during the closing years of apartheid, entered the Bench in the year of South Africa's constitutional transition and later joined the Constitutional Court at a time when that court was developing the practical content of constitutional democracy. His judicial career therefore sits across two legal worlds: the old order in which he practised, and the constitutional order which he helped to build.

It is difficult to choose only one judgment through which to measure his contribution. Froneman J wrote many significant judgments during his time on the Constitutional Court. Academic commentary records that he penned about



> "HE REPRESENTS THE ADVOCATE WHO CARRIED THE DISCIPLINE OF GRAHAMSTOWN PRACTICE INTO CONSTITUTIONAL ADJUDICATION. HIS JUDGMENTS SHOW THAT CONSTITUTIONAL LAW IS NOT RHETORIC. IT IS METHOD, PRINCIPLE AND CONSEQUENCE."

70 judgments during that period, including unanimous and majority judgments as well as concurrences and dissents.[17]

For present purposes, however, *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* is perhaps the clearest example of Froneman J's judicial method. In the first judgment, Froneman J dealt with the validity of the tender awarded for the payment of social grants. In the second, he dealt with the remedy to follow from that invalidity. Both judgments were unanimous.[18]

The force of *AllPay* lies in the discipline it brought to procurement law. Froneman J rejected the idea that irregularities in a tender process could be excused too readily once the outcome appeared convenient. He insisted that legality in procurement is not a technical obstacle to administration, but the very condition upon which lawful public administration depends. At the same time, in the remedy judgment, the court did not ignore the practical consequences of invalidating a tender responsible for the payment of social grants. It fashioned relief that vindicated legality while protecting grant beneficiaries from disruption.

For the Society, that is the importance of Froneman. He represents the advocate who carried the discipline of Grahamstown practice into constitutional adjudication. His judgments show that constitutional law is not rhetoric. It is method, principle and consequence. In that, his career reflects one of the highest aspirations of the Bar: to produce lawyers capable not only of arguing the law, but of shaping it.

GroundUp / Ciaran Ryan

Morné van Rooyen

Vysotksi

CONCLUSION

These six judges do not exhaust the Society's story. They are examples of it.

Through Kotzé, one sees the early insistence that public power must be subject to law. Through Maasdorp, one sees the discipline of precision: the careful formulation of principle and the understanding that legal language matters because legal consequences flow from it. Through Howie, one sees the ability to take difficult legal concepts and give them lasting shape, so that principle may be applied with clarity rather than confusion. Through Leach, one sees the determination to remained focused on the law above all else, and to insist that legal principles are adhered to in a pragmatic, but firm manner. Through Mpati, one sees the movement from Grahamstown practice to national judicial leadership, with a career marked by service, humanity and appellate excellence. Through Froneman, one sees the advocate's discipline carried into constitutional adjudication, where legality, fairness and rights are given practical force.

Each of them was connected, in his own time and in his own way, to the Eastern Cape Society of Advocates. Some passed through the Society in its earliest form. Others practised in the chambers of Grahamstown during apartheid and transition. Others carried the Society's discipline from the Eastern Cape into the Supreme Court of Appeal and the Constitutional Court. Their careers were different, but the thread is the same: the Bar formed advocates whose work did not end at the lectern. It travelled with them to the Bench, and from the Bench into the law reports.

That is why this history is worth celebrating. The Society's contribution cannot be measured only by its age, its chambers, or its roll of members. It is measured also by the law its members helped to shape: constitutional supremacy, civil procedure, administrative legality, contempt, public appointments, procurement, social justice, consultation, sentencing and the protection of rights.

In celebrating these judges, the Society celebrates more than individual achievement. It celebrates a tradition of advocacy that values independence, precision, clarity, courage, service and principle. These are the qualities which shaped them at the Bar, and which they, in turn, carried into the law of South Africa. A

Notes

1 https://www.ecbar.co.za/
2 "The Grahamstown Bar – a brief history" by IJ Smuts SC, April 2004.
3 *Brown v Leyds NO* (1897) 4 OR 17.
4 Derek van der Merwe, "Brown v Leyds NO (1897) 4 OR 17: a constitutional drama in four acts. Act four: Kotzé delivers his judgement, Kruger dismisses him, Milner prepares for war and Brown seeks international redress" (2018) Fundamina 24(2).
5 L Wildenboer "The judicial officers of the Transvaal High Court, 1877–1881" 2019 Fundamina 25(2).
6 "The Grahamstown Bar – a brief history" by IJ Smuts SC, April 2004.
7 *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16.
8 *Advocate*, August 2008, Tribute by RJW Jones. *Advocate*, April 2003, Names in the News, by Eksteen SC.
9 *Supra* Eksteen *Advocate* article.
10 *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA).
11 https://www.supremecourtofappeal.org.za/index.php/judges/judges-of-the-supreme-court-of-appeal/16-judges/leach-lorimer-eric
12 *Director of Public Prosecutions, Gauteng v Pistorius* 2016 (2) SA 317 (SCA).
13 *Advocate* December 2019, Tribute to Lex Mpati, Craig Watt-Pringle SC.
14 *Supra* Watt-Pringle.
15 *S v Mahomotsa* 2002 (2) SACR 435 (SCA).
16 https://www.concourt.org.za/index.php/judges/former-judges/13-current-judges/76-justice-johan-froneman
17 Tribute to Froneman, J Cameron, PER (27) 2024, https://scielo.org.za/scielo.php?lng=en&nrm=iso&pid=S1727-37812024000100029&script=sci_arttext
18 *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC); *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2014] ZACC 12; 2014 (4) SA 179 (CC).