

Edwin Cameron Constitutional Court Oral History Project

Interview 1: 9th December 2011

Interview 2: 16th January 2012

Interview 1:

Int This is an interview with Justice Edwin Cameron, and it's Friday the 9th of December 2011. Edwin, thank you so much for agreeing to be part of the Constitutional Court Oral History Project, we really appreciate your time.

EC Great pleasure.

Int Edwin, I've had the good fortune to meet you before and interview you, and that was in 2008 for the Legal Resources Centre Oral History Project. I remember it being a very rushed interview because you were so busy, and also a very brief interview. So I wondered whether today we could start at the very beginning. I'd like to actually ask you to reflect on early childhood memories, and how formative influences may have in some ways shaped your sense of social justice, and also in some way prepared you for eventual legal life.

EC Well, for me, it was very much two things: race and class. Growing up as a white person in a black society, a society in which white was legally privileged. And I remember, I thought of this quite recently, that I was actually grateful to be white, and bizarre that you should grow up in a society where you are grateful that you are white and not black. But the other influence was of being very poor. I came from a fractured home, a dysfunctional family, and I spent five years in a children's home. And that gave me an experience of poverty, of dispossession, and of not having. But the link between the two came when I got to my second year of high school and my mother was determined to get me into an elite boys' school. And she did. She managed to get me into Pretoria Boys High and that changed my life. I had four years of high schooling at a superb educational institution, admission to which was racially exclusive. So I was a hard-working, ambitious, talented young person, but the opportunity was mine only because I was white. And I went on to an all-white institution, that's Stellenbosch University; and I got the Rhodes scholarship. So looking back at that, being white and privileged played a pivotal part in the opportunities I had, and what I now am. And that has given me a great sense...not a burden, because I don't think one should be burdened by privilege, you should be creatively energised by it – and that's given me a sense of how opportunities should be made available in society...governmentally created and offered opportunities. I feel very strongly about that. Or governmentally facilitated or created opportunities. And about

why irrationality or arbitrariness or discrimination or partiality are so wrong. Because those opportunities should be available to everyone.

Int Edwin, in terms of the themes of race and class, I want to take you right back. At what point did awareness become part of your identity in terms of disparity between races and issue of social class, when you were growing up?

EC I think it was only at high school. This was an elite boys school with a fairly liberal ethos. And I remember that the headmaster had some other headmasters from either Mamelodi or Atteridgeville, I couldn't remember, it was a Pretoria township, and we made...I'm quite ashamed of this and it almost feels hard to say because one doesn't want to associate one's childhood self with silly, petty racism, but it was there. And we made jokes about whether the headmaster was going to offer these other headmasters tea from mugs. And of course the truth is that many white and Indian families, the more affluent Indian families, were severely racist as well, that they had a separate set of cutlery, tin mugs, tin plates, and we knew that our headmaster, who was a liberal man, Mr Desmond Abernethy, would never do that, but that sort of crass fourteen year old joke, seemed funny then. That you'd have these dignified people coming there and being offered tea in a tin mug. Not that there's anything wrong with drinking tea in a tin mug, I've done it subsequently myself often. But the mug as a vector of class contempt and oppression, and that was what our horrid schoolboy racist jokes were homing in on. And in fact, just talking to you now, I don't know whether the headmasters came from Atteridgeville, but of course Dikgang Moseneke's father was a headmaster in Atteridgeville. So I wonder whether his father came to Pretoria Boys' High at the time I was there? And it would be fascinating – I never met his father, I haven't met his mother – to find out if maybe he was one of those that we made these jokes about. But that...I remember being ashamed of that almost at the time. And we...I think there was an issue, where my sister...my mother left, and in my final two years of school, my sister, who's three years older than me, cared for me and took me through grade eleven and matric, and I think we had, by that stage, abolished cutlery and utensil separation, which for a white household was unusual in the late sixties, or/and seventies. But that was my first awareness.

Int I'm also very curious about intellectual development, as a child growing up in this household, were you the only boy...the son? And I wondered what privileges may have accorded in terms of gender?

EC I was very aware of that as well, because my mother thought that I as the boy ought to get the educational privileges. My sister, who as I've just said is three years older, was put into a commercial high school in Bethlehem and didn't get a university entrance matric. She later had to do the proper subjects, and do her BA and other qualifications through Unisa. But I was very aware of

that, that as the boy child I was being privileged on the basis of my gender, very much so.

Int In terms of the actual structure of apartheid, I wondered whether you had from an early age been aware of the separation...that black people did certain types of labour, that they lived in certain areas, I wondered what your sense was of that?

EC Intensely aware of that, my first...in fact I need to go back earlier, I've...before the Children's Home, we were in Pietermaritzburg, in a white working class area of Pietermaritzburg, which bordered right on the Umgeni River. And on the other side there was an Indian township, or an Indian settlement of homesteads. And there were festivals...I remember the brightly coloured floats going by on the Indian Festival of Light, Diwali, or other festivals, which I don't recall. And I remember my mother being racist about Indians, and I almost can't, you know, rephrase what she said because it seems so shameful to me now. But of course it's important to remember those things because in Pietermaritzburg I was between the ages of three and six, but the idea that you shouldn't go there because Indian culture is dirty and it's beneath us. That was what was conveyed and that a society should systematically inculcate that sense of denigration and superiority, now seems to me a terrible waste of beauty.

Int And I also wondered, in terms of your own intellectual development, what were things that really in some ways were impressed on you or that you in some ways devoured? Was it books, comics, newspapers?

EC It's definitely books. Very much books. Books were my escape from a childhood of anguish and grief, because the children's home was difficult and after the first year there, my older sister was killed in a cycle accident, which was very traumatic for me and my middle sister, and the books were a way out. And doing well at school was a way out and words were a way out. And so...but for a broader intellectual development, I'd have to skip from high school to Oxford. And it was then that I started reading. Steve Biko was arrested and killed just about a year after I got to Oxford. I arrived at Oxford in October '76, he was killed just less than a year later. And that was a shattering event for me. And just after that, a month or two after that, I met one of my closest friends, Loyiso Nongxa, who was the first black African Rhodes scholar, is now head of Wits University, and we've worked together and have been very close friends for a long time. And I remember talking to Loyiso (Nongxa) about the death of Steve Biko that icy winter's evening when he first visited Oxford, it was either December '77 or January '78, and by then my political understanding had already quite radically shifted.

Int I'm not sure how much you want to go into this but I was very curious about having to move from a family home into a children's home, and I know that you're a patron of children's homes now, and I wondered...you mentioned that it was difficult, but I wonder also whether in some ways it created resilience?

EC I think it did...resilience and I think the capacity to empathise. I think you don't have to have been in a children's home to have empathy, but it helps. And that's why I'm involved with so many children's institutions and charities. Because children react so differently. Some cope quite well with the relative deprivation of an institutional environment, and with the social stigma that attends it. I was at a children's home last night, talking to young teens about ARV (Antiretroviral) adherence, and I was talking to seven of them, and they are in various schools across north and south Johannesburg, transported there every day, but their teachers and peers don't know that they go to a children's home. Because we were talking actually about whether their HIV (Human immunodeficiency virus) status is known and this secretiveness came out as a result. So it...so there's a stigma in being an institutionalised child, even though there are millions of youngsters in our country, young kids who are in need of care, so there shouldn't be a stigma, but there still is.

Int And I know, when I interviewed Laurie Ackermann, he spoke at length about the importance of Pretoria Boys High in his life, and I wondered whether you could talk about that, because it seems to me when you said your life changed it was so fundamental and it sounds like it must have been on many levels...

EC Yes, it was the big break in my life, without any doubt. It gave me a...I don't have the means to compare, but I'm sure it was as good a schooling as I could have got at almost any elite institution. I'm sure that some elite institutions, Eton, or some of the American private schools, might have had better beds or better trips or better technical equipment, but the teaching was superb, the facilities were superb, and it was a sense of intellectual excitement about being in class. It was and still is a very fine school. And government funded, a government school. So there's a sense that you can have excellence, and it can be government provided. But it did change my life, intellectually in a sense of learning, and in a sense of awareness of privilege. That headmaster, Desmond Abernethy, he was in every good sense of the word, a liberal man, every good sense: politically and intellectually and otherwise, and personally. And he gave me this important sense that privilege is not something to be burdened by but to work creatively with. And I think that's very important.

Int Growing up, in terms of the sense of being different, I wondered where that may have come from and how you negotiated difference?

EC Well, I realised very soon after the onset of erotic self-consciousness, when I was about fourteen, that I was same-sex orientated, and it was completely traumatic, deeply shameful, very, very distressing. And I suppressed it for the next fourteen, fifteen years, trying to live a straight life, even though I knew that I was not straight and that I was same-sex orientated. To go back even further than that, long before the onset of erotic consciousness, I knew that I was different, and I think a lot of gay people, gay and lesbian people, report this, that they knew from toddlerhood that there is something distinctly different. They couldn't have vocalised it, they couldn't have expressed it in terms of political self-identification, but that they were different. And I had that sense always. But the next fifteen years, after onset of express knowledge of my gayness, were spent trying to suppress it. And precisely that led to the strength and assertiveness of my political coming out when I was thirty, that I would never ever again do that, or apologise for being gay, and that...ja, it took a long time to get there but when I did, it was emphatic.

Int And I'd like to come back to that. I'm very interested in the intellectual development and also social development, coming from South Africa, and going to Oxford, because I know you continue to return to Oxford, and I just wondered what Oxford means to you and what it created?

EC The two pivotal institutional influences and intellectual influences, are Pretoria Boys High and Oxford. I enjoyed my years at Stellenbosch, but the memories and importances there were human and my residence at Stellenbosch, a place called Wilgenhof there, Stellenbosch almost left me intellectually unscathed, I would say. But Oxford, a law grounding, a law method, a law methodology, and as you rightly suggest, some institutional connection, which I still treasure.

Int And I am very curious, in terms of language, did you grow up English or Afrikaans speaking? I know that you speak both very fluently, I was curious about that, and how that may have had any impact, if at all, at Oxford?

EC That's a nice question. My mother was an Afrikaner, she was a Schoeman, and her younger half-brother is a very famous Afrikaans writer. So very Afrikaans and because of the family fracture, much closer to my Afrikaans relatives than to my English relatives. So my first language, and my mother tongue quite literally are Afrikaans. My most proficient language is definitely English, but I speak Afrikaans like a native. And, I had a consciousness of that at Oxford because some of my friends at Oxford, Willem Landman, Hannes Schoombie, were also Afrikaans speaking and we'd speak a lot of Afrikaans then, and relish doing so. But of course that language consciousness also played into one's sense of race and class and privilege. Just the sense, most Afrikaners when I was growing up were still working class; the big onset of Afrikaner wealth and privilege came in the late sixties. And English-speaking people were seen as more sophisticated, more affluent. And it's not dis-similar

to class transition and class tensions and resentments we have now, except that of course they're highly racialised now, with the emergent black middle class and so on.

Int When you are at Oxford, in terms of social class and the very fact that Oxford and Cambridge are both seen as being the arbiters of social class, I wondered how you felt having to negotiate high tables, very different conversations, and especially coming from South Africa and maybe even having to have political discussions about that.

EC Yes. You know, it's interesting, as a white colonial, as a white working person from a working class background – my father was an electrician, although he could never keep a job...that was part of the family fracture; he was what I call a catastrophic alcoholic – but you get a free pass in English society and that's what struck me, that was the big change. The big change, big insight in England – I got into England just after the start of the second Wilson government and I was there during the Callaghan government – but it was not race so much as class, and that was the pivotal insight for me in my years at Oxford. And that I could, as a colonial with a Rhodes scholarship, seen as elite, be invited to dining clubs, whereas working class English members of college would never be, because they had the wrong accent or hadn't gone to an elite school. It was shocking and distasteful for me and I developed a very strong antipathy to class differentiation, which was very strongly linked to the racial manifestation of class differentiation in South Africa. So when I came back, in the late 1970s, I would describe myself as relatively highly politicised by that stage.

Int Interesting. And Oxford politicised you (laughs).

EC Yes, definitely.

Int Interesting. Why law?

EC That also happened at Oxford, I went to Oxford to do classics and I swopped after a term and started late on law. And it was very much a sense of trying to make my life meaningful through the capacity to be meaningful to others, to help others. I mean, that's a corny way of putting it, but it was very, very much that sense, that I didn't want to lead a life of a classics don or a literature professor, where I didn't feel that what I was doing could actually be of direct practical help or assistance or relevance to other people. I'm not running down literary studies, but that was my subjective feeling, that by changing to law I could really make a practical difference to people's lives. And that is what my commitment was in becoming a lawyer was to use it. By the time I got back, as I've just said, I was in flaming activist mode and wanted to use my law to make a difference in South African society.

Int I'm very curious, Edwin, given that apartheid was legally structured, I wondered how you thought that law could be an instrument of social justice and legal justice?

EC Well that was what was so fascinating. I'm just reading quite a lot about Bram Fischer now, because I'm going to give a lecture in Oxford next year about him. And the fascinating thing is that even a man as revolutionary as Bram Fischer, leader of the Communist Party, was a QC, Chairman of the Johannesburg Bar, long years after the banning of the Communist Party, I think it was 1961, just three years before he went underground and was struck off the roll, he was chairman of the Johannesburg Bar. And the point I want to make is that legal regulation offers scope, and certainly apartheid, its unique feature was its legally regulated nature. It wasn't the quantity of blood or the number of lives lost, because compared to Biafra or Sudan or the Congo or Burundi in '64, Rwanda in '94, the scope of loss of life under apartheid was fractional compared to those homicides. What was ghastly about apartheid was the systemic and systematic nature of its assault on human dignity through the law. And yet it left space, and that was why it was exciting to be a human rights lawyer. I started practice in the Bar at the end of 1982, but moved very quickly to Wits Centre for Applied Legal Studies. And the trade union movement had been legalised in 1979. Black trade unions before that were illegal. They wanted to let the genie out of the bottle but still control it, and of course that was what was so exciting about the trade union movement was that it was an apartheid phenomenon, and it helped destroy apartheid, and that's the paradox of the legal system, that you...that because of its formal commitments, and some measure of substantial commitments, you could use those to thwart the objectives of apartheid. I'll give you one example if I may, two examples actually. They wanted to make KwaNdebele an independent homeland, it was part of the grand structure of apartheid, and it was important to some extent, they wanted to make KwaZulu-Natal independent and give sections of the Eastern Transvaal, as it was then, to Swaziland. So it wasn't negligible in the political movement of the time. And we brought an application challenging the proclamation creating KwaNdebele because women voters weren't enfranchised. Now we didn't have a single client who wanted to vote in KwaNdebele because all of our clients treated KwaNdebele with justified contempt as a homeland. But we got the proclamation overturned, and we stopped the...we certainly thwarted the process of KwaNdebele to Bantustan status by setting aside the elections and putting it back for a few years. So that's what I mean by that.

Int Okay. And your second example?

EC The second one has just slipped for me, it was also a voting case...it wasn't the KwaNdebele women but it was also about voting, where people had no interest in voting. But asserted their rights to thwart the process that had

deprived them of it, and the objective was the process, not the right that they complained of being deprived of. [In revision – it was the *Moutse* case, (*Mathebe v Government of the RSA*), which thwarted the incorporation of Moutse into the near-independent “homeland” of KwaNdebele by successfully invoking the apartheid argument that they were not ethnically homogeneous Ndebeles.

Int You mentioned that you came back from Oxford ‘a flaming activist’, I wondered whether you could talk about that. How did you then negotiate that being *in situ* in South Africa?

EC I joined organisations. Can’t remember very well now which ones I joined but it was coincident with my coming out as a gay man. I joined the Bar, moved into a house in Westdene with my first male lover, and started my practice. So it was all-simultaneous. My practice was very much directed to trade union work, conscientious objection, appearing for activists and challenges to inhibitions on activists. But I started a gay lawyers’ organisation and so it was a very activist life. I can’t...it’s funny, I’ll have to go and ransack my memory about what...I mean, I was involved in organisational activity at the time, but I can’t remember it precisely and I think some of the Johannesburg left would probably remember better than I would now what precisely the organisations were...

Int So you returned to South Africa in the late seventies, would that be correct?

EC Ja.

Int And would you have been at Oxford during the 1976 riots?

EC No. I left just after that.

Int Right. So you were here, and I wondered...

EC Just, just, just, just left...just after that.

Int Right. I wondered what impact that may have had on you at all?

EC Profound impact, laid the basis for the conscientisation and the insights that occurred at Oxford. Because I was a very quiescent Stellenboscher, and I’m not proud of that at all, in fact, I’m ashamed of it. The fact that I did have the opportunity to take a more radical stand at Stellenbosch but chose, for various reasons of personal frailty and ambition not to take a stand at Stellenbosch.

But the Soweto uprising of '76, I remember it most vividly in my own consciousness, and it laid the basis for an insight into what was happening in our country and what was so deeply wrong about it.

Int Some have said that it created a sense of terror within them, what did it create within you?

EC I remember, I remember that quite well. I was about to leave Stellenbosch on a trip to Namibia with a friend, and there was a cold freeze over the whole country, and news was coming in every hour on the radio of incidents and people being killed, mostly youngsters being killed by the police, but there were also some people, very sadly a teacher in Soweto, a white social worker in Soweto and a few other people. . So that is right, you know, definitely the white reaction of “the black hordes are rising”, you know, it was deeply embedded. I remember. I mean, this was ten or twelve years after I was a child at the children’s home, which was in Queenstown. I remember the word Poqo, which we didn’t pronounce that way, we said ‘Pocko’, was a consciousness to us, there were trials of Poqo members in the Eastern Cape, when I was a very young boy, seven, eight, or nine, at Queenstown, at the children’s home. And I used to look at the mountains around Queenstown and wonder if the black hordes would come over the mountains one night. Of course one forgot that we were inextricably intermeshed, which is the difference between South Africa and Israel, for example, because Israel has managed to effect a much more radical form of separation than South Africa ever did because here the races have always mingled. So the notion that people would come into a white area over a mountaintop was just fanciful. But a deep part of white lager consciousness was what was triggered in me by the Soweto riots, the Soweto Uprising of '76.

Int I’m curious, were there any books, literature that may have somehow contributed to this...?

EC I read Biko at Oxford for the first time. I read it for the first... ‘*I Write What I Like*’, it was banned here, and it had an integrity and a clarity, which were very impressive. And it is a great pity...we’ve been very lucky to have people like (Nelson) Mandela and (Archbishop Desmond) Tutu, and Helen Suzman, who died three years ago, right into her nineties, really senior statesmen, people of stature and integrity who’ve helped us bridge the horror years of apartheid and the difficult start years of our democracy. And it’s...one wonders what it would have been like to have (Robert) Sobukwe and (Steve) Biko, as old men too. (Robert) Sobukwe would have been, I think, deep into his nineties, or maybe even a hundred by now, and (Steve) Biko would have been much younger. But it’s a terrible loss. Anyway, one just thinks what a loss it was because he struck me so forcefully at that time of Oxford.

Int I'm also wondering, you came back really at the height of repression and tension, the 1980s, and I wondered whether you could talk about that and how you negotiated political activism in the form of practice?

EC Yes, it was a daring time and the Centre for Applied Legal Studies was a very exciting, challenging, active place. It wasn't like...you and I spoke about the Legal Resources Centre, we always thought the Legal Resources Centre took itself very seriously. I spoke a bit about that with you in the interview that you mentioned three years ago. And it was very much a sense of being available as a lawyer, and I didn't explore any other activist availability as an underground member of the ANC. I know some of my colleagues in this Court were underground members of the ANC. I was never. And very much a legal activist role, an expression of political consciousness and commitment through devotion to my legal work. I didn't want to charge money, I didn't want to make money. I was not interested in making money because I thought that the law was an instrument to thwart apartheid's goals, to try to block some of the evil that was happening on it, to try to give representation and legal assistance to people who were entitled to it.

Int I also wondered, in terms of joining the Bar, you did that during the early eighties, and had you by that time come out?

EC Yes. I came out at the end of '82, at the time I joined the Bar. It was simultaneous.

Int And I'm curious how you were received in terms of the Bar and your colleagues?

EC Ja, it's hard to know because having decided to come out I just went all the way. I just made no apology, it wasn't half-hearted, it wasn't, you know, dankie baas (thank you master), or apologetic. I remember one incident where I don't even think I'd finished pupillage, I'd just moved in with my lover, Wilhelm Hahn, and Sydney Kentridge, who was this revered QC/Silk...he was actually an SC (Senior Counsel) still then, he hadn't got his London Silk...came across to a table in the Bar Common Room and invited me to come to his and Felicia's (Kentridge's) home for a party on a Saturday evening. And I said, "May I bring my partner?" So he said, "Who is this person?" And I said, "Well, his name is Wilhelm Hahn". And he said, "Who is he?" So I said, "We're living together". So he said...I mean, it was really, I mustn't overemphasise this because I think it was unusual for Sydney to be confronted, and he's a deeply liberal man, but the moment it dawned on him that I was actually asking if I could bring a homosexual partner to his party...he said, "Of course, you must". And I arrived at this party, at which the elite of Johannesburg's liberal left were, with Wilhelm (Hahn), and that was early, that was two or three months after coming out, and I started speaking on public platforms about gay

equality and the necessity for gay equality to be linked to the struggle for justice...for racial justice in our country, very soon after that. I think my first gay equality speech was 1983 or 1984. So a long answer to your question is that I don't actually know what people say behind my back, because no one has ever said it in front of me. I was lucky, I'd been at Wits, I had a reputation as a Wits lecturer. I'd been to Oxford, I came back with a reputation for having done well at Oxford. I'd published an article in 1982, very critical of (Lucas Cornelius) Steyn, who was a Chief Justice under apartheid. So my practice benefited from all of those things, and I don't think people discriminated...if people discriminated against me because I was gay I never felt it because I was overwhelmed with work right from the start. But the problem always was turning work away and managing the excess of work, never looking for work. So I just don't know. It's a curious thing to say after nearly thirty years of being "out". But I cannot think of many incidents over thirty years in which I've had to apologise or negotiate any form of implicit or oblique homophobia, let alone overt.

Int Discrimination sometimes is not overt but there's always the perception, gendered, racial, and also gay discrimination. And I'm wondering whether the perception was ever there?

EC That I had the perception?

Int Hm.

EC No. No, I don't know...yes, I suppose there was, there was a man called Rex Welsh, who was a very distinguished QC (Queens Counsel) ...he made homophobic comments to me, cruel homophobic comments, after I came out to him. And I thought at the time, and I think looking back, that it may have been his difficulty dealing with his own internal issues. Often it is. I think that is true of Rex (Welsh). A single man with a failed marriage, living on his own, not taking kindly at all to a young protégée leaping out of the closet with a male partner. So there were...in fact there were that sort of incident, but not brute public homophobia ever that I know of.

Int Edwin, do you think it may have ever impacted on your work at the Bar in terms of cases, etc.?

EC I don't think so. I'd be interested if you asked other people that question. Other people might say, yes, well we know that attorney wouldn't brief Edwin (Cameron) or on this political left team they said don't put Edwin (Cameron). There was...I remember one comment and I'm going to mention the person, someone...Simon Nkoli was one of the activists arrested with Terror Lekota and Gcina Malindi and all the others in the Delmas Trial, and David Dison was one of the attorneys on the team, and someone relayed to me that someone

said...well Simon's (Nkoli) a gay man, how could he be arrested? And David Dison was alleged to have said, well, he hit them with his handbag. Now it depends on how the comment was made. I'm not going to infer that David (Dison)...it was probably an offhand comment, probably a cheap comment, but I wouldn't think that David Dison is homophobic. But it's very interesting, that comment was relayed to me, and I remember being indignant with David (Dison) at the time. One should of course blame the person who relays that sort of comment to one, not the person who makes it, because you don't have the benefit of the context. But...so there were that sort of incidents, but trivial. And the real issues for me, weren't subjective experiences of homophobia because I had almost none, the real issues for me were discrimination, mainly manifesting in racial and gender discrimination, and manifesting by like part, by like proportion, in anti-gay discrimination. And those were the things that I was fighting against. Outside me.

Int Sure. I'm very curious, Edwin, you mentioned how, wanting to link gay rights, and the discriminatory aspect, to the racial discrimination in this country. But I'm just curious advocacy for gay rights must have been so difficult at a time when, on the agenda, the hot issue was really the ending of apartheid.

EC That's right. It was difficult both ways because the gay white lesbian and gay community was very conservative. I remember we had a terrible fight about whether Simon Nkoli, who was a treasured friend of mine by then, was a terrorist. And the white gay male community was very reactionary in the 1980s, and of course no one now remembers that, but they were reactionary and racist. And that manifested in attitudes, even amongst people who thought of themselves as gay spokespeople. And there were documented instances of that. But conversely, I think the same, I mean, I spoke to some of my ANC clients and comrades about being gay, and I think it was difficult for them, but they had a conscientious engagement with it on almost all occasions. And of course we were able to ride the liberation wave. The wave that turned its back on discrimination, oppression and stigma, and said, yes, everyone, everyone, "even sexual orientation", it was the even sexual orientation wave that carried us home with the new Constitution.

Int I also wondered, during the eighties you were so active on so many levels, I really wondered whether you could focus a bit on your political work, because you did do a lot of political work for the unions as well as political trials, and I wondered whether you could talk about some of that, and your experiences and memories.

EC Ja, it was a desperate time, and of course I can't disentangle the sense of desperateness about the Emergency from the rest of my life. The first Emergency was July 1985 for seven or eight months. The second Emergency was June '86, right until the (F.W.) de Klerk announcement four years, three and a half years later. And that was in the very time that I was infected with

HIV and was diagnosed. HIV infection around about Easter 1985, diagnosis September 1986. So, really the word that I would use is desperate. The desperate sense of the disintegration of the state, the appearance of 'dirty tricks squads', the bad, bad judges sentencing people to death, hoping that you'd get a good judge. At the same time as dealing deeply repressed within myself this knowledge of an HIV diagnosis that was a horror. So a desperate and an exciting and a sort of exhilarating time as well. I can't...I mean, I can think of some of the cases that we did, the *Magopa Land Removal*, there were a number of land removals cases, lots of conscientious and religious objection cases, lots of cases for ANC activists, for stone throwers, for organisations like COSAS (Congress of South African Students)...I think I've lost my CV (curriculum vitae) from that time, my Wits CV of 1989 when I was promoted to a professorship at Wits. And I mean, that documented all the cases I'd done and I've forgotten most of them now. But a lot of them, with favourable judgments, because you were using the law to try to inhibit evil. It is almost as simply stated and simply-minded as that. that's what the fight seemed to be about and I think it was.

Int It's interesting, Richard Abel's book is '*Politics By Other Means*' and when I listen to you I'm very curious in how you use law as an instrument of social justice. Do you think that earlier judgments, for example *the Rikhoto (Rikhoto v East Rand Administration Board); Komani*, overturning pass regulations, do you think some of that may have paved the way, or do you think that there was this inability to really, to kind of overturn the rule of law within a perverted system? I'm just curious how you understand that...

EC I think that *Komani and Rikhoto (Rikhoto v East Rand Administration Board)*; were absolutely pivotal and the social historians will trace the history of the disintegration of apartheid differently from what the political historians will trace it as. And *Komani and Rikhoto* were in some sense also reflections of an urban reality, which was undeniable to parts of the Afrikaner elite. I mean, both the *Komani* and *Rikhoto* judgments were given by Afrikaner judges, I think, (Frans Lourens Herman) Rumpff in the one case and (Hennie van Heerden, if I remember, in the other case. I might have it wrong. Both argued by Arthur Chaskalson on behalf of the Legal Resources Centre, and hugely important in disabling the endorsement out and the ten year ban and the pass system, which was eventually given up a few years later. So, the legal system both reflected the disintegration of apartheid at that time, and accelerated it, I would put it, ja, I would say.

Int Interesting. You know, in my previous interviews for the Legal Resources Centre, there's been almost an international kind of...I don't know what one would call it, but a curiosity about the anomaly in terms of this sort of adherence to the law within this system that was so unjust. And I wondered whether you, practising in the heart of that, how you thought that functioned?

EC Ja, it's such a lovely question that, it's the question that Bram Fischer, one hundred times more than a small fry like myself, or my colleagues at CALS (Centre for Applied Legal Studies) manifested, but the whole idea that he could be defence counsel, leading QC (Queens Council), in the Rivonia Trial, while passing on exhibits to potential saboteurs, a map and a list of targets, he passed it on, I think to Denis Goldberg before their arrest. And so the paradox of being loyal to a system that you despise and whose professed values you revile. And yet the complexity, and thinking what I want to talk about in talking about Bram Fischer in the lecture next year would be the paradoxes that evil legal systems can have good, and that good legal systems like ours under a good Constitution can also have evil. So that's the paradox. But it was...exhilarating is the word, I've used the two words, I've used desperate and I've used exhilarating for those times.

Int And in having an Afrikaner background, I wondered whether I could ask you this question, there's almost a sense that within an Afrikaner community or society, particularly legal fraternity, there was this real adherence to the legal system, and to following it, even if it then didn't come in their favour.

EC Ja. I think that's right. I think there was within the Afrikaner community...this is not too simplified, but there was a commitment...the way apartheid was expressed by NG Kerk (Nederduitse Gereformeerde Kerk -Dutch Reformed Church), theologians, academics, there was an attempt to create it as a just system, which it couldn't ever be. But that impossibility only became clear to its proponents much later. But the answer to your question, the part that's important to your question, is that the Afrikaners did take the law seriously. And, you know, Appellate Division orders were followed, and to me it's still magnificent the way government, big strong government, obeys court orders in our...as a society under a Constitution and a free and democratic country, as much as under apartheid. So the Afrikaners took law, they took theology seriously. I'm not saying that the 'dirty tricks squads' took law and religion seriously. They obviously didn't. But there were serious sections of the Afrikaner elite who were serious about legal justice, about apartheid being a just system, and of course the contradictions were so extreme that you could hardly propound that proposition, but they tried to.

Int You've written a very moving book, Edwin, '*Witness*', and I wondered whether you could talk about your HIV status and also at a time when it wasn't such an issue in this country, but certainly was an issue in the United States, and I'm wondering where your sense of solidarity and solace and comfort came from?

EC At the time I was infected, the HIV epidemic was in North America, and Western Europe, Australasia, still largely seen and largely epidemiologically manifesting as a gay disease. Of course by the mid and late 1980s that had all radically changed in Africa, we realised what a different pattern the epidemic had here. But...and my work brought me to HIV, rather than my HIV

status. Through my work, I did work for the National Union of Mineworkers, for the Congress of South African Trade Unions, but with my own HIV status, a desperately maintained secret, a very severely rigidly maintained secret. And I suppose when one thinks about being gay or having HIV, you think of the social resistances that both those conditions trigger. And I suppose one looks for transcendence in some way, how do I be a person, be a lawyer, be a judge, who is proud to be gay, who is not ashamed to have HIV, but who is also a lawyer and a judge, and a person, who's not defined by those things. And that's a common human quest.

Int In 1990 you became a member of the ANC, I wondered whether you could talk about your memories of change, social change, in this country; what were some of the watersheds, the memories that will be memories that you will remember?

EC In my own area in Brixton, I'd had a semi (semi-detached house), which I'd let out a few years before 1990, to a mixed race couple. And we had threats and unpleasant phone calls and dreadful language, but by the early 1990s, Brixton/Mayfair, that whole area, had had a very significant influx of more affluent members of the Muslim community. Especially in Mayfair, but Brixton and Auckland Park later as well. So the residential nature of Johannesburg was already changing by the time of 1990. And my one vivid memory of 1992 is the fear that the white electorate was going to reject (F.W.) de Klerk's reforms in the referendum. Of course they voted two to one to endorse them, but I was terrified of the opposite outcome. It was a heady time, there was a time that was almost inconceivable that the ANC and the SACP (South African Communist Party) should be unbanned; that liberation leaders should be told they're free to come back and then arrive back; that (Nelson) Mandela should be released. It's still stirring in memory, and still momentous in memory, and rightly so. I suppose part of our quest now is not to lose that sense of the extraordinariness of what had happened then and what the social goals were for which it did happen, for which the struggle was fought, for which sacrifices were made.

Int Edwin, this is such a riveting interview but I'm going to be very respectful of your time, and stop at this point.

EC Thank you. I'm grateful for that, Roxsana. Thank you so much.

Interview 2

16th January 2012

EC ...thought at all that you'd ask me the types of questions you did about my personal life, about HIV and my own infection, and my stand on it, I hadn't thought that...or being gay, I didn't think that that's what we'd talk about at all. I thought you'd talk about the doctrines and jurisprudences at Court. So that touched me and took me back and I found the process very intensely engaging and moving. But there was no cerebral reflection.

Int That's fair enough. And I'm sure we'll do the jurisprudence today. We'll come to that.

EC A bit of it, ja.

Int I wondered, Edwin, if we could start at the point of how your appointment to the High Court came about and what point that came about?

EC The Constitution came into effect in April 1994, and within a few months, Dullah Omar, the new Minister of Justice, phoned me and asked me if I could head a commission. It was the first commission that President Mandela, the new president, would appoint...first Presidential Commission. It was into some crooked arms transactions by ARMSCOR, under the old apartheid government, and I agreed to do so. And to be appointed to have the stature of a Judicial Commission, he made me an Acting Judge. And a number of people then said, well why don't you make yourself available for appointment as a permanent judge, which had always been my ambition. I'd always wanted to be a judge. I think it's the most wonderful and creative way of being a lawyer. And I accepted nomination. At that point you still had to be nominated...I don't even think at that point, and I might be wrong about this, that you had to accept the nomination. The Judicial Services Commission later formalised the nomination process where you had to apply. I was nominated, I think, by the General Council of the Bar, or by the Johannesburg Bar Council. The Judge President at the time, Frikkie Eloff, made it clear that he would support my nomination, and I was interviewed by the Commission in December 1994 and appointed with effect from the first of January.

Int And this was to the High Court in Johannesburg?

EC Exactly.

Int I wondered whether you could talk a bit about life on the bench in those six years?

EC It was a tremendously good experience, very, very demanding, the Johannesburg High Court, and I believe the pressure has only got worse. It's got an enormous turnover, so you do trials, civil trials, criminal trials, motion court, urgent work, an enormous amount of insolvency, commercial work, contractual cases, completely fascinating and a very, very good grounding. My practice had had some commercial dimensions but it was mostly a human rights practice: trade union law, conscientious objection, various things, human rights law, so I found it quite exhilarating. At the same time I didn't realise, and I think it was because I was in denial, that I was already losing my strength, because of the HIV virus. I'd come to see Arthur Chaskalson before accepting nomination, came to see him in the brand new Constitutional Court, which was still across the road at Braampark Centre. And I told Arthur (Chaskalson) about my HIV infection, which was a tremendous shock to him. And we discussed whether it was necessary for me to disclose it to the Commission, which Arthur (Chaskalson) said it wasn't. And I think he was right. I think he was absolutely right. I was able to disclose it three years later, after I'd started medication. But at the time of my appointment I didn't disclose it, and part of the reason was that Joe Slovo had been appointed a Cabinet minister just a few months before, with a very advanced form of cancer, and he died after a year. And Arthur (Chaskalson) made the point...he was initially very distressed personally to know that I had HIV, because at that time there was no cure or treatment. And death seemed inevitable. Which is partly why I was in denial about it myself. But quite rightly we decided that it was my legitimate choice not to mention, because I could give good years of service. Arthur (Chaskalson) said, you don't know whether you're going to fall sick. A bit of denial on his part as well. Or when you're going to fall sick, which was quite true. At that point I felt I was still in good health and energy (though looking back now I know better). And you've got years of service ahead of you to give. Well there were fewer years than I thought in 1994 because by August 1996 I was posted to Pretoria for a month, and it was very demanding. I had a law clerk, the first black permanent law clerk in the whole of the Johannesburg Pretoria division, which was the biggest division in the High Court in South Africa. There'd been a black American temporary law clerk, appointed by Richard Goldstone, for a few months, but my law clerk was the first permanently appointed black law clerk. He couldn't drive. So I had to do the driving across every day, and I got a severe flu, and I never really overcame that flu and then a year later, in 1997, I fell very severely ill with AIDS. And started the medication, because by that stage the medication was available. But all of that, a long roundabout way of saying that I threw myself into my work unreservedly. I was excited by the work, it was exhilarating, insolvencies, contract work, criminal work, it was absolutely fascinating. The diet of a High Court judge in Johannesburg is very, very, very challenging. And from every account I've had from my colleagues and peers, whom I respect very much, it's only grown more so. But it was very, very tiring, very demanding, but enormously beneficial to have that sort of experience.

Int Edwin, I'm fascinated. I wondered at this point whether you'd reflect, having come off the apartheid roller coaster, I wondered how you made that transition for yourself from having to do active anti-apartheid work, through the law, and using law as an instrument of social justice, and then getting onto the bench, and having to deal with, perhaps, and not to belittle what happened, but sometimes more routine matters?

EC Ja. I didn't mind that because it was a return to hard letter law. I mean, we've got a case now before us, which is about the interpretation of a provision that makes organisers of marches liable for damage (*South African Transport and Allied Workers Union (SATAWU) and Others v Moloto NO and Another*). It's a fascinating question because it involves three sub-sections, how you read them together, can they be read constitutionally? And I love that. The lawyer's brain in me likes grappling with that, so I enjoyed that. If I twist your question slightly, I would ask a slightly different thing which was, what was it like for you as an anti-establishment, vociferous, and in some ways virulent critic of the apartheid judiciary, to join them? Because the judiciary I joined at the end of 1994 was almost entirely white males. The Gauteng...Transvaal Provincial Division was about forty or fifty judges, all of them white males. Most of them very conservative. There'd been a few liberal appointments, like (Robert) Bob Nugent, John Myburgh, a few others had been appointed, after the negotiations had started in 1990. And the answer to that question is that I saw it is part of my mission. We had a Constitution and being a judge, together with these people, was a chance to change their minds. And in fact we did...Mahomed Navsa was appointed soon after me. Lucy Mailula, the first black woman to be appointed a judge, was appointed in 1995. Lucy (Mailula) came to see Mahomed (Navsa) and me, we both encouraged her to apply. And the very first judges' dinner that I attended was at the end of the court year in Pretoria in 1995, and I took a male partner. It really did create a sensation. I mean, this is 1995, and I happened to take a very engaging, attractive young author who'd written a prize winning book, and all the wives of all the Afrikaner judges from Pretoria had read this book, it had appeared in both Afrikaans and English. So he was a great hit, and all the judges' wives wanted to come and talk to him. But I made the point, and interestingly I'll name a name here...my dear friend (Robert) Bob Nugent, who is a very liberal-minded person, and who personally would say he has no issue with sexual orientation, actually advised me against doing that. He came down to my chambers, he said, "don't do it". He said, "Because you'll be making a point", and I said, "That's partly why I want to do it". And we debated that, and of course there are always strategic debates. And (Robert) Bob (Nugent) later said to me, I want you to know that I think I was wrong, and that you were right to take a male partner. So that's a vivid illustration. Obviously on the bench as well, I was trying to do the same thing, change colleagues' attitudes not always to do with a personal thing like sexual orientation, but that's what I was trying to do.

Int Very interesting. And in terms of the transition from the High Court to the Supreme Court of Appeal, at what point did that occur?

EC That happened at the end of 2000. And interestingly, you asked me before we did the clapperboard thing and started recording, about Ismail Mahomed; it's something that I think is worth mentioning, and we'll get back to Ismail (Mahomed). Ismail (Mahomed) had never accepted two things. The one was that Arthur (Chaskalson) and not he was appointed the President of the Constitutional Court, in effect the Chief Justice of constitutional South Africa. And the second was that the Supreme Court of Appeal and the Constitutional Court were never going to merge. So Ismail (Mahomed) delayed posting vacant posts in Bloemfontein. And when he died in June 2000, the posts were immediately advertised. He'd kept them on ice for three years, because he'd been hoping that Arthur (Chaskalson) would have to retire...Ismail (Mahomed) had it all calculated, all worked out, and he actually spoke about it. Arthur (Chaskalson) was going to have to retire after seven years...I can't remember how long the Constitutional Court's first term was in the Interim Constitution, but it was quite short, five or seven years. And then Ismail (Mahomed) was going to...having been appointed in Bloemfontein on the longer-service terms of ordinary judges at the end of 1997, was going to be able to live on in the judiciary and become Chief Justice when Arthur (Chaskalson) had to go. But of a united Court. Anyway, that's a partial response to your question about Ismail (Mahomed), because I didn't respect that; it showed Ismail (Mahomed) in his machinations and his obsessive career interests. He was very obsessive about his own career. And I'll say some other things about him later, but it was his death that meant that these four posts were advertised for Bloemfontein in the second half of 2000, and I was appointed together with Mahomed Navsa and Lex Mpati, and Ian Farlam. We were the four appointments.

Int And I'm wondering, at that time, the Constitutional Court had sort of set sail as such, and I'm curious about joining the Supreme Court of Appeal and what were some of the tensions and debates around constitutional jurisdiction at that point?

EC Enormous tensions. Enormous tensions. I remember (Robert) Bob Nugent was appointed as an acting judge, and he and Mahomed Navsa and I, were regarded as the hothead outliers of the court (Supreme Court of Appeal). The old fuddy-duddies on the court...and I don't think I'm doing them a disrespect by calling them that, they were fuddy-duddies...saw us as not being in the mould of their own appointment, which meant that you had to have had a commercial practice and then been a silk and a High Court judge for a while, and then appointed after a due time. And we weren't in that mould. But we had a lot else to contribute, and I think that was eventually seen, that all three of us, in different ways, had something to contribute. But it was a battle. You know people talk about racial resistances in the courts, but (Robert) Bob

Nugent and I, as white males, and Mahomed (Navsa), although he would be appalled to hear this...Mahomed (Navsa) who was accepted anyways as a white male...he'd be appalled. I mean, I tease my friend, Azhar Cachalia, you can't tease Mahomed Navsa in this way, but I tease Azhar (Cachalia) the whole time as being a white male, although he obviously isn't. And Mahomed (Navsa) too obviously isn't, but in the racial geography of South Africa, the big divide is the black/white divide. Mahomed (Navsa) fell on the white divide. We were all three treated, you know, very snootily, very snootily. There were incidents, Mahomed (Navsa) will remember them more vividly than I will. (Robert) Bob (Nugent) will remember them, I know, very vividly. But we were treated, I think, with great disdain and reserve by some of the judges. Others were very gracious and welcoming. But we fought to make our place there, and we fought through hard work, and through genuine contribution and through writing our best judgments and working incredibly hard. So, that was also exhilarating. I remember now my first few years at the High Court were exhilarating. I remember my first few years at the Supreme Court of Appeal were exhilarating. And trying to make a real mark on the common law through judgments, applying the Constitution to it.

Int I'm also curious, from the Supreme Court of Appeal side, how the Constitutional Court was perceived?

EC With great ambiguity, resistance, competition, it was absolutely...and to get back to Ismail (Mahomed), he'd engendered it. He'd engendered it. The other thing that Ismail (Mahomed) did, which apart from stifling the advertising of the vacancies, was that an amount had been set aside for the extension of the Supreme Court of Appeal, just after he'd become Chief Justice, which was then the head of the Supreme Court of Appeal. He'd never used the budget allocation. So the extensions only started being built after he had died. Similarly. Because he had said, no, we don't want to extend the court, I want it to be amalgamated with the Constitutional Court. And Ismail (Mahomed) himself had engendered an attitude on the part of the Bloemfontein judges that said that there's a division within the Constitution between the common law, which is non-constitutional, and the Constitution. The Constitution itself makes provision for Bloemfontein to be the final Court of Appeal in non-constitutional matters. So it was Ismail (Mahomed) who put the judges up to this idea that there was non-constitutional administrative law or non-constitutional recusal even. There was a case called, *State versus Roberts* that said, the common law has always known about recusation. So the application for recusation isn't a constitutional issue. Bizarre things, which this Court had to deal with in the Pharmaceutical Manufacturers (*Pharmaceutical Manufacturers Association of South Africa and Another in re: Ex Parte President of the Republic of South Africa and Others*) case. And Arthur (Chaskalson) wrote that splendid judgment that said, there's only one law. But there was a great deal of tension, vying, competitiveness, and ill will, I would say, in the first few years, while the Constitutional Court was still establishing its authority.

Int And you were appointed to the Constitutional Court here in 2009, is that correct?

EC That's right. At the end of 2008.

Int I wondered whether we could at this point, perhaps talk a bit about your friendship with John Didcott?

EC I knew John Didcott from the 1980s, because I wrote quite a few notes and short articles in the law journals about...and the *Annual Survey of South African Law*, particularly there...about judgments he'd written. And John (Didcott) had a very strong writing style, one that became a bit stylised in the end and I think a bit precious, I fear to say. But I think it's true and fair to say that. He had a very vivid, strong, expressive style of writing, and eventually he became enamoured with it and weakened it, I think. But I liked it very much in the eighties, and he was a very brave anti-apartheid judge, a very, very brave...no one must say that one wasn't able to take a clarion, expressive stand against injustice as a judge on the apartheid bench, because John Didcott did. So we got to know each other then. He actually came to me during a meeting and he said, "oh, you're the fellow who's writing these things". I said, "I'm very pleased to meet you". And I met him every year. The Centre for Applied Legal Studies, where I was based from the beginning of 1986 had this annual judges' conference. And it was a wonderful place to meet judges. It was funded by the Ford Foundation and the Ford Foundation in its memorial should know what an impact that money made because it brought together conservative judges, middle-of-the-road judges, liberal judges, and young activist academics like myself. And we had a wonderful weekend, three day weekend at Mount Grace always, and fascinating debates and conferences. And that's where I met John (Didcott) . John (Didcott) was a very emphatic, very opinionated person, and I regret to say again, I hope I don't sound mealy-mouthed, he was intolerant of other people's views. He was quite arrogant in his own views. But a very, very fine principled judge.

Int ...in terms of observations of the Court early on, I'm sure you were a keen observer of the Constitutional Court...

EC Correct.

Int And I'd wondered whether you felt that John (Didcott) and Ismail (Mahomed) may have been quite strong personalities?

EC Yes. They were not merely strong personalities, they were prima donnas. Both of them. It was a Court of egos. Very, very strong egos, and I think Ismail

(Mahomed) and John (Didcott) were amongst the strongest of them. Very definitely and one could see it in the way the Court functioned. I never sat on the same bench as John (Didcott) but I heard from people that they'd be crossing swords, and very strong egos, and of course that was regrettable and it showed in the judgments. And I think it also showed in the multiplicity of judgments and the length of judgments. It was bad from a point of view of a first instance judge or a practitioner to be the way the Constitutional Court gave too many judgments and too many long judgments in its first years.

Int I'm curious and I'll come back to that, and I also wondered whether you could say some words about Ismail Mahomed because I know you did have a very strong friendship with him.

EC Ja. But a conflictual one. I fell out with Ismail (Mahomed) in the Delmas Treason Trial where we took...we were consulted by Professor Willem Joubert who was dismissed as an assessor by the trial Judge van Dijkhorst, and I believed this was a fatal point against the trial, which was later vindicated by the Appellate Division, under apartheid in 1989. But Ismail (Mahomed) differed from how we should handle the case and I thought that he took a wrong and un...well, it would be unfair to call that unprincipled, but I thought he took a wrong approach. And I wasn't very keen to work with him after that, because I thought...well, I did think he was unprincipled. I think he was wrong about how we should have approached the fallout from the Delmas assessor. But we worked together a lot. It wasn't an easy experience because Ismail (Mahomed) was a tempestuous person. He had impossible hypoglycaemic crashes when he would get beside himself with vexation and anger and become abusive. And I didn't think that was proper, I don't think you should ever become abusive. When you're beside yourself you should try to contain it. And it was also difficult to work with him because of this career preoccupation, which he exhibited right to the end of this life. But of the things I said about John Didcott, some of the things one must say about Ismail (Mahomed), which was a very strong intellect, and also a sense of the law as an instrument to attain justice, I think. Very important in Ismail (Mahomed), and he made some very important contributions. Could have made stronger contributions if he hadn't been overborne by this sense of ill will and envy towards Arthur (Chaskalson), which I think were very regrettable.

Int In terms of your friendship, were you aware at that point when he was appointed to the Constitutional Court, and then he had to go to the Supreme Court of Appeals, did you get a sense from him about his great dissatisfaction?

EC Oh, yes. Overtly. I remember I was in New York, funded by the...I used to call it the CIA, but it was the State Department...on a tour in June 1994, when Arthur (Chaskalson)'s appointment was announced, and Ismail (Mahomed) had a heart attack of some sort, it was some acute cardiovascular event. And

I phoned him from New York, I phoned him from my hotel in New York, and had a very long conversation with him in which he was...the only thing he could talk about was that Arthur (Chaskalson) had been appointed. So I was intensely aware of it, and I came to see him with (Robert) Bob Nugent and John Myburgh. The three of us came to see him after Hennie van Heerden's death...whose death...it was (Michael McGreogor) Mick Corbett's retirement, and Hennie van Heerden was nominated, I'm getting it wrong, of course Hennie van Heerden was nominated. And we said Ismail (Mahomed) should and I thought Ismail (Mahomed) should, because he had a very varied strong background, he'd bring a big change to the SCA (Supreme Court of Appeal). We were wrong. Because he let all these petty ambition and career things stand in his way. He could have been a great judge in the SCA (Supreme Court of Appeal), and he wasn't because he got mired in the pettinesses, he stoked up the judges. I know from when I arrived there, Joos Hefer and Louis Harms and Robin Marais told me the things that he had done, which was to incite ill will and disfavour between the two courts. But he was absolutely explicit about his dissatisfaction. We were pivotal in Ismail's (Mahomed's) decision to apply for the Chief Justiceship in Bloemfontein. But shamefully he insisted that Madiba (Nelson Mandela) beg him. I remember at, I think at his memorial service, I might have this wrong, I think Madiba (Nelson Mandela) spoke...I think he came and spoke, it was a memorial service in the State Theatre in Pretoria, and Madiba (Nelson Mandela) told the story of how Ismail (Mahomed) said, "I won't apply unless you personally ask me". And then Madiba (Nelson Mandela) phoned him and said, "I ask". And I think, compared to the sacrifices that Mandela (Nelson Mandela) had made, for Ismail (Mahomed) to exact that of him showed the human weaknesses in his character. And the reason why he wanted Madiba (Nelson Mandela) to ask him to apply was that he said he had suffered so greatly as an Indian person who had to get a permit to enter Bloemfontein or the Free State, and couldn't stay overnight. Or needed a permit to stay overnight, which was deeply humiliating. It was petty apartheid at its most undignifying and degrading. But to put that to Madiba (Nelson Mandela) as a condition...Madiba (Nelson Mandela) actually told the story, I'm remembering better now, at Ismail's (Mahomed's) memorial service at the State Theatre. And...so I was very closely involved. And then he would come back, he kept his office at the Court in Braampark, and I was appointed temporarily there between August '99 and May 2000, after Sandile Ngcobo was appointed, and Ismail (Mahomed) would come back every vacation and he'd talk of nothing else, literally, you know, in long, long, long hours, long sessions in his room in Braampark. He'd talk about nothing else than his vexation with Bloemfontein and his thwarted wish to have been President of the Constitutional Court.

Int One of the things that's said about him was that he had this incredible ability with words, it was almost poetic, and...

EC Flowery.

- Int ...as a person of letters I wondered what you thought of his command of...
- EC You're being provocative, Roxsana (laughs). I've said enough truthful but I think negative things. It was flowery, it was too flowery, but he had a great diction, he had a great intellect, a great passion for justice, a great energy for it, and great verbal ability, which was overemployed. Stop provoking me. (laughter)
- Int I'm also curious though, Edwin, because it sounds like he was very hard on his friends, and I wondered what made you continue to maintain a friendship with Ismail (Mahomed) right to his death, as I understand it.
- EC Yes. Well, the respect for the passion and the power. He was very difficult to remain a friend to, but it was respect for his passion, for his power, he was a very intriguing and enigmatic man. Enigmatic home life, enigmatic relationships that only came out afterwards. He was a very enigmatic and intense and interesting man. And I won't say more.
- Int Sure. I'm also wondering, from '94 onwards, when the Court was being set up, Arthur (Chaskalson) had been appointed, I wondered what your observations were in terms of the appointment of the judges, both the sitting judges, as well as the judges who came through the JSC (Judicial Service Commission) interviews?
- EC I thought it was a very, very strong first Court. I mean, some people flourished in the Court, like Kate O'Regan who's been one of the finest minds and productive capacities ever appointed as a judge in South Africa, I think. You can go right back to 1910 or before and Kate (O'Regan) will stand out, I think, as one of the very top judges. So what a wonderful Court and a Court of varying strengths, strong minded lawyers, call it a Court of prima donnas, as I've said, but the accumulation of legal power and learning in that Court was extraordinary.
- Int What did you think of the appointment of some of the activist type of judges, for example, Albie Sachs?
- EC Yes, um...(laughs) Albie (Sachs) has very great gifts as a lawyer and he brought them to the Court. He has great gifts as a lawyer. And...I mean, are you asking me to say what I would have done if I was President Mandela? Why are you provoking me?
- Int Not at all.

EC I don't want you to edit any of this out.

Int No, no.

EC I don't want you to edit any of this out, no. Why? Because I'm not going to be untruthful about anything. I respect Albie (Sachs') legal powers and his creative powers and his poetic powers, very deeply. I think there were unanswered questions that arose from Albie (Sachs') interview.

Int The JSC (Judicial Service Commission) interview?

EC Yes. But I...it's not my...I don't want to mar this interview by going into them. I think Albie (Sachs) had an enormously productive fifteen years here, and a credible fifteen years. I think Wim Trengove cross-examined him at his interview in...it was 1994, wasn't it? It was October 1994...September 1994.

Int October '94.

EC Yes. And I think those questions still require resolution, and they still...the historians are still grappling with them. Whether Albie (Sachs) played a morally defensible role in the investigation of the ANC atrocities is still an open question, but it's not for me to...I think those questions are real. That's as much, as I'll say. So I know that Arthur (Chaskalson) strongly supported Albie (Sachs). Anyway...

Int I'm also wondering what you think of the appointments of certain other people, for example, Richard Goldstone who was appointed and then had to leave as Special Prosecutor...

EC Well he didn't have to leave, he wanted to leave, and I know, because he talked to me about it at the time. He got (Nelson Mandela) Madiba's blessing to do it. So I think he got the blessing of his colleagues as well. I think they all thought it would be good for the country, for a South African judge to take it. And then it gave the chance for people like Sydney Kentridge, John Trengove, you know, and others to act here. So my impression from those years is that Richard (Goldstone) did it with the backing of both the (Nelson) Mandela government and of his colleagues.

Int You're absolutely correct. I also wondered in terms of the mix of gender and race, etc., how you found the first Court, the first Bench?

EC Well there were only two women, which was very little, and surprisingly few black people. I think there were only three black people and one Indian, Ismail (Mahomed). It was Tholie (Madala), Pius (Langa) and Yvonne (Mokgoro). That's right, and Ismail (Mahomed), four out of eleven. Which is remarkable given that we're a majority black country, and I personally thought that the Court should as quickly as possible become a black majority Court, for obvious functional reasons, not for politically correct reasons, but for drop dead stupid obvious reasons. I mean, stupid in the sense that they're not debatable. And that's why when I was up with Sandile Ngcobo for appointment in 1999, and many people said I should have got the appointment, I thought that persuaded by Deputy President Mbeki, President Mandela made the right choice frankly. I thought that Sandile (Ngcobo) was a credible convincing and powerful appointment, and he showed that in his twelve years here. And I wrote about it in my book, I said that he was a lawyer with very strong constitutional credentials, and my personal view was that the lawyer...Dullah Omar phoned me, I was about to go into a criminal trial at two o'clock, one wintry afternoon in May 1999, and Dullah (Omar) phoned me personally, and he said, "I'm so sorry you've not been appointed, they decided to appoint Judge Ngcobo, and the Cabinet just felt that there had to be another black judge". I don't tell that story in my book, because I didn't want to bring race into it. That's what Dullah Omar said to me. And the Cabinet was right. Sandile (Ngcobo) was the fourth black African, and the fifth black judge to be appointed. You know, as I said, duh, it's not a...it's a stupid debate, it's so obvious.

Int But you must have been at some level disappointed, Edwin?

EC Of course I was, but I still thought it was right. Of course I was, Roxsana, but I'm so glad that it didn't happen. And this isn't a Pollyanna. I then got the job in the Supreme Court of Appeal because those vacancies were then advertised...no, they were advertised a year later, that's right, they were advertised in the second half of 2000. And I had eight years in the Supreme Court of Appeal, which were incredibly beneficial. I learnt so much there about writing, about the law, the diversity, about working with colleagues. So I'm really grateful that I didn't get the job in '99. And my disappointment was genuine, but my wish for Sandile (Ngcobo) to have the appointment was unstinting, it really was. It wasn't a difficult issue for me and it still isn't. It was quite clear he was a very competent, powerful lawyer, with constitutional roots and there's no doubt that he deserved the appointment.

Int What were your observations of the first case that was taken, the *Makwanyane (S v Makwanyane and Another)* death penalty case?

EC Well a powerful judgment, which is rightly cited across the world. A correct decision to let each judge speak individually, I think. Other cases, many other cases, I think each judge should have shut up. But *Makwanyane (S v*

Makwanyane and Another) was a good decision, that there was either a judgment of the Court nor a judgment where one judge writes and everyone concurs. And I think there are different occasions for different types of judgments. That was a good one where you had eleven different voices each saying in their own way. Very, very clever, very clever decision by the Court. And it's never really been questioned. The ACDP (African Christian Democratic Party), a small political party, criticised it, but I think...I watched in December there was a very disturbing and moving ceremony at the gallows in Pretoria, where many of the political activists who'd been hanged under apartheid were memorialised. And I just don't think that the death penalty, certainly in South Africa's political elite is...I think there's a strong feeling amongst...a sort of a grassroots feeling that the death penalty is right for certain types of retribution. But I don't think there's a political issue, even with ordinary South Africans, ordinary suburban township and rural South Africans, that it really is an issue. And the *Makwanyane* (*S v Makwanyane and Another*) (judgment) has to do with that, and very powerfully so.

Int Do you think... at the time, when the *Makwanyane* (*S v Makwanyane and Another*) case happened that that was the same sentiment in the public?

EC No, but I think it was what the political elite expected. They couldn't do a deal with the National Party government, because the NATS (National Party Supporters) thought the death penalty should be retained. So everyone bought into this clause that gave the right to life and then left the issue to the Constitutional Court, the new Constitutional Court. But everyone expected that the Constitutional Court would rule it unconstitutional. They didn't think necessarily that they'd do it unanimously, and they didn't think that they'd do it so strongly with all those eleven diverse judgments. But everyone was expecting it. I mean, no one would have been surprised.

Int There's always a sense that the first bench was progressive and had such a strong human rights bench across, even with the sitting judges...

EC A human rights mission.

Int Yes. Even across the sitting judges that were appointed.

EC I agree.

Int (John) Didcott, Laurie Ackermann, etc. But there's criticism perhaps from other judges that it doesn't really represent the wide spectrum of opinion and ideology and spectrums in South Africa, unlike the US Supreme Court. What's your sense of that?

EC I think that's right. I think that's absolutely right. I think that it's been an activist Court, it's been a human rights committed Court...that may be changing and I know that on our Court at present there are differing views. But there's no doubt that the judges of this Court have represented a particular constitutionally activist approach to the law and the Constitution. And you see it practised every day in our judicial conferences. What does the Constitution mean? What is the commitment that it represents? And it's very impressive to see this operating amongst your colleagues, you sit there and you see the debates that take place. And it is very impressive. But there's no doubt that the Court...you know, for example, shortlisted with me and Sandile (Ngcobo) was Kees van Dijkhorst. Very, very strong and clever judge. The judge who'd made a mess up of the Delmas Trial where Ismail (Mahomed) and I had had our fallout. So history all patterns into itself. He would have taken a very different line. Louis Harms who was never nominated for service on this Court, a tough common lawyer, a brilliant patents lawyer, would have taken a very different view. Those judges have never really got a chance for their voices to be heard in this Court. And of course there's the voice of African traditionalism, Bernard Ngoepe, the Judge President of Gauteng, who's now retiring, has publicly said that the Court isn't respectful enough of African traditional views and laws. The Chief Justice in a memorial oration at Judge President (Fikile) Bam's funeral on the 27th of December just three weeks ago, said something to that effect. So yes, it's absolutely true what your question implies, which is that this Court has had a homogeneous human rights directed constitutionalism to its ethos and that that still prevails at the moment.

Int Others would say, given the history of South Africa, that that was essential...

EC Yes. Yes. Of course, definitely, I still think so. You see, I'll tell you why. Because we, obviously, live in a half broken half fixed society. And the Constitution is an instrument, it's a social instrument, a dynamic social instrument for governmental and public power. Corporate governmental and public power to be exercised in a way that conduces towards a more just future. We've only started on that path, we've got so far to go. We've become less equal in some ways, our society. The poorest people have got more coverage, thank goodness, through social grants, a big housing programme...I mean, I went to Venda a year ago, and the furthest, remotest part of Venda has got part of the electrical grid, and don't underestimate what it means to a Venda household, because I stayed overnight twice, to have electrical power, dangling from a cord in the roof. So there's been a definite...I don't know how the statistics quite work, and I might be getting this wrong, but the poorest people have become less poor but the division between people like ourselves who are sitting on comfortable settees in lavish offices with air travel and cell phones and comfortable homes, that division has become more. It might also be that part of the poorest have become poorer, I don't know quite how the statistics work. But I think that that's what it is. There's been more social grants to the neediest, more social provision for the neediest, but some of the poorest of the poor become poorer. But the most

visible statistic is that the distention between the super elite, amongst who judges find themselves, and the bulk of South Africans. And I think the Constitution is an instrument for remedying that, for creating more equality. We haven't explored the equality clause.

Int I'm also curious, Edwin, in terms of your observations of the first two years of the Court, what was your sense of some of the ways in which judgments were adjudicated and approached, the style of the Court as being so different from the Supreme Court of Appeal, the lack of formality, etc. What was your sense of that?

EC Yes. Well, a lot of it was so wonderful, I liked the lack of formality. When I got to Bloemfontein we persuaded people to drop the 'My Lord' rubbish. 'My Lord', 'My Lady' stuff, which this Court had dropped in its first sitting in February 1995. I liked all of that, I thought it was very, very, very powerful. There was a widespread sense that this was not a Court of law but it was a Court of political opinions. Well, with some of those judgments, they were so strongly reasoned, it became quite clear that this is a Court of lawyers. I think there were faults, there were too many judgments, too long prolix, too many footnotes, I mean, really, I still think so. I still think so.

Int There's some sense also that this Court really became a frontrunner in changing a lot of the ways in which the judiciary approached judgments, in the paragraphing, uses of computer, did that somehow impact on you?

EC Yes, that's right. Ja, certainly. And beneficially, I would say, definitely.

Int The *TAC (Minister of Health and Other v Treatment Action Campaign and Others)* case...it's a wonderful outcome, but it's been criticised for somehow overstepping that fine line between the judiciary and government. Do you ever think that?

EC No, how could it have? The question before the Court was whether the government had complied with its constitutional obligation to take reasonable steps to provide...within its available resources, to provide access to health care. The evidence was overwhelming. Nevirapine was provided free by Boehringer Ingelheim, the scientific evidence was incontestable, that taking a single tablet of Nevirapine before labour started, and giving a half tablet to the baby after birth, reduced the risk of HIV transmission by half. The scientific evidence was incontestable, and the government was refusing to provide it at more than two or three, or maybe five pilot sites. No. No overstepping at all. I don't think so at all.

Int What was your sense of that case (*Minister of Health and Other v Treatment Action Campaign and Others*) and how it was managed? It was quite a tough case.

EC It was a pivotal (*Minister of Health and Other v Treatment Action Campaign and Others*) case. I think it was the...the other case, the Western Cape provincial (*Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others*) case in 1995 is cited...1996/7, where President (Nelson) Mandela went on to the television and said, "they'd ruled against me and I want everyone to know that I'm accepting it". That's often cited as a pivotal case for rule of the law. It wasn't. *TAC (Minister of Health and Other v Treatment Action Campaign and Others)* case was, and I'll tell you why. Let me start personally, having fallen very severely ill in 1997 I started on antiretrovirals and I realised with immense drama, personal, deeply life changing drama, that my life had been given back to me. I mean, within ten days or twelve days, you're starting to get hungry again, your energy is returning...it takes a long time, I mean, it takes you two or three months to adjust to the drugs...or it did me. I think the drugs now have become much easier to adjust to. And I was on a very high powered combination. You wouldn't start someone...my doctor...there was much less experience...my doctor started me on protease inhibitors, you'd never start someone on protease inhibitors now. So I had severe gastric reactions and nerve tinglings and so on, which you wouldn't have nowadays. But what was incontestable was that the virus had stopped being active in my body and that I was going to live! It was so amazing, it was deeply moving, and that's why I went on my campaign. So by the time of the Nevirapine case, I'd already been on the campaign trail for three years to make drugs available to everyone. In the midst of this, this Mbekiite nightmare of ludicrous, absurd questioning of AIDS science nightmare, while hundreds of thousands of people are falling ill and dying, and the Court's judgment was the beginning of the end of the road for that. So it was a...this wasn't a peripheral...the (Nelson) Mandela rule of law question (*Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others*) was about whether the President could issue a proclamation to activate a law, to change a law, and the Court said, "no you can't, because of separation of powers". And it's an important legal doctrine, but it's quite a technical legal doctrine. This case (*Minister of Health and Other v Treatment Action Campaign and Others*) wasn't about technical legal doctrine, it was about the core governmental power to decide on health policy. And the Court said that government wasn't behaving reasonably. And to President (Thabo) Mbeki's credit, the only way in which he emerges with any credit, from the entire disgraceful, shameful, deplorable, grief-filled and suffering-filled, and death-stricken AIDS debacle, the only way in which he emerges with credit from it, is that he accepted the ruling. And that is to his enormous credit. The fact that President (Thabo) Mbeki bowed his head. His Minister of Health went onto the television one night to say that they weren't going to follow the judgment, she said that, she said, "Yes, I know we must listen to the Court, but the Court must also listen to

us". So the interviewer says to her, "does that mean you're not going to follow it?" And she says, we're not going to follow it. The next night the Minister of Justice, Penuell Maduna, went onto the television to say, "we're going to follow it". And he must have done that by instruction from President (Thabo) Mbeki, and may President (Thabo) Mbeki's legacy be redeemed by that, because I think that was so important. So I think it was a pivotal case. And today, I'm one of one point five million people in our country, I'm sitting here today because of antiretroviral treatment, and the Court's judgment. Had the Court faltered, I think it would have been the end of constitutionalism. I really do. But the Court didn't falter. It gave a judgment of the Court, in contrast to *Makwanyane (S v Makwanyane and Another)*. No individual judgments. All eleven signing on to it. Quite magnificent. Right in the middle of a heated social debate about AIDS science, about antiretrovirals, about presidential power, about health policy, a quite momentous, historic and extraordinarily courageous use of judicial power, and rightful use of judicial power.

Int Edwin, having lived through that time, it has often been sensed that having come off apartheid and then having to have faced this, another crime against humanity, how do you remember living through that period, of the denial of HIV, etc.?

EC Well, going back to the Court decision, the fact is that you can have stupid, arrogant, misuse of power even in a just system, even in a democracy, even in a constitutional democracy. Apartheid was a stupid, unjust system, without a just democracy and without popular mandate and without a fair legal system. But AIDS denialism was all those things within a...the difference was that you had a Constitution that could review the President. You couldn't review...I mean, look at a comparable, comparably horrifying health policy decision which was to give most of public funds for health to whites. White hospitals. I mean, as a white person under apartheid you didn't need medical insurance, you'd go to a hospital and you'd get excellent health care. But black babies, malnutrition. I mean, there was kwashiorkor at one point in South Africa. Disgraceful, appalling, people dying because of lack of primary health care, which Nkosazana Dlamini-Zuma, to her credit she did wonderful things as a health minister in her five years. She took up against smoking, she got in a primary health care system, which I think saved many, many, many, many, young babies and other people's lives. So you couldn't have challenged the apartheid government's allocation of funding, but under the Constitution you could. So I saw it, I saw that as a fundamental test for constitutionalism, which the Court and legal system and President (Thabo) Mbeki, passed with very moving magnificence.

Int Edwin, your acting stint (at the Constitutional Court), when did that come about, in 1999, was it for two terms?

EC Yes, it was for two long terms. For four terms altogether, ja.

Int I wonder if you could talk about how that came about and then your experiences of coming to this Court?

EC Well, in that phone call when Dullah Omar phoned me that May afternoon, that wintry afternoon, just before two o'clock, my assessors were actually sitting in my office when the call came through, my secretary said, Minister of Justice on the line. I knew it was about the appointment. He said, the Cabinet decided, right from the start, because there'd been a debate, President (Nelson) Mandela was going to appoint me and then Deputy President (Thabo) Mbeki intervened, it went back to Cabinet. And Cabinet decided that whoever was not appointed would become an acting judge, because it was between the President of the Court, the Minister of Justice and the President, and that was decided. So Dullah (Omar) had told me in that discussion that you're going to become an acting judge in the Court. It wasn't completely comfortable. I never enjoyed being an acting judge, because you...I felt, perhaps wrongly, that I was there on sufferance. I haven't been appointed, and it was very good of Arthur (Chaskalson) and Dullah (Omar) and President (Nelson) Mandela to give me the acting appointment, but I was very, very happy to get the job in Bloemfontein. Arthur (Chaskalson) had initially said, as the President of the Court, you'll carry on acting until the next vacancy. And I said to him after a few months, I think before the end of 1999, I said to him, Arthur (Chaskalson), I don't want it. I've been appointed for six months, and then another six months, I said, I want to go back to the High Court, I don't want this to be indefinite. Because there'd been indefinite acting judges in Bloemfontein. Ian Farlam and Lionel Melunsky had been acting from 1996; for four years they'd been AJAs (Acting Judge of Appeal). Because Ismail (Mahomed) hadn't advertised those vacancies that we keep on getting back to. I didn't want that.

Int Your experiences at this Court and the differences in style from the Supreme Court of Appeal, the conferencing method, etc., I wondered whether you could talk about those aspects?

EC Well, it's very interesting...let me talk about one really fraught case, which was the *Ermelo High School (Head of Department: Mpumalanga Department of Education and Another v Hoerskool Ermelo and Another)* case, which was heard in the first few months after I was here, and I learnt a lot from that case. Dikgang Moseneke wrote the judgment. It was a case where the department had tried to force an Afrikaans high school in Mpumalanga to admit English language pupils but had gone about it the wrong way. The case was hugely loaded politically because of the Afrikaans language issue, because language was seen as being used as a cipher to block black pupils. The high school itself had reduced to numbers from, I think, about 1600 to fewer than a thousand...890. But the school didn't want the extra classroom space to be used by black pupils when there was a critical shortage of space. The High

Court quite wrongly okayed the departmental exercise of power. Came on appeal to the Supreme Court of Appeal, which gave a very correct judgment saying that the department exceeded its powers. And then in that atmosphere of fraught racial, linguistic, cultural tension, it came to this Court. And I learnt so much from the way Dikgang (Moseneke) handled the case. He said...obviously this...and the way he dealt with it as well with...Pius (Langa) was still the Chief Justice, Dikgang (Moseneke) his deputy...and the way the Courtroom was filled with Afrikaner teachers and Afrikaner pupils and black learners and black government officials. So we knew we were on the line, and the way Dikgang (Moseneke) handled the debate in Court was very, very interesting and informative to me...instructional to me, that's the word I've been looking for. And the way he wrote the judgment as well, he said this case (*Head of Department: Mpumalanga Department of Education and Another v Hoerskool Ermelo and Another*) is about the legal rights and the wrongs of the departments bullying the school...because the department did bully the school. That's the shorthand for what happened there. But it's about more than that. There's also a school that has got a shrinking number of white kids, in an area that desperately needs black kids to get to school. And we crafted a remedy, which said to the bureaucrats, you were wrong. And we're setting aside your decision and the school governing body retains the power to decide, but we ask the governing body to give us a report, in the light of what we said. And we made remarks about the diminishing white learners and the empty classrooms. And I thought that was very moving, very instructive to me. I've learnt so much in this Court, I learnt a huge amount in the High Court, a huge amount in the Supreme Court of Appeal. I've learnt a lot in the last three years in this Court about how to use, and how not to use, the power of this Court. So it's been fascinating. Very different. Very collegial, I'm sure that all your other interviewees have said that. I like that. Very respectful of each other. The tone is not an abrasive, intellectually arrogant tone. I don't know how John Didcott and Ismail Mahomed managed here, because I'm sure they were very abrasive. We no longer have an abrasive tone. You value each person's contribution, not because you condescend to it but because you really know that they're seeing something that you might not be seeing. And that there isn't only one intellectual or analytical or values-based approach to a legal problem. And I really have derived great insight and benefit from that.

Int Edwin, when you were here in 1999 and 2000, what were...I know many people have really highlighted the collegiality, but I wondered what your perceptions were of racial and gender issues? Not just as actual happening but as your perceptions thereof?

EC Well, there were actual happenings as well. Let me give you an example, there was a case called *Chief Lesapo versus North West Government (Lesapo v North West Agricultural Bank and Another)*, where the issue was whether government could execute on a debt owed to it itself. And Yvonne Mokgoro produced a judgment, which I didn't think grappled with all the issues, and I wrote a note saying that I think the judgment might be wrong,

and setting out my views, which were initially that in fact this form of execution on assets, given the safeguards that exist in the Act, was in fact justified. And I remember Zak Yacoob came to see me and said, "This is completely wrong, you don't do this in this Court, you can't just circulate a note querying her judgment, you first go and speak to Yvonne (Mokgoro)". I remember I was bewildered and shocked and quite upset. I was very upset actually that Zak (Yacoob) had said that I'd done something wrong, and by the feeling, which I'd internalised that I had done something wrong. And the issue was the racial dynamics of the Court. So it was out there, it wasn't unspoken.

Int And what was the racial issue?

EC The racial issues were...they're issues of discourse. You know, I grew up in a poor household, as we discussed in my first interview, in a children's home, five years in a children's home, but when I got to Pretoria Boys' High, I never had any doubt that I had a voice to find. From a poor home, disadvantaged background, alcoholic father, all those things, but I knew I had a voice. And I think that's part of the white male thing. You're a black woman...as a white male in the sixties and seventies, going to Pretoria Boys' High, Stellenbosch and Oxford, you don't doubt that you've got a voice, and that your voice is one that's entitled to speak its views. Now you don't see that, it's only by reading Biko, by understanding Fanon, whom I've never read in the original, I want to confess on tape, but understanding the excerpts that I've read, that you understand that the power of discourse is racialised, and that also took place in this Court. Now I don't know what your other people have told you about, but it was there. And there was anger about it. I mean, Sandile Ngcobo was a very angry person. A very angry person. About the power of racialised discourse, and he came repeatedly and expressed his anger to me, and at me. And I understood it, and I don't think it was always unjust and I saw how the racial dynamics operated in Bloemfontein. People would send out a "smart" judgment in response to a black colleague's draft, which was seen as disrespectful. There was a lot of debate, if you ever did this oral history project on Bloemfontein, you would have a lot of the judges who would see racial issues...I mean, Mahomed (Navsa), not a white male but on that side of the cultural divide, and, well then I've felt and received that arrogance from our older white colleagues myself. But when it was directed at black judges, it was felt far more acutely, it was felt in a racialised way, and worse, it may well in fact have been racialised in Bloemfontein. So the idea that you could nominate a black colleague to do the first draft and then whip out an alternative, was seen as an appalling affront here in the ConCourt. Not the way to do it. First work on the draft and say, you know, wouldn't you be willing to consider this alternative, or here are paragraphs for you to insert in your judgment because I don't quite agree with the approach. And it's about the legacy and power of racialised discourse. And it's a vital insight, I think. But it was present in this Court from the start, from February 1995, or whenever they were invested in October 1994.

Int Just to piggyback on this issue, when John Hlophe's Report came out on racism, you were at the Supreme Court of Appeal, if I'm not mistaken, and did you then have the session discussing race and gender?

EC Yes, we did. We did. Look, the Hlophe Report had numerous factual misstatements, misrepresentations, gross inaccuracies, I was aware of them because of Belinda van Heerden, Elna Revelas. I mean the Hlophe report said that the judges who supported Ms Revelas' appointment to the Cape bench were against transformation. Well, the person appointed in her stead, at Hlophe's insistence, was a white male called Hennie Erasmus. So it was bizarre that the report should say...the report simply...he either misremembered or deliberately misrepresented what happened. And he accused Belinda van Heerden of being racist. She wrote a long reply, which I saw. And all of that was buried by Arthur (Chaskalson) and Pius (Langa). And I want this to be on video, an un-embargoed video, it was completely buried. Those false allegations were never publicly debated or resolved, and their author was never called to account, and I think that was a terrible mistake.

Int Why was it buried?

EC I don't know what Pius (Langa)...I think they thought we could move forward. And we haven't moved forward. There're still issues arising from it. I think they should have been publicly debated, the people accused and the accuser should have been publicly confronted about their versions, and the truth should have come out. Now the one thing I've mentioned that Hennie Erasmus was appointed instead of Elna (Revelas), when Elna (Revela)'s backers were accused of being racist or anti-transformation, is a simple fact, which I happen to know. But there might have been many others. Now those should have been publicly debated. What Pius (Langa) and Arthur (Chaskalson) were thinking, I've never privately or publicly asked them. But we did...to get back to your more particular question, we did go through a process in Bloemfontein, which was very hard. I believe this Court did as well. But we went through it and it was very beneficial. Not everyone bought into it. Some people bought into it and then retracted.

Int I'm also wondering, in terms of not racism as racism, but perceptions of race, how does one then negotiate a judicial transformation process, where it's more than just demographic? What are some of the broader issues of judicial transformation that you think Courts are grappling with?

EC Let me give you an example, when I came into an untransformed, white male...almost exclusively white male judiciary, end of 1994, my understanding, and I think it was a correct understanding, is that every judge understood that he – and it was almost exclusively he – had to visit prisons every year. Part of the complexity of a transformation is that that sort of

internalised conception of valuable duty may get lost. And in this case it did get lost, or nearly lost. Because my understanding is that relatively few judges now do prison visits. So when I came here in 2009, I tabled this issue with my colleagues. I said, I think we should get prison visits going again, and the way to do it is not by telling other judges to do prison visits but by doing it ourselves. So we agreed on this in 2009. We started a series of prison visits in 2010 and 2011, which we're going to carry on with in 2012. Hoping that other judges will pick it up. So there are issues like that of the conception of the ambit of your judicial duty, which are entailed in the question of transformation. There are constitutional issues, there are racial issues, there are gender issues, the ambit of duty issues, so it's a very complex process.

Int I'm also wondering, Edwin, when you were here in 1999/2000, what were some of the judgments that you...you took on, and also the challenges of adjudicating cases in the Constitutional Court?

EC I thought the Constitutional Court was over-constitutionalising some issues. And Kate O'Regan and I dissented in one case, where we...it was about the burden of proof when someone is caught with property not belonging to him...and most perpetrators are him, so I'll stick to the male exclusive gender. And we gave it a dissent...I want to say *Makwanyane (S v Makwanyane and Another)*, of course it was *Manamela, the State versus Manamela (State v Manamela and Another)*. And I think Kate (O'Regan) and my dissent was correct. We said that there is ample justification for putting the burden on someone who's caught with property not belonging theirs. Whether it's stolen property, proven to be stolen property, or not. And the majority, I remember we had a very close split and we were trying to persuade Arthur (Chaskalson), and Arthur (Chaskalson) went the other way, and then two or three of the colleagues went with him and Kate (O'Regan) and I were left on our own. We'd hoped that Arthur (Chaskalson) would come with us. And I thought there was some constitutional overkill. I still do, in some of the judgments. I gave a judgment in Bloemfontein called *State versus Ndlovu*, that's the most widely used judgment on admission of hearsay evidence in criminal trials. It was the first judgment at appellate level that looked at using the hearsay admission act, the admission of evidence act. And when the first hearsay case came to this Court, the judgment was written by Bess Nkabinde, she said very carefully, we're not saying whether *Ndlovu (S v Ndlovu)* is right or not. Now *Ndlovu (S v Ndlovu)* is nearly ten years old. It's nine years old this year, I think. And it's been used in every trial court almost every day. It was a case that said with the proper guarantees of truthfulness that hearsay evidence is admissible. Which is what the statute says, but it was challenged constitutionally because it was a pre-constitutional statute and the judgment in *Ndlovu (S v Ndlovu)* said it's constitutionally kosher. This Court by saying, we're not saying whether that judgment is right, was in effect putting a query against it. Well, we'll see what happens. We'll hear argument, I'll keep an open mind, but I'm sure as hell going to sit on that case and rehear all the arguments and keep an open mind on it. But I would just as a general

proposition, without any particular facts, or applications before me, I would hope that this Court wouldn't go for constitutional overkill in the application of hearsay evidence. As it happens, that precise issue, is the issue that the European Court of Human Rights has just ruled on in the United Kingdom, where the United Kingdom Supreme Court also said, we've got to be able to use hearsay. Now interestingly that this Court said, we're not sure if *Ndlovu (S v Ndlovu)* is right. And we'll see what happens when it comes here, we'll see with the Europe...the European Court of Justice retracted a previous decision and said, okay to the UK, you can go your own way on this. And all of that will be argued before us and we'll see where we go. I've got an open mind, of course.

Int It's curious because this Court has been known for its use of comparative law, and when you got here in your acting stint, did you find that refreshing, did you find that as process quite interesting?

EC You know, I think there might have been overkill as well. Ja, I think there was. The Constitutional Court judgments had almost a formulaic aspect to them. And we made light of it, we almost joked about it in the High Court and the Supreme Court of Appeal. You know, there'd be the lower court process and then the comparative chunk, and I don't think you should put in a comparative chunk unless there's a real hard little sliver that you're going to put into your judgment only because it's going to make a difference to it. So I don't like these long comparative things. And you'll go and look at all the judgments in the first ten years of the Court. Well, anyway, maybe I'm unjustly minimising, belittling the value of it. And I do think comparative constitutionalism is vital. Look at this absurd debate in the United States Supreme Court. I mean, if anyone were to question it, I'd say, no, rather have it all in, even these long formulaic chunks, rather have them in than leave them out. But once you agree that comparative constitutionalism is essential to understanding, and our Constitution says it is, it mandates it, then I don't think you should do it formulaically, or perhaps so extensively.

Int I'm wondering in terms of process, when you got here and the experience of working with ten other judges, that's quite different from the Supreme Court of Appeal...

EC It's very hard here. Very hard. It's the difference from working on your own, or working with one other judge in an appeal from the Magistrates' Court, which doubles the complexity. Working with a third judge in a full bench of appeal, the collegial complexity is one times two times three. It's not just one further function of difficulty; working with five, it's one times two times three times four times five times as difficult. And eleven, it makes that infinitely more difficult. It really is difficult, very rewarding, but laborious. As Kate O'Regan said in her *Helen Suzman Lecture* last November, just to go around the table, even if every judge takes only five minutes to say what they think, you've already

taken an hour. And that's if every judge is very succinct. So it's very laborious but very worthwhile and very important, I would say. I would say that an ideal size for the Court, if you no longer have diversity and gender issues to take account of, would be nine, rather than eleven.

Int Edwin, you'd known Arthur (Chaskalson) for a long time before you came to do your acting stint at the Court, I wondered how you perceived Arthur's (Chaskalson's) management of this Court during the time you were here in 1999?

EC Well, it was very strong. His intellectual pre-eminence and predominance were unquestioned. Very, very strong. The Court ran very, very well. Arthur (Chaskalson)'s attention to everything concerning it was minute. When I joined the Court as an Acting Judge in August '99, a crisis erupted because the Minister of Justice Penuell Maduna made some very disparaging remarks about the Constitutional Court judges being out of the country all the time. And he mentioned (Johann) Kriegler and (Richard) Goldstone. And he said other belittling things, he said, you know, there's not enough work in the Court, that sort of thing. And the fact, compared to our current workload, I mean, we delivered...I don't know what the figure, it was over thirty, thirty-seven judgments last year. In some years the Court delivered only fourteen judgments, or fifteen, sixteen, seventeen, eighteen, nineteen. So we had over thirty set downs last year, a very heavy year. But his comments were completely off the mark because to suggest that the Court was idle or that its members were holidaying overseas was absurd. In fact Arthur (Chaskalson) then issued a press statement showing that (Penuell) Maduna had signed off on Richard Goldstone's presence in The Hague and he'd signed off on Johann Kriegler going to East Timor to run the election there. So we had this, and the good thing that came from it is that the Court started round-tables with the media. We called in the media, we all sat around, and there were editors, we gave them lunch, a finger lunch, I mean, it wasn't anything lavish, and I think the Court should do more of that, because...in fact I should raise it again, we should have the media back to Court. So Arthur (Chaskalson) was good with all those things. Arthur (Chaskalson) was less attentive to the needs of the rest of the judiciary, but that's not what this interview was about. He was very focused on the Constitutional Court.

Int When you say the needs of the rest of the judiciary..?

EC Of the rest of the judiciary, the High Courts and so on.

Int Right. So the relationship between the Constitutional Court...

EC Yes. I said to Arthur (Chaskalson) that he had to visit the other courts, and eventually, when he became Chief Justice, he did. But Arthur (Chaskalson)...I

think Arthur's (Chaskalson's) preoccupation was always with this Court rather than with the rest of the judiciary.

Int In terms of reviewing the cases of this Court, the first fifteen years, there's a sense that socio-economic rights have been dabbled with, but there isn't really a coherent jurisprudential philosophy that's been developed, and as such, socio-economic rights haven't been satisfied through the court cases brought here. What's your sense of...?

EC You're being provocative, I don't agree at all. No, I think it's an extraordinary jurisprudence. I think *Grootboom (Government of the Republic of South Africa and Others v Grootboom and Others)* has laid the basis for it. I think *Mazibuko (Mazibuko and Others v City of Johannesburg and Others)* shows the limits of it. But I think an extraordinary amount has been achieved. I think it's a path, I don't think it's the end of a path, but I don't agree at all with the criticism. I'm very much aware of the criticism of the Court for not having accepted a minimum enforceable content, a minimal eligible content. But I don't agree with it. I think the socio-economics rights jurisprudence has been amongst the most meritorious achievements of this Court.

Roxsana, I'm getting a bit hypoglycaemic. How are we with time? I've got another fifteen minutes.

Int We have about another twenty-five, but we can stop. Do you want to take a break or...?

EC Ja, how far are we from the end. I can probably push through for another ten minutes, but I'm actually getting a headache.

Int Okay, we can stop.

EC Can we do that? Are we nearly at the end? Because if it had been earlier in the interview I would have gone into a long disquisition about the socio-economic rights jurisprudence.

Int Well, then I'll have to interview you again then...

EC No, you won't. It's fine. I think the jurisprudence is very strong, it's been... *TAC (Minister of Health and Other v Treatment Action Campaign and Others)* case, *Blue Moonlight (City of Johannesburg Metropolitan v Blue Moonlight Properties 39 (Pty) Ltd and Another)* case. Terrific cases. *Joseph (Joseph and Others v City of Johannesburg and Others)*...you know, I think the cases for which the Court is criticised in not giving relief, *Nokotyana (Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others)*

(Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others)
and *Mazibuko, (Mazibuko and Others v City of Johannesburg and Others)* I
don't agree at all with the criticism.

Int In terms of the issue of pragmatism and principle, in terms of the judges; how have they grappled with the issue of pragmatism and principle in adjudicating cases?

EC Trying to think of a good example that I can bring forward. I find that hard to answer in the abstract.

Int Theunis Roux has written about the 'Chaskalson Court', do you get a sense that that in some ways was not indicative of your time here, politically?

EC Um...what does Theunis say?

Int For example, when he talks about how the first bench was politically a very canny bunch; they had particular outlooks, what did you think?

EC I think that's right, and I think if you look at the outcome in the *Prince (Prince v President of the Law Society of the Cape of Good Hope and Others)* case and in the *Jordan (S v Jordan and Others Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* case, they were both decided by one vote with Arthur (Chaskalson) on the side in *Jordan (S v Jordan and Others Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* of not saying that Parliament may not criminalise sex work. And in *Prince (Prince v President of the Law Society of the Cape of Good Hope and Others)* on the side of saying Parliament does have the power to ban dagga even for religious use. I think it was a very canny Court, a Court that said, where are we going to expend our power? And that's why I found it so impressive that in the *TAC (Minister of Health and Other v Treatment Action Campaign and Others)* case, the Court unanimously said, we're going to put all our moral and institutional authority behind this issue. Very interesting. I think Arthur (Chaskalson) was deliberately conserving the Court's power for a more fundamentally important case, and that case came – it was *TAC (Minister of Health and Other v Treatment Action Campaign and Others)*.

Int Well, I'm not going to tax you very much further so I'm going to start closing.

EC Thank you.

Int I wondered, in terms of some of your concerns about the Court; in terms of your fears and concerns about the Court, what those may be?

EC You know, I think the fight for constitutionalism and for the rule of law is one that's been fought in America, Western Europe, in England, the meaning of it in relation with the European Court of Human Rights, it's not unique to South Africa. So it's a supranational issue. But I think it's a real one here too. And I see our role as judges as being as messengers of constitutionalism...when I talk to groups of lawyers, I spoke to an advanced advocacy training course last week, and I said, your role is as emissaries of constitutionalism and the rule of law, so I see it as a battle. And it's a battle with foes. The foes are political will, where we have had the President (Jacob Zuma), who despite some adverse remarks has reaffirmed repeatedly in his State of the Union address, in his address to the Judicial Conference last July, his commitment to constitutionalism and the rule of law. But you need political commitment. If you don't have it, as in Swaziland or in Zimbabwe, you don't have the rule of law. Political commitment, crime, corruption and inequality, I see those are the four biggest issues to do with the success of constitutionalism. And the last one goes back to this issue of socio and economic rights. That's why I think the *Blue Moonlight (City of Johannesburg Metropolitan v Blue Moonlight Properties 39 (Pty) Ltd and Another)* decision, which we gave last November, such an important one because it affects the most vulnerable and poorest people facing eviction in urban centres. And I think we've got a long way to go but I think the Constitution offers a creative mechanism for us to go all the way. I really do. And for reconceiving a society in which there is economic productivity, but there's also social justice. And the Constitution offers that. So I think it's a fight. I think corruption is corrosive. That's why the *Glenister (Glenister v President of the Republic of South Africa and Others)* judgment was so important. And I think constitutionalism has many foes. Some of them are the people who want to use the apparatus of state, to become predatory, to become an enrichment. This is something that the Deputy President has said, that the General Secretary of COSATU (Congress of South African Trade Unions) has said...Deputy President (Kgalema) Motlanthe, and Zwelinzima Vavi has said. And the question is whether the power of the state is going to be used for distributive justice or for the enrichment of an elite. I see that as being the crucial issue. And it's an issue that is present, not only in South Africa, but in Kenya for example, where the issues aren't primarily racial issues, but they're historical issues, but the historical issues in Kenya are primarily issues of tribalism and ethnicity. So I see that as being the main issue.

Int One final question, in terms of the transition to democracy and the role of the Constitutional Court, what were the challenges that were then, and what were the challenges that remain now?

EC Well, the first challenge was the assertion of the legitimacy and authority of the new institutions of government, Parliament, the executive, and this Court particularly, and I think that's been a success. The major issues for me are social equity and corruption. Those are the big ones now, and I think they're still racialised issues in some sense because our racial past has not been

dealt with fully and effectively. But these are also, in an important sense, post-racial issues. Because they are issues of the new order: corruption and social equity, because we have the power...we, including myself, as Constitutional Court judges, as members of the executive, as members of the legislature, to take very vigorous positive action.

Int Thank you so much, Edwin.

EC Thank you.

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