

6th January 2012

Int This is an interview with Advocate Geoff Budlender and it's the 6th of January 2012. Geoff, thank you so much for agreeing to participate in the Constitutional Court Oral History Project, we really appreciate it.

GB Thank you.

Int I had the good fortune to interview you previously for the Legal Resources Centre Oral History Project, and in that we did take somewhat of a biography. But I wonder for the purposes of this project, if you could talk a little about early childhood in terms of family background, processes of political and social conscientisation, and events that may have shaped you to take on a legal trajectory?

GB Okay. Well, I was born in Port Elizabeth in the Eastern Cape to a middle class family. My parents were liberal-minded people. They were both active in the Progressive Party, so I grew up in that atmosphere. And really became politically engaged when I went to university. I was, in fact, initially involved with the Progressive Party as a...in my early days at the university, but I became involved in student politics and I became president of the Students Representative Council at the University of Cape Town. I then became, when the leadership of the NUSAS (National Union of South African Students) was banned in early 1973, I became, in effect, acting president of NUSAS, that's the National Union of South African Students, for that year. My political trajectory, I think, was influenced very heavily by my time in student politics, particularly by the people in the Black Consciousness Movement and particularly by Steve Biko, whom I came to know very well and who had a major impact on my view of the world and of South Africa. He really changed me. So he was very significant in my life, and so were other people involved in student politics at the time.

Int How did Steve Biko change you?

GB Well, he changed me because I came from this white liberal background where the premise was that if only black people were like us everything would be fine. Steve Biko showed that black people didn't want to be like us, they wanted to be like them. They wanted a liberation of a kind which was much more fundamental than simply becoming integrated into white society. And they were very challenging and very demanding. They challenged all of my assumptions about how I was, where I'd come from, and where the country was going. And Steve, in particular, had this capacity to be on the one hand

strongly rejecting of the liberal politics, which NUSAS (National Union of South African Students) had slipped into in the early seventies. But on the other hand able to be the friend of people who were in NUSAS (National Union of South African Students), like me. And he could be your friend while being at one level your political opponent, and at another level your political comrade. He had extraordinary human qualities. He wasn't the only one, but he was different. He was just a special person. And so that changed my view of what I wanted to do. And what they taught people like me was that actually this was not a struggle which was going to be led and won by white liberals, it was going to be led and won by black people, and what whites like me had to do if they wanted to be useful in this process was to find ways in which they could be supportive, without in any way demeaning themselves but saying there was a broader struggle and the question was how they could fit in and support it. That really fitted in with what happened to my personal life, because I started as a medical student at UCT (University of Cape Town). I wasn't good at that, I didn't enjoy it. Meanwhile I was getting engaged with lawyers all the time in my political work, and I was seeing that they could do something really useful, because they were protecting us, defending us when we were engaged in protests and helping us in many ways. And so I switched to law in, I think, 1971... '71, yes. It was a very deliberate intention of learning about how law could be useful politically in the struggle against apartheid. And that's how I came to do what I did.

Int I just interviewed Dennis Davis, who spoke at length about your leadership qualities, and particularly during the sit-in at the church, and I wondered whether you could talk a bit about that; it's such an important historic event?

GB Well, that was an event in 1972, when I was president of the SRC (Student Representative Council) at UCT (University of Cape Town). Students had always protested and demonstrated on the steps of the cathedral. It was a traditional thing, which UCT (University of Cape Town) students do and frankly no one took a whole lot of notice of it. What happened in '72, was that there were protests on the black campuses, early '72. Black students were expelled from the universities. Their protests were in the first instance about the quality of the education they were receiving. Although of course it was also broader than that. And what we did was, we in response to that we launched what we called a free education campaign in June '72, which involved producing pamphlets, demonstrating, writing articles, all the usual sorts of things. One of the events was the usual sort of demonstration on the steps of the cathedral. I wasn't there at that demonstration, it seemed to me a good thing to do but I was busy with other things and it was not terribly interesting. And inexplicably the police attacked the students. It had never happened before. And they attacked the students quite viciously, in public sight. This wasn't black people being attacked in the townships, out of sight of the white media. This was right in the heart of Cape Town. Mainly white students being attacked, and attacked brutally by police in public sight. And it became a major issue in Cape Town, then there were also demonstrations

elsewhere in the country. And Cape Town was in turmoil for a while. Many white South Africans couldn't believe what had happened. I still today don't really understand why the police did what they did. It's inexplicable to me. And I was thrust into the position of having to lead this whole process because I was the president of the SRC. And so we had further demonstrations at the cathedral, we had marches, we had all sorts of things, big public meetings. And I became the person at the front of all of this, really as a result of the position I held. So it was an extraordinary time. It also had a big impact on my life. The white students were given disproportionate attention by the government. One has to remember this is the early seventies. The ANC's entirely underground and it's only just beginning to emerge from underground. Black trade unions are just beginning to emerge. If one is looking for extra parliamentary opposition, where do you find it? Well you find it amongst the students and in the churches. So we received a disproportionate attention given how many of us there were and who we were. But we became quite significant players for a while.

Int You also, quite early on, had thought of the idea of a public interest law organisation, the LRC (Legal Resources Centre), quite independent from Felicia (Kentridge) and Sydney (Kentridge), and Arthur (Chaskalson), and I wondered what were some of the events that may have led to you thinking along this route?

GB Yes. Well, I graduated in 1975, and I went to work for Raymond Tucker, who was an attorney in private practice in Johannesburg, who as a large part of his practice was doing political trial work. And in '76, '77, and '78, I was engaged very substantially, firstly in the trial of five NUSAS (National Union of South African Students) people in '76, and then in the trial of Tokyo Sexwale and others in '77 and '78. The work was very interesting and I thought worthwhile but it was entirely defensive, and I thought that there was really a need for finding ways in which the law could be used more positively to open up space. In '78 I went on a trip to the US, under the auspices of the state department, curiously. They had a big international visitor programme at the time and I was one of those that was given that opportunity. And I spent a month or six weeks in the States and I visited a lot of public interest lawyers there. I visited NAACP (National Association for the Advancement of Colored People) Legal Defense Fund, the ACLU (American Civil Liberties Union), all the usual suspects. And I was very interested in what they were doing, it seemed to me it really provided interesting models for what we might be able to do. So I became very keen to be part of something like that. And as I was thinking about it, a lot of other people were talking about it. And one thing led to another and it led to this part of the energy, which led to the establishment of the LRC (Legal Resources Centre). I had always wanted to do this. I was part of a discussion group in which Felicia was involved, and in which we were trying to plan something. Arthur (Chaskalson) then became engaged. One of the days, we were in the middle of the Tokyo Sexwale trial, which was in Pretoria, and one day he said he wanted to drive just with me to Pretoria and

the others should go in separately. And in the car he said he was planning to be part of this new organisation, and he wanted to know whether I would be interested, whether I'd think of joining it. And I said, "Yes, I'm in". And he was quite startled, he said, "Don't you want to think about it? don't you want to discuss it?" I said, "No, I'd already known that's what I want to do". And that's how I got in. I was in on the ground floor, which was fantastic.

Int Wonderful. And you've spent and dedicated so much of your life to the Legal Resources Centre and that's well documented. Geoff, I just wondered, in terms of particular legal trajectory, during the height of the eighties and just prior to transition, what do you think are some of the highlights?

GB For me the highlights were two things. First the campaign around the Pass Laws, leading to the abolition of the Pass Laws in 1986. I always thought they were one of the pillars of apartheid. I think they were. With the Pass Laws gone the whole system became much more difficult to sustain politically and economically. So we worked on the Pass Laws right until the end of...until 1986, they were repealed. That was a big thing in my life. The other big impact on me was the work with rural communities, facing forced removal. Which again I thought was one of the pillars of apartheid, because this was the foundation of territorial segregation. And what I learnt...I learnt an enormous amount from the forced removal work about working with rural communities, which I'd never done before. I learnt about the way in which political mobilisation could work with legal work to produce quite unexpected results. And so those were two similar experiences for me personally. The Pass Laws was a systematic planned thought through legal campaign, which of course was then parallel to things that were happening politically, but actually trying to work quite systematically to change the law through incremental steps through litigation. And the other was, doing work around the political consequences of resistance to injustice and how the law could be part of that. And that in a way laid the foundation for what I did afterwards. I mean, what I did post '94 was in its style quite similar to what I was doing before because that's what I'd learnt to do.

Int Right and I'll come back to that; I'm curious to understand that. In the early nineties, certainly leading up to 1990 and change, did you in any way envision that political transition would happen in your lifetime?

GB I didn't really think so. It seemed absolutely hopeless. In the mid...second half of the 1980s, we had successive States of Emergency, which were very depressing. For the first time I started to wonder whether there was any point in being a lawyer. Because the law is in part about a restraint on public power. And there was no longer any restraint in that arena. The Public Safety Act said that the President could make whatever Emergency regulations he liked. And the Appellate Division had in a succession of judgments said that was fine, there was no problem with even the most extreme regulations. So the

law was what the president said it was. Well, that's pretty well contrary to any notion of legality. And during the Emergencies I started to have doubts about whether this was something I could continue to do, whether it was really meaningful. And then it suddenly started turning around very quickly. I certainly hadn't anticipated it and I didn't think it would happen so quickly and I had no great optimism it would happen in my lifetime. I suppose I would have hoped...well, obviously I was hoping but I had no great optimism about it. It came as an astonishing event, an astonishing process.

Int Were you aware that Dennis Davis had made a speech at the Rotunda about change would happen in 1990? (*laughs*)

GB No (*laughs*). Is that what he said? (*laughs*) Well, there you go. But Joe Slovo was famous for having said, somebody asked him in the 1970s, when is change going to come in South Africa? And he said, "I'm very annoyed about that question, I've been asked that question for many years, and whenever I'm asked I say, in five years' time. I give you the same answer, in five year's time." (*laughter*). I didn't know Dennis predicted 1990.

Int He said in a year's time. And he was quite right.

GB Well, in 1989 it was possible to see things were happening. No, sure, in 1989 it was already turning quite fast. But in 1987 or 1986, it was a different proposition.

Int From 1990 to 1994, what was your involvement, if at all, in terms of the negotiations process?

GB I played a part in CODESA. I was the Rapporteur for one of the working groups at CODESA, on the re-incorporation of the homelands. So I was in that. And I had a few small marginal involvements in the Constitution making process. On the odd occasion I was asked for my advice or view on particular things. But I wasn't in the negotiations at all, and I was at the LRC (Legal Resources Centre) doing my usual business for the most part.

Int In terms of being asked for your views in the Constitution making process, I wondered whether you could talk about... were there particular things that you contributed during that time?

GB I think my main contribution was in the area of land and property rights, which was the thing that I was interested in, or most interested in. And we were, at that time, we set up a working group on land restitution, of which Kate O'Regan was part, and Aninka Claassens was part of it. I think Derek

Hanekom, who became the Minister, was part of it. So I was involved in trying to formulate new land legislation. In fact, I was part of a broader legislative review process. The ANC set up a legislative reform working group, dealing not with the Constitution but dealing with regular legislation. And I convened that for a while. We were looking at law, and all sorts of areas of law, trying to figure out what would need to be done to change the law. We set up sub groups which were trying to prepare drafts on various aspects; the idea being that something would be ready when the elections...immediately after the elections were held. In the event the only law, which found its way through that process was the Restitution of Land Rights Act, which was where I was working. But I was part of a broader process trying to figure out what law reform was necessary. We didn't make very much progress with that.

Int And the need for the Constitutional Court, what were some of the debates, if at all, around that?

GB Well, I wasn't really very much part of that but the great debate was whether we would have a specialist Court. I was, I think, quite early persuaded that it was necessary, both because of the personnel of the SCA (Supreme Court of Appeal), and its bad record, and the fact that we needed to transform the judiciary and needed to start at both ends, at the top and the bottom. And a new Court would create that opportunity. If one was going to wait for a slow process of change to the SCA (Supreme Court of Appeal), it would take a very long time, and we wouldn't get the right people on to the Court. It seemed to me what was very persuasive was the argument that this would be a different sort of Court, with different sort of members, and that's what happened. I thought the arguments were very persuasive and I think, in retrospect, they were right.

Int When you say different sort of Court, are you suggesting the break with the reputation of the courts generally also?

GB Well, it was partly a break from the reputation of the courts and it was partly a recognition that we had to break from the view that the only people who could be judges were people who had been advocates for a long time. We had to broaden the pool, bring in academics, activists, attorneys, not just advocates. And so one wanted to create a much broader pool, because if you created...even if you created a new Constitutional Court, but you said the criteria for appointment were as before, you would appoint the same people as had always been appointed. and so it was partly about getting a different sort of people on the Court, and also about the need for a Court which represented a decisive break from the past, which wouldn't feel the need to defend what had happened in the past, which would be unembarrassed by any of that baggage and would be able say quite cheerfully, well that was wrong. That was very, very important. Because the paradox of the transformation was, it was a legal change, it wasn't a revolution. That carried

with it and carries with it the risk of that you continue the old into the new. And to some extent you have to continue the old into the new because of the need for stability, but it carries with it the risk of reinforcing existing power relations, existing inequalities, existing dispossession. It's a deeply ambiguous process that we went through, the notion that the old parliament voted itself out of office on the basis that all existing laws would remain enforced, is a strange way to go. It was the right way to go I think, but one needed new institutions to avoid that just becoming more of the same.

Int I'm also curious...you have a close association with Arthur (Chaskalson), and did it come as a surprise to you that Arthur (Chaskalson) was declared President of the Court?

GB Well, there was all this speculation. I hadn't really thought about it. And one day we were at the LRC (Legal Resources Centre) and he asked me to come and see him in his office; he was there and I think George Bizos was there. And he said in his typical way, he said, "I don't know if you've seen there's been all this speculation in the newspaper that I might become President of the new Constitutional Court?" And I just laughed, I said, "Yes, well, you know, newspapers." And he said, "well, I've just been invited (*laughter*). I said, "oh, okay, very good, well done." I was completely taken aback. Not shocked, but taken aback. Because he announced it in this typically modest Arthur (Chaskalson) way. I thought he was going to say how annoying it was that the newspapers engaged in all this speculation. But that purpose was to say he was doing it. So I was a bit surprised, but I wasn't...not because I thought it was inappropriate or even that it was surprising that he should be chosen. I'd just never really applied my mind to it. Looking back he was...you know, there were really only two possible choices, him or Ismail Mahomed. And it's not surprising that he was chosen, not at all. But I hadn't even thought about it.

Int What do you think of the deep sense of disappointment that Ismail (Mahomed) suffered as a consequence of not being chosen?

GB Well, I think it was shattering for him. I didn't know Ismail (Mahomed) very well, I had worked with him, he'd been a Trustee of the LRC from its inception. I had huge respect for him. I think it was a shattering blow for him, from which he never fully recovered. I think he was very hurt by it. I'm told...people say that he had been told that he was going to get the job. Whether that's true I don't know. But he was clearly very hurt by it.

Int Geoff, what do you think of the choice of the four sitting judges at the time?

GB Well let me remind myself who they were...they were Johann Kriegler who was a very good choice. There was Tholie Madala, whom I didn't know, who turned out to be quite a conservative man, but I think was an asset to the

Court, bringing a different experience to it. There was Richard Goldstone, who was not a surprising choice. Who was the fourth?

Int Ackermann.

GB And Laurie Ackermann, also a slightly more surprising choice. The person who was the surprise is of course John Didcott, that he wasn't appointed, and I think he was very hurt. But no-one has the right to these positions and John (Didcott) was appointed not long after that, yet by then he was very ill. And Ismail (Mahomed) was one...wasn't Ismail one of them.

Int It wasn't Kriegler, Kriegler was chosen later...

GB Did he come in later?

Int It was Ismail Mahomed.

GB It was Ismail (Mahomed), well, he was an obvious choice. Seemed to be a good selection. Other than John Didcott I don't know of any other people who would have been particularly suitable. And John Didcott, in fact, played a very limited role in the Court. It turned out that he...partly he was ill, but also partly I think it wasn't his sort of institution. It didn't really seem to suit his personality being part of a large group of eleven people. He liked to run his own court, I think.

Int in terms of that, are you referring specifically to the way in which counsel experienced him?

GB Ja, it's my judgment of how influential he was on the Court, which is based just on reading judgments and being in the Court and watching what was happening, it seemed to me he didn't become a central player as one might have expected, given that he was so smart and very experienced as a judge, one might have expected him to play a very central role. But he didn't. I don't know why...I don't think he did.

Int How aware were you of some of the debate and some of the discourses, particularly around the JSC (Judicial Service Commission) interviews?

GB I was...it was really, I was on the margins of all of that. I was...had my head down at the LRC (Legal Resources Centre). I watched the debates...I mean, I watched in the newspapers what happened, I didn't attend the interviews, but it really passed me by, by and large.

Int I'm curious, it seems to me that you may have been preparing the LRC (Legal Resources Centre) for engagement through the Constitutional Litigation Unit and I wondered whether you could talk a bit about that, that process of preparation?

GB Well, what we were trying to work out was, it was a very curious time. Our friends were going to be in government and it became clear that our friends were going to be in the courts, increasingly, and particularly in the Constitutional Court, and we were having...there were lots of opportunities for us to be involved in drafting the new legislation. We were very clear at all times that we would remain critical of the new government; critical but supportive, I think was our view. But there was never any thought that we would no longer be needed. You only had to live here to know what the needs were going to be. But we were trying...so we were part of building a new constitutional order, and I think what we saw our role as, was that there would be a new constitution with new rights, and our job was to make those rights real. And sometimes that would involve supporting government and defending it against reactionary forces, and sometimes it would involve pushing government to do what had to be done. I thought there would be more work than there was in the end in protecting government programs. And I think that partly reflects the fact that the courts themselves, like the Constitutional Court, didn't need much assistance in that regard. But also that curiously and surprisingly the right-wing didn't really take to the courts as a site of struggle. They hadn't learnt the lesson, which we'd learnt – some of them I think have since learnt it – but they were surprisingly passive. We all anticipated huge battles around the property clause, and that never materialised. That's one of the great mysteries of life that although you had significant legislation dealing with land reform, water law reform, mineral rights reform, there's been no substantive challenge to any of that legislation. I would not have expected that.

Int In terms of building a cadre of people who would have been schooled in constitutional jurisprudence, how did you go about that in terms of building up the Constitutional Litigation Unit?

GB Well, what happened was it had a particular history. We were muddling along, which we'd always done, we were all trying to learn about the Constitution, and I had a visit from John Healy of Atlantic Philanthropies – I didn't know then that that was who he worked for – who said if you could close your eyes and wish for something that you would do at the LRC (Legal Resources Centre), which is different, what would you do? And I closed my eyes and thought, ahah, what we need is a specialist constitutional litigation unit, which will run litigation and which will train us and support our offices, and we need Wim Trengove to run it. And so I said, that's what I want, I want a Constitutional Litigation Unit with Wim Trengove. And John (Healy) then said,

well you should put up a proposal to us, which we did. It seemed to me there was no prospect of getting Wim (Tregove), but I discussed it with Felicia (Kentridge), who said, "Well, let's go and see him". I said, "Don't be bloody mad, he won't be interested". She said, "Let's go and see him". We went to see him and to my astonishment he was interested, and that's what led to it. And the CLU (Constitutional Litigation Unit) really guided the work of the LRC (Legal Resources Centre) after that. The idea was that it would be a resource for the LRC (Legal Resources Centre) offices and that it would litigate strategically, and I think it did that quite successfully over the years. It played a big role in the emerging jurisprudence.

Int In terms of the first case that the Constitutional Court took, the Makwanyane case (*S v Makwanyane and Another*), I wondered whether you could talk about that, and the social environment in which it occurred?

GB That I was actively involved in, and it was really the only case I was involved in, in the Constitutional Court, before I went to Land Affairs, which was in '96. We were invited by the Court to represent the accused or the appellants. And, I can't quite remember how the invitation came, whether it came from...I think it went to the Bar Council in fact, and from there to the LRC, I'm not quite sure. In any event, Wim (Tregove) led the team, Thandi Orleyn and I were the attorneys, and that was the first opportunity to engage in a substantive way with the Constitution. It was a curious case (*S v Makwanyane and Another*), the mood of the country was...I think if you'd taken a vote people would have voted in favour of keeping the death penalty. But there was a space open and everyone knew that the Constitution had changed things. And the Constitution deliberately left open the question of the death penalty, or supposedly left it open. They left it to the courts. And so we did an enormous amount of work in gathering comparative experience and comparative law around the issue. The American experience played quite large...looking back it may be the last time...I would have to think of other cases, but it may be the first and the last time that American jurisprudence really had a material impact on our jurisprudence, because where were we going to borrow from? There was obviously a lot of interesting learning in the US, that's where it had been litigated uphill and down dale. The Court quite quickly moved away from American jurisprudence, but it was material there. We got a group of American lawyers to put in an amicus brief, which was an innovation. And it was the only case I've ever been involved in, I think, in which I didn't meet my clients. Certainly the only case in which I was involved as an attorney, in which I didn't meet my clients. And I didn't really want to meet them. They had committed quite nasty murders, and I thought I don't really want to meet them, I'm just going to...we're going to fight a legal case. In retrospect that was stupid. But I felt quite twitchy about it and we kept our distance and now it's quite embarrassing to think that. I mean, the notion that we were...we were after all representing them, and we never met them. I don't think any member of our team ever met (T) Makwanyane and his co-appellant (M. Mchunu).

Int Why do you think that was?

GB I didn't want to engage with them. I thought what they'd done was awful and I thought they were probably very awful people, and I didn't want to have any engagement with them. I just wanted to argue a legal question. I mean, it's pathetic. But it was the first illustration of something that Jack Greenberg said, I will never forget, Jack, in the early days, as we were getting towards the Constitutional...or perhaps immediately after we'd got it, he said to me, "There's one thing that's going to change in your life, that when you have a new Constitution, you're going to find you have many clients you don't really like. You've always represented people whom you like against apartheid, now you're going to find yourself representing people you don't like in defence of principle, and you'd better get used to that".

Int Interesting.

GB Well, I didn't get used to it, at least in time for the death penalty case (*S v Makwanyane and Another*). But it was a tremendous experience the death penalty (*S v Makwanyane and Another*) case, it was an absolutely riveting hearing. It was fascinating.

Int What were your memories of having to appear before eleven judges?

GB Well I didn't appear, I was the attorney. Wim (Tregrove) did the argument. Gilbert Marcus appeared for an amicus...well, there were various amici. Dennis (Davis) appeared. It was an overwhelming experience. I remember the judges walking in and Arthur (Chaskalson) looking very nervous, uncharacteristically nervous. And I remember the debate became very heated. The judges were much more active than one was used to in the regular courts. Particularly Ismail Mahomed and John Didcott, who hammered away at the Attorney-General. I suppose that's who John (Didcott) and Ismail (Mahomed) were, but it was unusual in a court. I remember at a certain stage, after they'd been hammering von Lieres for some time, appearing as the Attorney-General, I remember Sydney Kentridge saying in his dry way, "Mr von Lieres, I'd like to hear your argument" (*laughs*). And for about thirty seconds John (Didcott) and Ismail (Mahomed) were quiet and then they started again. They were the noisiest of the judges on that case...and that's a strong memory I have of it. At one level it seemed inevitable what the outcome would be, but at another level not. It was very intensely fought.

Int Why didn't you think?

GB Well it had to be won in the end because of who the judges were and because of what the Constitution said. I mean, the thought that those people could say it's fine to hang.

Int Why did you think that at another level it didn't...that it could have swung the other way...?

GB Well, because the judges listened very carefully to the arguments. I mean, you could see where Ismail (Mahomed) and John (Didcott) were. The rest were actually listening very closely, and engaging and asking thoughtful questions, and I don't know what the other members of our team thought but I wasn't overwhelmingly confident that we were going to succeed. Now, in retrospect, it seems obvious. But, you know, that was early days for that Court, one didn't know what that Court was going to be like. One has to remember our tradition of courts playing a very...taking a very narrow legalistic interpretative approach to the law, and there was nothing in the Constitution, which said explicitly that the death penalty was impermissible. And one could make a credible argument that if that had been intended that would have been said. And the fact that the Constitution makers left it open raised a question. In the end, now that we see how the Constitutional Court approaches the constitutional interpretation, the result is obvious. But it wasn't so obvious then.

Int Did you think at the time that this was a bold case to take on for a new Court?

GB Yes, it was, but they had to. They had to. It was an important symbolic statement that they took this on straight away. And it was bold. It would have been easier to start off incrementally but it felt like the right thing to do. After all people were going to be hanged. They were going to be hanged under the new order. You couldn't stop it unless the Court dealt with the question of whether it was permissible.

Int You went to Land Affairs after that?

GB Yes, I went to Land Affairs in, I think, April or May '96, and I was there until about January 2000.

Int So the case that you took on before the Constitutional Court thereafter, which case would that have been?

GB The first time that I was in the Court after that was *Grootboom (Government of the Republic of South Africa and Others v Grootboom and Others)*.

Int Right, interesting...

GB Which was some time in 2000. And that had been...the LRC (Legal Resources Centre) was already engaged but wasn't representing the litigants. The LRC (Legal Resources Centre) was going to represent amici. And, as I recall it...I can't remember the sequence of events...but in any event, Wim (Tregove) was going to argue it, and I was involved in the process of getting the amici together, discussing with the Human Rights Commission and the Community Law Centre.

Int Sandy Liebenberg...

GB Sandy Liebenberg from the Community Law Centre and the Human Rights Commission were our clients. And I was in Canada when I got a message from Wim (Tregove) saying that he wasn't able to...it had been set down for a particular day and for some reason he wasn't able to appear. I can't remember why, whether he was out...maybe he was out of the country, I don't know. In any event, suddenly I found myself thrown into it. I had never appeared in any court, other than the Magistrates' Court, or the Commissioner's Court before. I had been an attorney, was still an attorney, and attorneys hadn't been able to appear in the High Court until some time in the late eighties or early nineties. So this was my first appearance outside of the Magistrates' Court or the Commissioner's Court (*laughs*). That was quite an experience.

Int Were you nervous?

GB Ja, I was very nervous. I didn't know what to expect. I had done a lot of trial work in my younger days, a long time before...a long time before, I mean, in the eighties. And I don't think I'd appeared in a court for ten years. And so it was quite a...I was very nervous about it. But nervous but quite naively not as nervous as I might have been. I think now if I did it again I'd be much more nervous than I was then. So I was thrown in, and I didn't really know what to expect. And I didn't have the benefit of having watched that Court for the four years. The last time I'd seen the Court in action was in whatever it was, '95, I suppose, in *Makwanyane (S v Makwanyane and Another)*. So not only was I out of touch with litigation, I didn't have the feel for the Court that I would have liked. And so I had to prepare argument really without a strong sense of what sort of approach would appeal to the Court and what wouldn't.

Int And as it happened...

GB As it happened it went quite well. It went quite well. The space was left open for us in a way by the fact that the appellants, or the Grootboom (*Government*

of the Republic of South Africa and Others v Grootboom and Others) representatives, took quite a narrow approach to the issues. I had wanted to take a similar approach. I had said, it seems to me, it's a simple case of Children's Rights 28(1)(c), or whatever it is, 28(1)(c). And a friend in Canada had persuaded me, Bruce Porter, and said to me, "No, no, you've got to go for broke on this, this is a big case. You've got to go for the section 26 rights, and for the content of section 26(2)". And he persuaded me of that. So that was where we focused our argument. That field was wide open because no-one else addressed it. And it's a curious thing, I mean, people say that the LRC's (Legal Resources Centre's) argument was...played a decisive role in the outcome of the case. Actually very few of our arguments were accepted. I think what we did is we opened up 26(2) and we opened up a different way of looking at 26(2). But a large part of our argument was around the question of a minimum core content of the housing right. They rejected that. And so it wasn't so much what we proposed as the way of looking at it that we proposed, which I think opened things up for the Court. I was in America when the judgment was handed down, and I was quite disappointed. I thought the judgment was quite weak. As time passed I realised it was an extraordinary judgment, it was quite extraordinary in how far-sighted it was. It's still of huge importance today. Still one can go back to it and find all sorts of things in it which were really profound. So it's an extraordinary judgment I think. I mean, I think it's an extraordinary judgment, not just because it opened up this new area of the law, or because of the outcome, but because it's an unusually far-sighted judgment. You can chart all sorts of things that have happened since then back to Grootboom (*Government of the Republic of South Africa and Others v Grootboom and Others*), to the judgment. Richard Goldstone phoned me when I got back to South Africa, or I saw him, and he said, "What do you think of the judgment?" And I said, "I was a bit disappointed, I was about seventy percent satisfied." And he was, I think, quite disappointed by my response, but I think he was very pleased with the judgment. When he retired I wrote to him saying I was wrong, it was actually an extraordinary achievement.

Int There's been much misunderstanding of the outcome of the Grootboom (*Government of the Republic of South Africa and Others v Grootboom and Others*) case, and I wondered whether you could talk about that?

GB Well, what happened in the Grootboom (*Government of the Republic of South Africa and Others v Grootboom and Others*) case, well a few things are misunderstood in the Grootboom (*Government of the Republic of South Africa and Others v Grootboom and Others*) case. Firstly what's misunderstood, is that the case as far as the Grootboom community is concerned, was settled. They actually achieved what they were seeking, which was secure tenure with shelter and with access to basic services. And that they got on the first day of the case. I think it ran for two days the case. In any event, on the first morning, people think that they went to Court for permanent housing. They never asked for that, they were asking for emergency relief and they got it. So

that's the first level of misunderstanding. So as to the continual refrain that Mrs Grootboom didn't have a decent house when she died - true, but that wasn't what she was there for. Secondly, there was a misunderstanding on the part of the Human Rights Commission. The Court's intention clearly was that a programme should be designed and implemented, and that the Human Rights Commission should monitor what happened. I was asked during argument whether the Human Rights Commission would accept the role of monitoring the implementation of the judgment. I spoke during the adjournment to Leon Wessels, the Vice Chairman of the Commission, who was in Court, and I said, well, what shall I say? And he said, yes, of course, we'll be happy to do that. The Court then made its order, and I then put up a proposal to the Human Rights Commission as to what they should do to monitor the implementation of the judgment, and they refused to accept my views as to what the Court's judgment meant. They thought what they had to do was monitor what happened to the Grootboom community. And I kept saying, no, no, no, that's not what it's about. The Court wants you to see what happens with the programme, and this is how you can do it. And I drafted letters for them to send to the provincial housing departments requiring three monthly reports, etc., etc., etc. And inexplicably they just refused to accept it, and they didn't do it. So they dropped the ball. And so the second misunderstanding is that it's not that the Court said, well there must be a programme and walked away from it. The Court had in mind that there would be a process of monitoring, and the Human Rights Commission failed the Court. And so the criticism of the Court for just making a general judgment I think is unfair. The other piece of the story, which is not known is that about a year after the judgment, I was asked to represent that community, the Grootboom community. I was still at the LRC (Legal Resources Centre) in the Constitutional Litigation Unit. Maybe I was in Cape Town already. I think I was. And their attorneys had sort of fallen away, and I went out and had a couple of meetings, and I then went to see the municipality, the Oostenberg municipality, and saw the officials there, and one of the officials said to me, look, we've been reading the judgment, this community is on the waiting list for decent housing. There are half dozen different communities in our area, Oostenberg, which are on the waiting list. We've been reading the judgment, and the judgment says we must help first those who are in greatest need. Actually, he said, as a result of the judgment and what's happened, these people are no longer those in greatest need because they have got security. They've got a place to live, they're not going to be washed away by the rain, they've got some basic services. There are people in our area who are in a much more desperate situation than they are, and seems to me, he said, we've got to deal with them first. That's what the judgment tells us. And I couldn't work out the answer to that because he was actually correct. We continued to press and say, yes, but, and on the other hand, and you must have a bigger programme. But the irony was that the judgment in a way...it was the judgment which prevented them getting the long term relief soon. And I then lost contact with that community. The leadership became, for what reasons which I don't understand, they didn't maintain the connection, they didn't respond to messages, they made appointments and didn't pitch, and I

eventually lost contact with them completely. But it was an irony of the judgment that their long term claim was undercut by the urgent relief which they had asked for and which they got.

Int Do you think that the community, and particularly Irene Grootboom, felt that going to the Constitutional Court, would make a difference in their lives? Did you get a sense...?

GB I don't know, I don't know because I didn't know them then, and I never got to know them really adequately. Sandy (Liebenberg) knew them a bit better than I did, but when I met them, they had the sense that they'd won an important case, and they were still complaining saying, this is a lousy place to live in, for good reason. And I was saying, well, we'll just have to see what we can do to get something permanent. I don't know what they...I don't know, I didn't know any of them well enough to have any sense of what was really going on in their minds.

Int The next case that you were involved in, was that the TAC (*Minister of Health and Other v Treatment Action Campaign and Others*) or would there have been another...?

GB It was the next big case, and there were a couple of others, I think. There were others. But the next really big case was the TAC (*Minister of Health and Other v Treatment Action Campaign and Others*) case.

Int I wondered whether you could talk about that, it's such an important case on many levels...

GB Well the TAC (*Minister of Health and Other v Treatment Action Campaign and Others*) case, you know, arose at a time that...the height of government denialism and AIDS. I was terribly disturbed by what was going on, like everybody else, and in fact again, John Healy had a significant role in it. He was visiting again and he said to me, "What's your Constitution worth if children are dying unnecessarily and the Constitution can't help them, what's the point of it all?" And that really stung. I mean, he said it quite critically. And I then gave it more thought than I had before about what we could do. And I got in touch with the TAC (*Minister of Health and Other v Treatment Action Campaign and Others*) and said, look, I don't know what you...I didn't know those people and Mark Heywood was the person I contacted, and I said, "I don't know what your plans are or what your intentions are, but if you want an attorney, I'm available for this". It turned out that they had previously considered litigating on the issue at the time before Nevirapine was registered for mother to child transmission, and they'd consulted Gilbert Marcus and Gilbert had said a claim wouldn't succeed. I think correctly. As it happened, at the time that I spoke to Mark (Heywood), it had just been registered. And so

we put together a team to work on it. And it was more intensively prepared than any case I've ever been involved in before or since. The TAC (Treatment Action Campaign) were enormously skilled and knowledgeable in the field. They had contacts all over the world. They had contacts with all the local medical profession, and our job was...they were able to produce the facts in a very, very skilled thorough way and we then had to figure out what the legal grounds were, and to massage the facts to fit the law, the arguments we wanted to make. And it was a very, very intense case. Before we sent out the letter of demand to the government...it took us a month to send the letter of demand because I prepared a draft, which we work-shopped and debated and I eventually sent out a letter, and it turned out to have been critical; it's referred to extensively in the judgment. It laid the foundation for the case. And the government fell into the various traps which we had set in the letter. And the litigation then proceeded. It was one of the most bitter cases I've ever been involved in. The stakes were very high. The legal teams got more involved in the case than they usually do and it became quite bitter and personal. Particularly for me for some reason.

Int Why do you think that was?

GB I don't know, I mean, it was of course very hot politically but usually lawyers are able to keep some sort of distance. Here one couldn't, partly because it was such a big life and death issue. I mean, it was like the second death penalty case in a way. Partly because all of the lawyers in the field, in the issue were passionate, and the clients were passionate, and we got ourselves very worked up and we worked each other up. And there was (Thabo) Mbeki dead-batting it, and his legal team really not behaving well. And it became very heated, the litigation. And there were allegations made against me of misconduct, which were just preposterous. And I think there were a couple of people on the other side who were similarly very invested in the case as we were invested in it. And it took on quite a nasty tone. We had an amazingly good run in the High Court, where the High Court Judge, Chris Botha, was very sympathetic to our case, which came as a surprise. We didn't know him. And we got to the Constitutional Court and we had a series of interlocutory disputes again, all of it fuelled by the denialism and all of it raising the temperature further. So by the time we got to the Constitutional Court the temperature was quite high. It was quite an emotional debate.

Int How do you think the judges handled all this?

GB They did very well. It seemed clear to me that we were likely to win. In fact, now looking back, it's difficult to imagine how we could have lost. We had a number of good, really solid legal grounds. The government's position was really inexplicable. And the critical thing was the evidence. It was an illustration of a maxim that Arthur (Chaskalson) taught me years ago in the LRC (Legal Resources Centre), he said, "Don't worry about the law, first get

the facts right". I remember him saying to me, "if you get the facts right then the law will follow. First get the facts right". And we got the facts right. And the government didn't get the facts right, they weren't able to produce any evidence to support their case. They didn't want to align themselves with the mad denialists, the Brinks, and people like that, and so they had no evidence. And the evidence was all very one-sided in the results. And the law followed the facts. There had to be relief on that set of facts, and so the only question was going to be, on what basis would we get relief? Would it be on the children's rights? Would it be on the access to health care? Would it be on rationality? Would it be on administrative law grounds? All of those things had a runner.

Int And there's been much made of the fact that the Court gave the judgment...

GB Yes.

Int And I wondered what you think is the rationale behind it?

GB Well, the gossip is...you must have...have any of the judges spoken to you about it? The gossip I heard was that there were some divisions in the Court, and that in the end this was a compromise judgment which would satisfy everybody, and that they also, because the political profile of the case was so high, they thought it was appropriate for the Court as a whole to speak rather than for one judge to speak. I've heard it said that there was a time when they were not fully unanimous and that at one stage Johann Kriegler said, well, if...to one of the judges who was not on board...okay, "Well if you're going to dissent, I'm going to write my own dissent, and it's going to be a very tough judgment, I'm really going to tear into what government has done, it's preposterous and outrageous". And that he was ready to go with a really hard-hitting judgment. And in the end they found a compromise. But it's all third-hand gossip.

Int Would you credit Arthur (Chaskalson) for bringing this together?

GB Well it wouldn't surprise me if he did it. He's a...the choice of Arthur (Chaskalson) as President of the Court was a stroke of genius or great good fortune, whichever it was. Because he's a team builder. He's brilliant at bringing people together, at identifying the differences and bringing people along. Ismail (Mahomed) was quite a divisive person in his personality, much more aggressive. And Arthur (Chaskalson) is a team builder by nature and it wouldn't surprise me if he had played a major role in moulding and shaping at all.

Int You dealt with this issue in the Bram Fischer lecture but I wondered whether you could talk about it because certainly there's been a sense from judges in

other courts that the TAC (*Minister of Health and Other v Treatment Action Campaign and Others*) judgment, in some ways, intrudes on the role of government and transgresses, and I wondered whether you could talk about that?

GB Well it goes quite far...the judgment. The remedy which was ordered went further than in any other case that I can think of offhand, in the level of particularity and the detail which was ordered. I was disappointed that we didn't get a structural interdict. I think this was the trade-off, that what they said to themselves, whether expressly or otherwise was, we won't go the route of a structural interdict but we will make an order which is very particular as to what has to be done. And...so it is quite intrusive. It was...because the Court might simply have said, you must have a reasonable programme, a refusal to provide Nevirapine or other drugs except at private sites is unreasonable, and you must now have a reasonable policy. In other words, the Grootboom (*Government of the Republic of South Africa and Others v Grootboom and Others*) model. Who knows what would have happened? It would probably have gone on for a long time, and there would have been further litigation, and I think that judges must have been aware of it, and it was a life and death case. I think what people forget is that TAC (*Minister of Health and Other v Treatment Action Campaign and Others*) was a life and death case, like Makwanyane (*S v Makwanyane and Another*), and if they didn't do something...they must have been aware the judges, that if they didn't do something which was effective, children were going to die. And I think that's what justifies a more intrusive order than...I think two things justify a more intrusive order than is usual. One is the fact that it was life and death, secondly was that the government's history was a history of blocking and obstruction and denial and obfuscation, and there was good reason to think that that might happen if there wasn't a clear order. So either you had to have a structural interdict which meant they could be held to account, or you had to have a specific order. That's the way I read the judgment. But it is unusually intrusive, to say that you must provide it at all sites, you've got to set up the training and the resourcing of the medical staff. And so it was intrusive. But it was intrusive only in the sense that...it didn't go any further than was necessary than to achieve the rights. There was no other alternative on the table. It's not as though government was saying, well, if we've made a mistake, leave it to us and we'll find another way of doing it. Government was saying, we haven't made a mistake. It was an all or nothing case. And it differs in that respect from a lot of other cases, including most socio-economic rights cases, where there are a number of options open, and the government says, leave it to us to choose which option. Here there was only one option, the government didn't suggest any other option, and the government made it clear that unless it was ordered to do it, it wasn't going to do it. It's a case which set the government's teeth on edge, but it was done in a style and in a manner which made it more palatable than would have otherwise been the case. I think that's part of the genius of the judgment.

Int I'm curious, some say that part of the reason for the victory is that there was such strong mobilisation and that it's an illustration that one takes a case to the Constitutional Court, one really needs social movements. I wondered whether you could talk about that?

GB I think that's true. I think...whether you need social movements...you need...I think...Arthur (Chaskalson) made the point in either that case or another case, during the argument he said to counsel, look, we live in the real world and we're judges, we live in the real world, we read newspapers and we watch the television, we know what's going on around us. It's a realistic attitude to the way judges really behave. I think what had happened by the time the case got to Court was that there was a tidal wave of political opposition to the denialism. And there was a...everybody really knew that the only way to break it now was through the Court. The political mobilisation that the TAC (Treatment Action Campaign) carried out, marching, petitioning, writing, going to Parliament, played a very big role in building that tidal wave, mobilising the doctors. They were brilliant at mobilising public opinion. To say...I mean, we all say a social movement. Social movement may be an inaccurate way of describing it. What they did was they built public opinion in a demonstrable way. So that everybody could see the public...people were horrified by what was happening, by children dying. And even within the ANC there was huge discomfort about what was going on. And so, social...ja, it wasn't a mass movement, the TAC (Treatment Action Campaign), but it did mobilise in poor communities, it mobilised people to march, and it shaped public opinion in what I think was a decisive way. And the Court knew that...the judges must have known that if they said no, there would be a huge let-down and people would say, as John Healy had said to me, "what's the point of this Constitution?"

Int Interesting. How do you account then for the *Joe Slovo (Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others)* case and its outcome?

GB *Joe Slovo (Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others)* case to me is a great disappointment. I think it's one of the two worst judgments...cases, I've been involved in. I think what happened in *Joe Slovo (Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others)*, the Court...one of the issues was eviction under the PIE Act, the test is what is just and equitable, and I think it's possible to make a very credible case that actually the only way to deal with the situation there was to evict everyone and to erect long-term housing. And bad luck for the people who were there. Some or most of them will get back in time, there will be some discomfort, but you can't make an omelette without breaking eggs, etc. The government made the case in the papers, that it wasn't possible to do an in situ upgrade, it wasn't possible to do multi-storey development, and the only way to develop the area, they said, was to move people out, develop,

and then move back those who could be accommodated. I think the courts believed that was the truth and said to themselves, what are we going to do now? What is just and equitable? And they thought, well, it's just and equitable that decent housing be provided and this is the only way to provide decent housing. What they didn't do...they...I don't want to use the word cheated, but if they played according to the usual rules, two things would have happened. Firstly they would have said, there is a dispute of fact as to whether there can be an in situ upgrade. We had put up evidence that there could be. And if they played according to the usual rules they would have said there's a dispute of fact on paper. You accept the respondent's version. That's how the law works. Either you refer it to evidence, you have oral evidence and cross examination of witnesses, or you accept the respondent's version unless it's not patently not the truth. And so what they should have done, according to the normal rules, firstly is they should have said, we have to find as a matter of fact that in situ upgrade is possible and that multi-storey and more dense development is possible. Therefore it's not necessary to evict everybody in advance. The second thing they should have done if they played according to the normal rules, was they should have said, that our clients had a right to occupation which had never been terminated. We had said in our affidavits, we have a right to occupation and you've never terminated it. The answer given by the government was not they had terminated the right, they said, we don't accept you've got a right, they said we don't accept that you ever had a right to occupy. And the Constitutional Court and the judgment, the majority said, we find that you did have a right but it was implicitly terminated by various other things that were done. But that had never been the government's case. And on the ordinary rules of pleadings, the Court should have said, the government was challenged as to whether it had terminated and it didn't allege it had terminated, it said that there'd never been a right in the first place. It's an unanswerable point, I thought. But the Court didn't want to go there. I mean, we had...the debate was quite heated, because I was quite annoyed and I'm...one of the judges said to me...I said...the other day I said to Kate O'Regan, "Do you remember what Albie (Sachs) said in the Joe Slovo case?" And she looked a little embarrassed and said "It wasn't Albie (Sachs) who said it, it was I who said it." One of them said...I said, "this right here, it's been established and it's never been terminated. Until it's been terminated you can't evict". And Kate (O'Regan) said...I thought it was Albie (Sachs), it was Kate...that's a very legalistic argument. And I remember saying to her, "that's what we do in the courts, that's what we do, we do law." Anyway, we didn't get one judge out of the eleven, or however many sat, and that was a...I think that was a Court taking an abstentionist position or an accommodating position, saying, well, government must make these decisions, it's for government to decide what should happen best, what's best to happen at Joe Slovo. Government has decided to do a full on upgrade with moving people out and it's not for us to second guess them and say, that's not right. I think that's what the judgment really stands for.

Int I find that curious in light of *TAC ((Minister of Health and Other v Treatment Action Campaign and Others)*, and what do you think...?

GB Well, there was an alternative. I mean, it's not as though government was saying the people of Joe Slovo must be homeless. It was saying they must go somewhere else while this is fixed.

Int But the 'somewhere else' was quite...

GB 'Somewhere else' was pretty bloody awful. But it's an abstentionist judgment, it's a deferential judgment, and they were all twisting around in that judgment, looking for justification. The judgments, I think, are quite tortured. Because they are, what's the world, teleological, they know where they're going which is that they must...government must be allowed to make the choice as to how to develop Joe Slovo and we will leave them the space to do it. And to do that they had to be unduly deferential. More than that they had to...they couldn't use...play according to the normal rules. And so I was very annoyed and upset by it, and I think the judges became quite annoyed by what happened afterwards. Because afterwards, in an attempt to...I think, in an attempt to justify what they had done, they then put government on quite a strict reporting regime, gave, in effect, a structural interdict, which we'd never asked for, and as the reporting took place, meanwhile, during the reporting period there was a change in the politics in Cape Town, the DA (Democratic Alliance) came to power, and the DA (Democratic Alliance) said, it is possible to do an in situ upgrade and it is possible to do high density housing. And so they started backing off from what they were supposed to be doing. And then I think the judges became quite annoyed. I think they realised they'd been misled. And so you get these quite strident directions saying, why haven't you reported as we told you to? Why haven't you done this as we told you to? And then to our astonishment, a directive from the Court saying, now make submissions as to whether the order should be set aside. We never thought...we didn't ask for that. And we made submissions, which weren't terribly persuasive, and the Court had clearly already decided that this eviction order couldn't stand any longer because the premise had gone. And I think some of them must have realised that they were cheated. The government misled them.

Int Do you think that...and this is speculation on the part of other people...that the politics of the day had something to do with the *Joe Slovo (Minister of Health and Other v Treatment Action Campaign and Others)* decision?

GB When was *Joe Slovo (Minister of Health and Other v Treatment Action Campaign and Others)*, I can't remember?

Int 2008...around...

GB What politics are people referring to?

Int Well, in the sense that they felt there was need not to trample on government's toes, that there was a...

GB Well, I think...I think...that's why I said it's a deferential judgment. I think the Court always has to make the judgment, how far can it go, and it may reflect partly the Court pulling back a little and saying, we've gone as far as we can, we're going to go over the boundary. We've got to retain our institutional credibility. That may reflect that. It was certainly...it's an astonishingly deferential judgment, given what went before it and given the Court's judgements generally on evictions, which are really pretty forthright. But this one had become a political issue to some extent; it was a big project, and they had a fanciful theory they were going to fix it all before the World Cup, that was part of the theory. And it was part of a big plan, the N2 Gateway Project, and I think there were unspoken concerns about the Court's legitimacy...political legitimacy, I think so.

Int What was the other worst judgment?

GB The worst judgment was a case called *Walele (Walele v City of Cape Town and Others)*, which is not well known. It's a case in which involves...I represented the City of Cape Town and it was a case about the issue of how a municipality is to make a decision as to whether to give approval for building...building approval. And it's of no great moment in the greater scheme of things, except it's just an awful judgment which is inexplicable. It's a six/five split against...they gave a judgment, the majority, which is unimplementable and has made the lives of the municipalities very difficult, and I still don't understand what happened. I was in the case and it was all one way traffic in our favour in argument. And the basis on which the majority found was never really raised and dealt with in argument. In fact it was such one way traffic in our favour that my opponent, the man representing Walele, when the judges walked out, threw his pen down and said to me, "it's no use coming here, they have already decided against you before they walk in". He thought it was a clean sweep in our favour, as I did. And somehow a six/five majority was cobbled together in his favour. It's a very bad judgment but it's not of any long-term social consequences, just inexplicable. It's just wrong.

Int Do you think that the Constitutional Court has done enough with regard to socio-economic rights and justiciability?

GB No, I don't think so. I think the issues are very difficult. I'm actually, despite everything, I'm not a...I'm quite a conservative as to the role the courts should

play. But I think they have dropped the ball in the sense that they have made it barely worthwhile for anyone to come to Court to argue for socio-economic rights, other than defensively. If you're arguing against an eviction, you're on strong ground, so long as you're not at Joe Slovo. But positive claims have been defeated consistently. The only one which really succeeded was...well, the only one which really succeeded was *TAC (Minister of Health and Other v Treatment Action Campaign and Others)*. There are others dealing with statutes which are a bit different. And I think they have...in their concern not to overreach, they've in fact largely...I won't say destroyed, but they've weakened greatly those rights, the positive rights, in the Constitution. And they've done that as a result of two things. They've done it firstly as a result by saying, we won't give a litigant anything which can't be given to every other person who's not before the Court. That was an issue we debated in *Grootboom ((Government of the Republic of South Africa and Others v Grootboom and Others)*. I remember some of the judges, I think Albie (Sachs), saying, "well, how can we give something to the Grootboom community, which can't be given to everybody else. All it means is that the question is not whether you've got a right under the Constitution, the question is whether you've got a clever lawyer". And I remember when it was raised with me I said, well, that's actually how it works and you've got to encourage people to bring claims before the Court. You don't want to discourage. And if some people get there first as a result, well that's part of the cost of the system, but you want to facilitate, not obstruct. And you want people to say, oh, I've got a right, I can go to Court. So they have damaged the prospects of going to Court for positive relief in a really significant way. And I can understand why they've done that because of all the difficulties of being over-intrusive, and the real difficulties that if there are millions of people without houses, where do you start without access to health care services or schools or whatever? So, I don't underestimate the difficulties but I think they should have been more creative in finding remedies, which would actually hold government to account. Because in fact what's happened is government has been let off the hook and people won't go to Court with those cases; there's now been *Mazibuko ((Mazibuko and Others v City of Johannesburg and Others)*, which I have mixed feelings about. I don't really know the case well enough to say anything sensible about it, but *Mazibuko (Mazibuko and Others v City of Johannesburg and Others)* is another obstacle to people going to Court for achieving positive benefits. And there's going to be another case now, which Equal Education are starting a case around schools and around facilities in schools. And that's a more sympathetic issue in a way, and maybe that will open up the jurisprudence again. But, I think the Court has been disappointing on that. And I say that without for a moment denying the difficulty of it.

Int When you say that you are conservative with regard to socio-economic rights and the role of the Constitutional Court, can you talk a bit about that?

GB I'm conservative with the view of courts generally. I don't like courts...judges thinking that they have a monopoly on wisdom, and thinking that they can invent solutions to difficult social problems, which are very difficult. It may come partly from the fact that I was four years in government. I know that these things are difficult and I know that there are people in government who are working very hard to try to fix them. And the notion that some judge sitting in a court in Braamfontein or somewhere else, will say, oh well, here's a...I've got the solution which you people haven't been able to find, makes me very nervous. And so I don't like highly intrusive orders. I think that there's a high risk that they go wrong because the judges don't know enough, and I say that not because I think the executive is so smart, I said in the (Bram) Fischer lecture, the Executive is not so damn smart, neither is the legislature. It's just that judgments of courts have a finality about them which make it difficult to change. And so I think they have to be careful. I'm much more in favour...rather than judges ordering regularly a *TAC (Minister of Health and Other v Treatment Action Campaign and Others)* type order, which I think is exceptional, I'm much more interested in judges opening up processes of accountability. I think that's what they do much better. I think they can make the government much more accountable for what it does. Make it have to justify what it does, and that creates the space for the democratic process, and still leaves the ultimate decision in the hands of the government, subject of course to review by the courts. And I think we all haven't been inventive enough about that. It's wrong to say, well the Court should have done it, we should also have been...we litigants...litigators should have been doing that. And we haven't done that...we haven't really thought skilfully enough about remedies.

Int I'm also interested in the issue of judicial transformation more than just demographics. I think a more broader transformation. What do you think about...?

GB Well, I think what's happening is that the government has seen the power of the Courts. I think it's become much less brave. I think the (Nelson) Mandela government was extraordinarily brave in the sorts of people that were appointed and in the way it responded to judgments. I think government is now behaving much more like most governments behave, which is to say, well, you know what, people are going to rock the boat. So we don't want people who are going to challenge us. It's not so much a matter of being executive minded, although I'm sure they prefer executive minded judges. It's a matter of saying we won't have people who are likely to rock the boat and make life difficult for us. And so what we're seeing is I think, appointment of people who...we're not seeing appointment of all of the brightest; it's sort of middle-ranking people. If the choice is between somebody who is a plodder and who will do the job and do it competently, but who will keep his or her head down and won't shake or rattle the cage, and somebody who is extremely bright but will rattle the cage, they will go consistently for the plodder. I think that's the lesson.

Int In terms of the approaches to judgments that the Constitutional Court has taken over the first fifteen years, some have argued that they've been bold, and others have argued that they've been extremely cautious; where do you fall?

GB I think they've been quite bold. I'm not very critical of the Court. I think I'm critical of some judgments. I'm critical of *Slovo (Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others)*, *Walele (Walele v City of Cape Town and Others)*, for other reasons. I think there are real questions about *Mazibuko (Mazibuko and Others v City of Johannesburg and Others)*, but I think *Mazibuko (Mazibuko and Others v City of Johannesburg and Others)* is not an easy case. I think they've not done as well as they could and should have done on the positive socio-economic rights. But having said all of that, I think when you look at the corpus of work over seventeen years, I think it's an extraordinary achievement, and so I'm an admirer. A critical admirer but I'm an admirer. I think the quality of what has being done currently is not as high as it was previously. That's a great disappointment. But again one may have to be a bit realistic and say, well, where in the world do you have a Court of the quality that we had in the first five years, and then maintain it for fifteen years? I mean, it was an extraordinary Court, it was a unique Court, and these things go up and down. When you think of the achievement of the first five years, I think it's breath-taking. You have eleven judges, none of whom has ever litigated or adjudicated constitutional law, none of who has ever studied constitutional law. A few of them had been to the United States and they've read a few cases. They've read *Sullivan (New Yorks Times Co. v Sullivan)* and they've read this and they've read that, and that's what they've done. And they come to sit naked. They have lawyers appearing before them who a re similarly ignorant and naked. And one of the first things they have to do is a certification judgment, which covers the whole scope of the entire Constitution, and they get it right. I mean, you go back to the certification judgment today, I think it's an underrated judgment. You go back to it today and you can hardly see anything there of which you would say, well, hang on, that's not quite right. I think it's a breath-taking achievement. And I think the quality of what they've produced has been very high. I think it's not what it was before. But...how would you...it's not realistic to expect that what we had in the first five years will continue at all times. I think the problem...so my judgment is not a very critical judgment. My judgment though is a judgment of concern, that I think we're on a downward trajectory, and the question is whether we will pick up again, and I'm not confident of that.

Int There's also been some criticism that the Court has not developed a clear conceptual legal philosophy, as such. Would you agree with that?

GB I don't...I'm a very practical litigator, I don't see that. I know that people who are cleverer than I am have got a lot of clever criticisms and say this is not how it should go. I don't know about that. All I know about is litigating cases and I know that when you litigate cases you want to know...you want a measure of predictability, and you want a measure of confidence that they will stick by the principles they've enunciated, they won't back down. And that they will have a concern about transformation. And for the most part, I feel quite good about that. As I say, it's less and less so...

Int Do you think this transformative judicial project has been in some ways achieved in part by the Court?

GB Only in part. They are transformed and have always been transformed at a demographic level. I think they have done some remarkable work in transformative jurisprudence, particularly around property, interestingly. I think that's where they've been most creative.

Int In terms of the Rights...?

GB In terms of existing property rights and the way in which they've read into existing property rights, I think it's been very thoughtful work. Leaning very heavily on the work of André van der Walt at Stellenbosch; they've had the benefit of some really serious analytical work. Transformative on other things? Well, I think there are a lot of...I think you can ask a lot of questions. My obsession is, why when a case comes before a court in South Africa in 2010 or '12, or 2000, does a court start by saying, well what did the Appellate Division say in 1911? I mean, that's...there's a good reason to think that's the wrong starting point. Now, you can say, yes, well, you've got to look there and see what happened and there is an issue of continuity. But our continual reference...we have the habit of looking for old authority. It's not terribly persuasive. I mean, why would those things in a different time, looking for different goals, be so important today? But, of course, I say that knowing that very often the reference to older authority is about procedure, and about non-controversial principles of law. But still, I think we are still...we still tend to do what lawyers always do, is when we ask for question we first look backwards. It's not obvious why that should be so.

Int What do you think of the issue of the social conditions and how they factor into decision making from the Court...?

GB I'm not sure I understand you.

Int Well...how important is it in taking into account the social conditions?

GB Oh, okay. It's very important, and you can usually get the courts to hear that, I think. I think the benefit...well, again it's changing, but we had in the first ten years, judges who were very acutely aware of social context, and that becomes critical, particularly in areas like customary law, social-economic rights. The context, and in fact it spins over into all sorts of things. The context of the Constitution, the factual context is very important. And you can usually get that before the Court. The Court is usually fairly responsive to it. I think less so, I think they've become a bit harder about that sort of stuff now. I mean, there used to be a standard joke: who is going to win the case? Oh, well, the good guys always win. Who are the good guys? And it's not as simple as that. The good guys can lose. But I always had the sense previously on the Constitutional Court that, in a sense, the good guys would win, the Court was looking for justice and looking for equity, and that would find a legal way to get there because that after all is what the Constitution is about. That's not cheating, that's saying, we're doing the constitutional work. And that's why it comes back to Arthur's (Chaskalson's) point, getting the facts right is so important. If you can show clearly where the justice and equity lie, the Court will help you. Usually, usually.

Int As an observer of the Court, do you agree with Theunis Roux's arguments about the 'Chaskalson Court'?

GB Which of Theunis' arguments? I disagree with a lot of what Theunis (Roux) says.

Int Well, let's talk about the issue of pragmatism and principle?

GB It is a pragmatic Court. But I think it's a pragmatic Constitution, which is not to say that it's not a Constitution without principles and ideals in it, but it's a Constitution which requires pragmatic judgments to be made, partly because there are always rights which are in tension with each other. There is no case which doesn't involve rights in tension with each other. So you've got to make judgments, and the Court said at an early stage, I think rightly, that there's no ranking of rights in our Constitution. And so there's always a balancing exercise, whether it's under the justification process or whether it's in the process of giving content to the rights. And I don't find...I suppose there...I mean, the *Joe Slovo (Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others)* case is an illustration of pragmatism overwhelming principle. And so it can go too far in that direction, but I don't think it's a fair criticism as a general proposition. It is true, I think, that the Court never gives a judgment which leaves the judges saying, hell, that's bad luck. You don't see...bad luck for the litigants, I wish they'd won. You sometimes hear judges in High Courts saying that, saying, I'm very sorry for you, I wish I could help you but I can't.

Int Do you think the Soobramoney ((*Soobramoney v Minister of Health (Kwa-Zulu-Natal)*)) case was one of those?

GB Ja, *Soobramoney* (*Soobramoney v Minister of Health (Kwa-Zulu-Natal)*) is perhaps the only example where the Court said, bad luck, I wish I could have helped you, but I can't. I can't think of another judgment in which the Court has done that. High Courts do it all the time. And that does reflect a very...well, I don't know, is that pragmatic or is that principled, I'm not sure?

Int Maybe there isn't that dichotomy...

GB Ja, maybe it isn't. But it is sort of teleological in that sense, it's the Court taking a long view and saying, well, what does justice require here? What outcomes does justice require? But that's actually what the Constitution says. I mean, you know, look at section 36, what does it say? In the end it says, "what's just?". And then it helps you by giving you criteria telling you what's just. That's part of what the Constitutional Court has to do. I don't have a problem with that.

Int In terms of the politics of the country and how it plays into decision making from the courts, I wondered what you thought of the idea that...where do you think there's the role for legal activism and what are the boundaries with that?

GB Well, I think there is still a critical role. You mean on the parts of the courts or on the part of the people outside the courts?

Int Both.

GB The fact is that we've got a Constitution which is still mocked by the realities on the ground. Seventeen years later. And in some respects not getting any better. In some respects better. There has to be legal activism to deal with that otherwise the Constitution is a mockery. And that's unacceptable in principle. Also unacceptable because the Constitution then won't survive if it's not real in people's lives. And so I'm quite impatient. I mean, I'm really tired of hearing judges saying, but so and so judge said, well, why don't we get the cases on the schools and why don't we get the cases on hunger? They need to help us to do that. I think the lawyers have...I think we haven't made half of the amount of use of the Constitution that we could have. I think we haven't done nearly as well as we could have. And, but perhaps...perhaps that's inevitable, and perhaps even desirable in a way because of the politics of the situation. I mean, if we had a...we can't...a vanguard court won't survive. The Constitutional Court can't be a vanguard Court. I don't think vanguard courts survive anyway for very long. And so, it's not so much that the courts and the legal process have failed, as that the political process has failed. It comes

back to the point I made in the (Bram) Fischer lecture that what we have is to some extent courts moving in to fill a democratic deficit. Kate O'Regan referred to it in her Helen Suzman Lecture as well, the jurisprudence of exasperation. It's a very dangerous situation and you can get courts to do crazy things, which in the end are destructive of the enterprise, I think. It does worry me. But I don't think we've done nearly as well as we could have.

Int Earlier you mentioned that in a way, post '94, you continued to do the kind of work you did pre-'94, and I'm curious how you feel about what you've achieved?

GB The clients are the same people. The clients are people who don't have adequate housing, they don't have food, they don't have decent schools to go to, they don't have health services. They're the same people living in the same places. The techniques which are available to help them are now broader because there's now a political process, which is, to some extent, more open. The legal tools are fundamentally different of course, because we've got the Constitution. But at its heart it's the same thing. It's the same thing about how do you get government to be responsive to the needs of poor people? How do you create a government which is responsive? And because all of what...you know, middle class people wouldn't tolerate for a minute what poor people tolerate every day. There would be an explosion. So how does the political system change and what is the role of the courts in that? That's the question that puzzles me. But it's the same...it's fundamentally the same issue, except that we have a now, a more sympathetic political system, which has now become much more closed again. In the first few years it was...you could get to see a minister, you could get a law passed, you could get to senior bureaucrats, and you could shake things up a bit. It's much more difficult now, and I'm not sure why that is. But the political process has become less responsive.

Int Interesting.

GB Of course it's partly a function of our electoral system, which doesn't help.

Int In terms of the transition to democracy and the role of the Constitutional Court, what were the challenges then, and what are the challenges that remain?

GB Well, the challenges then were, it tried to create a very different...to breathe life into a very different legal order. To transform what was...to make what was on paper real on the ground. To create new habits of government. To create new habits on the part of ordinary people that they can hold government accountable. Those are the challenges. We've done more or less...you can't say in any of those areas we've had total success. I think

we've had least success in holding government accountable. I think there's been a terrible failure. But again, it may just be a function of South Africa becoming a normal society. We have to keep remembering our ambitions are so high, we want to be different from anybody else in the world. So I...whether the Constitution...I don't think it can be said that the Constitution has done its job. I think it's done its job at a structural level. But whether it's done its job in terms of transforming society, I think the answer has to be no. I mean, I think it's a horrible thing to have to say, but you have to say that that's the truth.

Int What do you think have been the greatest failings of the Constitutional Court and some of its greatest achievements?

GB The greatest achievements are the easy part. The creation of a coherent entirely new system of law, of constitutional law, starting from nothing, is an astonishing achievement, as I was saying earlier. And we have that and we have a solid and a really coherent foundation in a remarkably short space of time. You'd have expected that to happen incrementally. It hasn't. It was this vertical take-off. It's an astonishing achievement. And it has had an impact on the courts in other parts...with other courts as well, that's a critical thing. It's now finally filtered down to the other courts. One sees magistrates, one sees the High Courts, one sees the SCA (Supreme Court of Appeal), taking...previously the other courts used to sort of snigger and sneer when you raised a constitutional issue. I once had a judge say, well you raise a constitutional issue when you've got nothing else to say. The courts now take it much more seriously across the board and that's a tremendous achievement, and that's partly the consequence of having established a new Court, which could set a new mode. The failures are...I think the two fundamental failures are, firstly, the failure to promote accountable government. I think we've seen the Court becoming much more interested in that issue now but I think we've failed considerably at that level. And I think the other failure has been the failure to give real weight to the positive socio-economic rights in the Constitution. I think we've done poorly on both of those levels. And as a consequence, there's been a failure to have a material impact on social conditions in the country, in the large. Not to say it hasn't had...you know, you can't say *TAC ((Minister of Health and Other v Treatment Action Campaign and Others)* didn't save tens of thousands, maybe hundreds of thousands of lives. You can't say *Grootboom (Government of the Republic of South Africa and Others v Grootboom and Others)* didn't do this, you can't say etc., but if you look in the main and you say, what are the social conditions under which people live today? And to what extent have the Constitution and the Constitutional Court had a material impact on that, you have to say it's quite limited. And that's a very sad situation. It's not a good picture.

Int Geoff, I'm sure I've neglected to ask you many questions but I'm wondering whether there was something that you'd like to include in your oral history that I've not asked?

GB I'd only say this, the thing that the Court has done...one of the things the Court has done best has been to create a forum where these things can be debated. And one tends to forget...I mean, a case in the Constitutional Court is usually a debate, to an extent that one doesn't see in other courts. It's a more open-ended debate than one sees in other courts and it's a more generous debate than one sees in other courts. And it is a debate which still starts from the premise that the Constitution is supposed to change things. That makes it always quite an interesting Court to be in. And whatever criticisms one may have, the Court remains a welcoming place for debate. It really...the judges like to hear a good argument, and they like to engage in an argument. That's very important. I think the other thing the Court has done...and the other thing that has to be said is that, it's quite astonishing how seventeen years on, the Constitution has taken root, despite its failures, that people say, oh, I've got a right, which wasn't part of our language. The way in which the language of rights and the way of constitutionalism has taken root, the quickness with which it's happened, is an astonishing achievement and the Constitutional Court has to take a significant part of the credit for that, I think. I think they've done very well in being a much more open and responsive Court than most courts. The judges going out, making themselves more accessible than judges usually do. Being willing to go on the TV and the radio, and write to the newspapers and talk in meetings. I think the fact that...to the extent that we have a culture of constitutionalism, and I do think we have that, that's quite a remarkable achievement in a short time, and I think the Court is entitled to a significant part of the credit for that.

Int Geoff, I hope you don't mind me taking this opportunity...but everyone talks about the fact that you haven't been made a judge yet and as I said to Dennis Davis, and I'll say this to you directly, I think that it goes without saying that you would make a brilliant judge and a Constitutional Court judge moreover, but I do think that the people of South Africa need you more.

GB *(laughs)* Well, it's very nice of you to say that. I'm actually very happy where I am. I think it may have been a stroke of good fortune in my life that I wasn't appointed. I certainly bear no sense of grievance...genuinely, I mean, I'm not being pollyannaish about it. I was irritated when I wasn't appointed. I was irritated at some of the reasons that were given or not given. But actually I'm not unhappy at the way it's turned out.

Int Good for you. Thank you very much.

GB Thank you.

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