

# Obituaries

## *John Mowbray Didcott (1931–1998)*

John Didcott spent 23 years as a judge, first in the Natal Supreme Court and, since 1994, as a member of the Constitutional Court. He became a human rights legend because of his strong support of justice and individual liberties.

During the worst years of apartheid his scathing attacks on the unjust policies of the previous government were pored over with delight by opponents of those policies. Chief Justice Ismail Mahomed recalls his 'sparkling moral courage' and says Judge Didcott's instinctive abhorrence of injustice will ensure he is remembered as one of the greatest figures of South African law.

John Mowbray Didcott was born in Durban on 14 August 1931, and matriculated in 1948 from Hilton College. He graduated from the University of Cape Town with a BA degree in 1951 and an LL.B in 1953. But he was not merely a successful swot – he also flourished in student politics. In his first year he was elected to the Students' Representative Council and served as its president from 1952 to 1954. He was also vice-president of the National Union of South African Students in 1953 and 1954, and its president for the next two years.

Durban attorney Graham Cox, a long-time friend, recalls those days with relish. 'He was a brilliant fellow, but in addition to being an incredible scholar, he was a magnificent speaker – quite superb as a demagogue. When he, Zach de Beer and Sharkey King (now judge-president-elect of the High Court in Cape Town) debated the government's race policies, there would be standing room only in Jamieson Hall. All three were strongly opposed to the official line, but also made it a principle to disagree with each other on everything.'

After graduating, the young Didcott was admitted to the Bar in Cape Town, but then joined the *Cape Argus* for a year as Supreme Court reporter. That experience alerted him to the difficulties and challenges faced by journalists and the media, and he was always an avid reader of newspapers, although often critical of their shortcomings.

From Cape Town he moved to Durban where he joined the Bar, but soon after setting up chambers there he was tipped off that the security police intended detaining him, and he skipped the country to Southern Rhodesia, where he spent some months as a prosecutor until it was safe to return.

His time at the Durban Bar was, according to Cox, one success story after another, and he was in great demand as a commercial lawyer. In 1975, at the

comparatively young age of 44, he was invited to take an appointment on the Bench. The offer may have been flattering, but for someone with strong liberal principles it involved careful thought. He had to balance the problem of administering apartheid legislation with the possibility of making a difference on the Bench and somehow helping to alleviate the impact of unjust laws.

Convinced of the useful contribution he could make, he accepted. However, his decision – and that of like-minded judges – was publicly challenged some years later when Natal University law professor Raymond Wacks urged that all ‘moral judges’ should resign. Judge Didcott had no time for this view. ‘It might be a fine protest,’ he said, ‘but it would soon dissipate, and the vacancies would be filled by people who had no qualms about injustice. If we argue that moral judges should resign, we can no longer pray when we go into court that we find a moral judge on the bench.’

His long record shows that he was often the answer to the prayers of those who felt the legal system had deserted them – he did indeed make a difference. He began rather tentatively, the year after his appointment, with the case of Durban detainee Harold Nxasana, in which he wrung his hands about detention laws, but found he could take no action in this case. Five years later he was more confident when he had to consider the banning orders of sociologist Fatima Meer and her son-in-law, convicted of attending a private dinner party. Using his devastating linguistic and legal skills he demolished their restriction orders, declaring them void because of their ‘vagueness’. This judgement was overturned on appeal.

Then came his 1983 decision, with two other judges, in the case of Beauty Duma, an unemployed woman found to have been idle and undesirable under the Black (Urban Areas) Consolidation Act, and which led to the government scrapping these sections. Under the law, idle and undesirable people could be jailed and made to perform hard labour for a year, but the law was poorly drafted and Judge Didcott tore it apart.

His legal contribution, however, went beyond human rights cases. His decision in the case of Roffey, an estate agent who joined a rival company, laid the standards for a restraint of trade by changing the onus of proof – a decision seen by some as one of the most significant changes in civil law for many years. He was also responsible for a decision which sought to bring clarity and justice to the question of *pro deo* representation for indigent accused persons in non-capital cases. Once again his passionate arguments for justice were overturned by the Appeal Court.

Counsel often found him less than easy in court. His intolerance of shoddy work and sloppy argument was legendary, and when he pushed his glasses high on to his forehead, then rubbed his eyes, even the best-prepared counsel was in for trouble. In the same way Cox remembers the student Didcott and his cronies going at each other with relish, so too in court the judge would often battle it out with counsel – but always with the intention of reaching a better decision. ‘He would argue both sides – with counsel, with the witness, even with himself,’ a Maritzburg attorney remembers.

Judge Chris Nicholson, who appeared before Judge Didcott many times while still at the Bar, describes him in action as being ‘like a chess Grand Master, simultaneously playing a number of matches with counsel.’ A member of the

Durban Bar, however, recalls that the judge was not always the winner. 'On the right trail he was magnificent. He was superb – his mastery of language and incisiveness of thought were unsurpassed. But just sometimes, when his judgement went wrong in a case, he would fly off with passion and vigour after a red herring.' But when he was wrong, the judge was quite prepared to admit it, and to do so with a flourish. For example, in the mid-eighties he felt he had to back down from his decision in a previous case. 'Having given the topic more careful thought,' he said, 'I recant altogether, borrowing the apologia of [Baron Bramwell in 1872] who, when he found himself similarly embarrassed, announced 'The matter does not appear to me now as it appears to have appeared to me then.'

Judge Didcott stirred controversy among many of his colleagues because he never handed down the death penalty. Was he merely lucky in his cases? Did he creatively interpret his judicial oath to justify not imposing the death sentence? Were other judges left to hear the really bad capital cases which he had somehow managed not to take? These questions are still debated.

Whatever the answer, he made no secret of his opposition to capital punishment. In his decision on a death penalty case before the Constitutional Court, Judge Didcott wrote: 'South Africa has experienced too such savagery. The wanton killing must stop before it makes a mockery of the civilised, humane and compassionate society to which the nation aspires, and has constitutionally pledged itself. And the state must set the example by demonstrating the priceless value it places on the lives of all its subjects – even the worst.'

Judge Didcott was an enthusiastic movie buff, and enjoyed carpentry and the pop music of the 50s and 60s. But it was his passion for the law and justice that made him 'one of the great judges of our generation', according to Constitutional Court president Arthur Chaskalson. Judge Didcott's commitment to justice led to a number of honorary doctorates and other awards. In 1991, the University of Natal awarded him an honorary doctorate. The Orator said: 'This university seeks to honour a judge who has striven for justice in a system of injustice. Under ordinary circumstances, it could be said that this is what all judges are appointed to do. Under [our circumstances], however, it is both a comment on the legal system and on Judge Didcott that he is one of the few who are prepared to do their appointed jobs.'

Judge Didcott leaves his mother Flo, his wife Pam, two daughters and four grandchildren.

CARMEL RICKARD

(By courtesy of the *Sunday Times*.)



(3) John Didcott