

Mbuyiseli Madlanga Constitutional Court Oral History Project

18th January 2012

Int This is an interview with Advocate Mbuyiseli Madlanga SC, and it's the 18th of January, 2012. Advocate Madlanga, thank you so much for agreeing to participate in the Constitutional Court Oral History Project, and may I welcome you back.

MM Thank you very much, and thank you for inviting me.

Int I wondered if we could start at the very beginning, if you could talk about your life experiences, in terms of growing up in South Africa at the time that you did under apartheid, and your experiences of social justice, and what may have been the events that may have promulgated a legal trajectory?

MM I was born and raised in a rural village [Njjini], Mount Frere, Eastern Cape. Well, one of the earliest, earliest contacts that one had with apartheid as such, was at a time when one was still very young and not even realising that this was apartheid at play. In the sense that all the fathers around us, you know, in the area where I grew up, were away in what was known as the labour centres, that is, Johannesburg, Cape Town, and all the big centres, Durban and so on. You know, the reasons are not far to seek for that, and you can imagine the impact that had on the social life in those families, the affected families. The fathers, the husbands, would only come back home in December. Of course not, they wouldn't necessarily come back at the same time, but mostly, most of them would come back in December, only for a few weeks, to go back again for a whole year. We were fortunate in my family, my father was a teacher and so he was teaching in the area, so he was with us all the time, but as I say, that was sheer luck. Our mother was a housewife so we stayed with her at home.

Int And it sounds financially, your family would have been a bit different from the other families?

MM That is so, that is so. But what was, you know, quite a burden on my father is he was a person who really, really loved family, and at no given point, except for when I was still very, very young, at no given point would it only just be my mother, my father, and my siblings at home. We were always, always with cousins, and nieces and nephews to our parents, and you know, a whole...in fact, quite easily, at my home, we would be twenty something children at my home. So even if, you know, on a teacher's salary, that meant quite a burden on my father, even though as you correctly pointed out, had circumstances been different we would have been much, much better than the rest around us.

Int I wondered also in terms of discourse and stories that were told within your family and the community about what it meant to live under apartheid, at what point did you get a sense of the racial disparities in the society you were growing up in?

MM Quite early on, you know...but of course again, as I said earlier, as a child you don't really have explanations as to why things are as they are. But quite early on. For example my father used to tell stories of how when...before he became a teacher, in his time it was quite difficult to get a school. Schools were run by the churches, and it would be the reverend who would find a school for you. You'd really have to suck up to them to get a teaching post. So it was quite difficult for him initially to get a post. So he came and he first worked in Port Elizabeth and Johannesburg, and I think back to Port Elizabeth again, or I might be mixing it up, but those two cities. He used to tell stories that when walking on the pavement as a black person, it didn't matter if there was only one white person walking on the pavement approaching you from the front, you had to get off the pavement. Those are the earliest, earliest stories that one got to hear and it's only when one got much, much older that one realised what was at play, you know, ja.

Int In terms of your own development and your wanting to do law, at what point did that arise?

MM I've been saying a lot about (*laughs*)...I've been saying a lot about my father, even there he had quite a role to play. When I was at high school, Mariazell High School in Matatiele, he wrote me a letter, in which there was a newspaper cutting from the *Daily Dispatch*, a newspaper circulating in the Eastern Cape. In it the so-called independent Transkei (*laughs*), they were saying they want their own judiciary, they want to have black judges and they're offering bursaries to people who want to study law and so on and so on. Not so much as, you know, wanting to collaborate or anything like that you know, but more because of...there are six of us at home, and as I've told you how we grew up and how many we were and how large the family that my father was supporting was, I felt, agh, if there's an opportunity for a bursary, let me go for it. But before that, before that, my preferences were becoming a teacher or a medical doctor, or, believe it or not, as a child, I loved trucks, the big, big trucks...or a truck driver. Teacher, medical doctor, truck driver. I'd never thought of law at all. So ja, law was triggered when my father sent me that newspaper cutting, and I registered for law the following year.

Int Interesting. And you did a B Juris degree?

MM Initially, ja, I registered for the B Proc degree, and the Transkei did not award me their bursary, they said no, we can only award it to you if you're doing the

B Juris degree, and then in my second year I switched over to the B Juris degree.

Int And you were also awarded the best law prize. Tell me about that.

MM I was (*laughs*).

Int That's quite an honour as a student.

MM Ja...ja, well, it was something that they ran annually, the Juta Law Prize for the best law student. First year, there was a student who was senior to us. I think it was a Mr Gwiji, I still remember him. So the entire law school, everybody, the lecturers, the students, were all called in, there was this huge ceremony. I was quite fascinated and I said, I think I would like to get that. And fortunately the following year I was the one who won it.

Int I'm also wondering, in terms of doing law at the Transkei, what period was this, and what was going on in South Africa at the time?

MM I registered at the University in 1980, and it was at the height of apartheid. And we as students naturally, students, there will always be what was called student politics, but that was quite euphemistic, because it was more than just student politics, it was politics about what was happening in the country, so as such, we were quite involved. But it got more intense in the later years...ja, in the eighties, much, much...it got more, more, more intense. And by then I had left...in fact, I think in my final year I was part-time, and that year, things got really, really, really hard and tough, and students got arrested and it was students who were in residence...by then I was staying out in some township at Ikwezi Lokusa...so because I was not on campus, I did not get arrested. Even my own brother got arrested, the one who comes right after me. And I was also in my final year, working part-time at the magistrate's office. I don't know how much detail to give, but agh, maybe let me go ahead, you'll see what you want to keep.

Int Sure, sure...

MM Working at the magistrate's office, we got to, you know, see even how things worked even on the judicial side. We used to have Wednesday meetings at the office of the person who headed the office. Maybe just to avoid him being identified and so on, let me not mention which office it was, which magistrate's office it was. But we would have those Wednesday meetings, and in one of them, the head of the office went so far as to say, if somebody comes with a bail application in matters involving the security of the state, you should just

refuse bail. And I stuck my hand up and I said, if a judicial officer is worth his or her or salt ... and I was still very, very, very young...if a judicial officer is worth his or her salt, there is no way that he or she can, because it has been said in this office, this is what we should do, refuse bail just on that basis. It would be a total, total miscarriage of justice. He came down on me but I did not back down. Also with those arrests, detentions and so on, some of the students who would have escaped and so on, and I stayed...because some of them were coming off from far off towns and so on and so on. I stayed with some of them in the house where I stayed. I stayed with a cousin of mine at his house. But he was somebody who was also quite understanding politically. I would bring, I remember on one occasion, I stayed with the late Bathandwa Ndong, who was [later] shot and killed by the Transkei police. Him, and the president of the SRC, the Student Representative Council at the time, Mr Mbalu, who I understand is in Australia now. And Thobile Bam, a very close (*gets emotional*)...a very...I'm sorry, very sorry...a very close friend of mine...and I think it was more than that...but these came as one group, so it was Thobile, my friend, so the others...of course I was quite acquainted to them as well, but he was a close friend of mine and the others came through him, and he was very close to them. So Bathandwa...he's well known in South Africa, I mean, as students we used to even have the Bathandwa Day, you know, because he was killed by the police, that being the day on which he was killed.

Int Was he ANC, or a PAC activist...?

MM No more ANC aligned, ja, ANC aligned. But then of course, the ANC was still banned and not operating actively in the country. So I stayed with them at my cousin's place, and we had a caravan outside and then the house. What we would do is, very early in the morning before the sun was up, they would come into the house, so as to be in the house all day, you know, and would only go out back into the caravan where I...I've forgotten how we would inaudible sleep, but not all four of us slept there, you know, some of us slept in the house, and some in the caravan. So very late at night, when it was dark, those who slept in the caravan would then walk across and go to sleep. And the interesting, or funny thing, if one could talk about funny things those days, was, I would then during the day, go back to the magistrate's office, and I would actually meet people...oh, maybe let me not mention their names, maybe some of them are still alive...that were in the Security Police, they would be there coming for their cases and all that, and they would greet me and, hi sir, and blah blah blah, and inside I would be saying, only if you knew (*laughs*) that I'm with some of the guys that you'd probably get medals if you were to apprehend them. I did quite a lot of things like...there was even Thobile's brother...Thobile is the one that, Thobile Bam, that I said was a close friend who died last year, we buried him in July last year. Even his younger brother, Sivuyile (Bam), he too, he was first taken in, the police were looking for him as well. He was first taken in by my father. We stayed out...oh, I did mention that we were staying out in a rural village, so my father took him,

kept him there, they gave him a name and...Sivuyile (Bam) is the name, but they gave him a name, I think they called him Mbulelo. So even the young ones at home, our nephews, nieces and so on, even years, years later, after '94, they still refer to him as Mbulelo. They thought that was his real name. But after that he too came to Mthatha, I kept him, I even took him to a nearby magisterial office and we applied for the Transkei travel document for him. And then he was to have left the country using that, but for some reason he never did, because one day my father, my brother, the one who had been arrested and who comes right after me, were driving out of Mount Frere, our home town, and at the outskirts of town we saw Sivuyile (Bam) being arrested by the police. And we drove back, rushed to where his mom was running a shop and we told them, hey, there's Sivuyile (Bam) being arrested and so on and so on. Ja, you know, I don't know whether you would like to...

Int No, that's very important. I'm actually wanting to find out, at some point you attended Rhodes University, and I wondered when... you did your LLB?

MM That was when the Groot Krokodil, or the Big Crocodile in English, as they called him, was at his roughest. That's the late President PW Botha. I was at Rhodes, '85, '86. It was...

Int So during the State of Emergency?

MM During the State of Emergency, that's right.

Int And what was your experience as a black student at Rhodes University, that had been transformed, and to compare it as well with your experience at the University of Transkei in the early eighties?

MM Agh, the university itself, yes, there would naturally be, you know, issues, but at the university itself, not that much. But what our issues were, were more the issues that were affecting the country as a whole, you know, everything that the country as such, was doing. That much really affected us and we too had our fair share. And then if there were demonstrations, we would hold our own at the outskirts of campus, rather at...yes, of campus, and the police would come, they would chase us and we would run, throw stones at them. And we would even sometimes join the local people and the road to Port Elizabeth, the N2, from King William's Town, through Grahamstown to Port Elizabeth, it used to run right past Grahamstown, through Grahamstown, roughly centre of town. It was when I was at Rhodes that they actually constructed a bypass. So now when you go there you don't touch Grahamstown, the town itself at all, because it was just chaos, complete, complete chaos and my own assumption was that it was a way of protecting their own, so to speak, in doing that, because roads would be barricaded and tyres would be burnt on the road, and so on. So we were in the thick of things, so to speak.

Int I'm also wondering, in terms of the legal trajectory, what aspects of law at that time in the late eighties intrigued you and interested you? What were you interested in pursuing as a career?

MM We had a lecturer Sarah Christie, she took me for administrative law, and her way (*laughs*) of teaching it, it just made law all the more interesting. I mean, I was already in my second degree by then, so obviously I was very much into law by then. But she made it...she brought it alive, so to speak. It literally came alive and she related it to what was happening, because even the applications that would be brought at the time for the release of people and so on and so on, and even the judgments that had already been handed down, would relate to what was happening out there. So it was...so for me, it was the subject or course. So I really, really loved it.

Int So when you lectured at the University of Transkei, what were your subjects that you taught?

MM I taught customary law, and the law of delict or tort, according to the English system, and advanced law of contract. I taught three courses.

Int What was your experience of teaching and why did you leave?

MM (*laughs*) I thoroughly enjoyed lecturing. I really did. Interacting with students and the feedback that one got, I really loved it. I left because I came across an advertisement where a scholarship was being offered, the Bradlow Notre Dame Human Rights Law Scholarship. So I was interested in that. I applied and Justice (Richard) Goldstone, formerly of this court, was closely associated with that. In fact, he was the focal person in South Africa in that scholarship. And I was interviewed at Wits University and two of us got the scholarship that year. It was Andrew Brooking, a graduate of Wits, and me from Rhodes.

Int And you attended Indiana? Is that correct?

MM I attended Notre Dame.

Int Notre Dame in Indiana?

MM In Indiana, yes.

Int And you were there for how long?

MM I went...it was one academic year, but I stayed on and worked for Amnesty International in Washington, D.C. afterwards.

Int And did your work at Amnesty, did that entail working on countries like South Africa specifically?

MM We never...did we do any...yes, I remember, I think, once...I was on what they call the Africa desk...yes. I remember I think we touched on South Africa, it related to the death penalty. Because it was at the time when all executions were on hold, so to speak. I remember we were even visited by a senior advocate from South Africa. I forget who it was, but from Durban, ja...so only, ja, to that extent, yes, it did touch on...but by and large it related to other parts of Africa.

Int And you also were at Notre Dame at the time, at a crucial time in the country's history. You mentioned earlier in your interview that you had friends who were very involved in anti-apartheid activities, often at the danger and risk to you and others and themselves, I wondered what it meant to you to have apartheid end at the time that it did?

MM I will tell you, when Nelson Mandela was released, I felt that I was losing out on quite a lot. I felt I should have been home. I was literally heartsore. And I was glued on TV (*laughs*), and you will recall that the release was delayed, a time had been given, and I was glued on TV, throughout that time, waiting, waiting, waiting, until the exact moment when he was eventually released. But very fortunately, you know, there was quite a lot of coverage in the US of what was happening in South Africa and fortunately also when he visited the US and went to Washington, D.C., that was when I was working for Amnesty International and I was in Washington, D.C., and I got to shake his hand. Of course, not that it was just me, it was a whole lot of, you know, and there was, you know, that place had been cordoned off, he was walking that side of the...and, you know, walking past, but it was so exhilarating, you know, so ja...

Int I'm also wondering, when you actually came back to South Africa in the early nineties, did you find that it significantly changed? What was your sense of transformation and transition early on?

MM Ja, it had changed, it had changed...

Int In what way?

MM For instance...(mobile *phone interruption*) I'm very sorry...simplest example, just before I left, for example, I've given you the example of, you know, harbouring people who the Security Police were looking for and so on. Very close to my departure, one of my friends at the University of Transkei said to me, I have been approached by...agh, I don't think he would mind me mentioning his name...this was Moss Matima, who now works for the Department of Justice; he was also a law student. He said, I have been approached by an ANC operative, his name is [Kgotso] Mmatli. And Moss Matima was not aware that I actually knew (Kgotso) Mmatli. It so happened that I had gone to the same high school that he had gone to and when (Kgotso) Mmatli was doing, I think, his penultimate year at Mariazell, I was doing my first year, I was just arriving. And he was one of those brilliant students that I really, really looked up to. So I still remembered his name when Moss Matima mentioned him. So he said, I don't know whether it was him personally that was in contact with (Kgotso) Mmatli, or it was somebody else and that string of, you know...and he wanted to know whether I would be prepared to work with them, whatever that would have entailed. But I had imagined that again it would have entailed something similar to what I had done...for instance, I would even transport Thobile Bam, Bathandwa Nondo and the others...I think the I had a motorbike, a motorcycle, so I would transport them on that. So I assumed that it would entail something like that, they want to go there, we do that, they want to sleep over one night, you know, you keep them over, that was my understanding of what Moss was saying. So I said, fine, I'm quite prepared to be party to that. And, then my departure came, and so I left the country. So to come back to your question, what was different? When I came back, people like (Kgotso) Mmatli were walking freely in the country.

Int Right, indeed, indeed, absolutely. I also wondered, when you started you were appointed as a judge, so you practised at the Bar and then you were appointed as a judge in mid-1996. By that time the Constitutional Court had been under way. When you were appointed as a judge, what were your observations of working at the High Court and observing the Constitutional Court in its early years?

MM I was quite fascinated. I must say, initially of course I didn't quite understand the multiplicity of judgments that would come out of this court. I wondered, can't they sit down, try to reach consensus...

Int Oh, you mean in terms of the dissent?

MM It was more than your usual dissent, you know, others voting all together there, and then there's a dissent there, and maybe two or three others will go with the dissent. It would literally be a multiplicity of judgments, if you see what I mean. And not even dissent because there would be a judgment saying X, and there would be three, four other judgments also in terms of the outcome,

also saying X. And if there is a dissent there would be a few dissents saying Y but saying Y in different ways, literally a multiplicity. So I never quite understood that. But that in no way takes away from...my fascination is not the word, I was quite excited about what was happening in our country. I was.

Int And your appointment to the High Court, how did that come about? Did that come as a surprise to you?

MM Um...what perhaps came as a surprise, more than the appointment itself, was being asked by the Judge President of the Umtata High Court to act, because I acted before I was appointed permanently. I was very, very young at the time, and ja...relatively junior also as a practitioner. So that came as a surprise. Then after I had acted, a position became available and he was the one who asked me to make myself available.

Int And then you were appointed as well, as Acting Judge of the Supreme Court of Appeals?

MM Ja.

Int And what was your experience there?

MM It was...I enjoyed it. But...

Int Was it at the time when Ismail Mahomed was there?

MM Yes, he was, he was Chief Justice. He was Chief Justice. But I found it to be too steeped in what...tradition, should I say. You know, that thing about seniority, you know, that sort of thing. I guess most of the people who were there, being people who were schooled in the Bar, so to speak, and the Bar also, as you probably know, has its own traditions and so on. So, there was that, too much of that, even when you deliberate after argument and the most junior you can't have a go before the most senior people have had a go. Which is...which is totally different to what happens here. Here there are no similar traditions at all, at all. There's no question of seniority or anything like that here.

Int I'm also wondering, in terms of your subsequent appointment to the Constitutional Court, what was the process by which that came about in 2000?

- MM I still remember where I was. I was on Circuit Court in Bizana, and I still remember I was in my hotel room at the time, and I got a telephone call from Arthur Chaskalson, who was then the President of this court, not Chief Justice. And he asked whether or not I would be willing to come and act here? So I accepted the invitation.
- Int I'm wondering, Mbuyiseli, in terms of your experience, having gone through the High Court, and then the Supreme Court of Appeals, and then coming to a Court, which was regarded as having really been a new Court with different types of procedures, etc, what was your experience and your method of adjustment...?
- MM Adjustment, I think one was eased in, you know, quite easily. It's terrible to use those two words together. In a sense the place was quite receptive. All of the colleagues, without exception, not a single exception. So, you know, one just...it was easy to mix in and to just find your feet, and ja...just be at home. That was quite easy.
- Int Did you find a great sense of collegiality, or did you find tension?
- MM Collegiality, collegiality. No tensions whatsoever, no, I did not experience any...
- Int And what about sort of racism or perceptions of racism?
- MM None at all. None at all. None at all. When I arrived, I think it was at the tail end of recess, and I was received by Johann Kriegler, who was the only judge here, very pleasant, and that evening, or was it the day after, I'm not sure, we went to his house, we had dinner, and I mean, sometimes it happens that somebody will be that receptive initially...that was to be...that was to be the attitude that he had towards me throughout. I'm just singling out the person that received me. But all the others, all the other white colleagues, no racism whatsoever.
- Int I'm also wondering, in terms of the cases that came while you were at the Constitutional Court acting here, that was August 2000 to May 2001, I'm wondering that period what cases came before you and...?
- MM (*laughs*) That's a difficult one. Agh, it was a mixed bag, a whole...quite a wide range of matters...
- Int In terms of issues, did anything particularly stand out? Were there any particular legal issues that stood out?

MM One that stood out, actually involves your country, it was the matter of Mohamed or Mahomed (*Mohamed and Another v Republic of South Africa and Others*), I'm not sure...

Int The extradition...

MM The extradition matter. That one really, really stood out. You know what for me was what...I don't know whether I want to say mind-boggling or, not really, but it just exercised my mind. Here we are sitting, going on about a case, and yet the horse has not only bolted but it's already quite a considerable distance away.

Int Why do you say that?

MM What are we on about? (*laughs*) Why do I say that? If everything had happened before and it was, say, a proper extradition, and Mohamed was not already in the US, we could if ultimately the decision was that he should be extradited, have had the usual condition that only if he will not be executed. How could we, sitting as a Court in South Africa, after the event, be able to say to the US, okay, fine you already have him, regardless of how that happened we implore you not to execute him. That could not have any legal implications on the US, all it could be would just be, you know, just weigh on their conscience. But what effect ultimately it would have, you know?

Int But he's never been executed, has he?

MM (*laughs*) But...

Int I'm just wondering.

MM I don't know, I don't know, but even if he wasn't, that's purely, you know...you know, but do you understand the thinking?

Int I totally understand you...I understand you completely. At some point you've resigned from the judiciary and I wondered what were some of the factors that prompted that decision?

MM One factor really, and I've always been quite candid about it, and I've never been cagey. I didn't just say personal reasons as most people usually say. It was purely financial, as I've said earlier, I had accepted my appointment at quite an early age, children still very young, with bonds and so on and so on,

and I just couldn't make it on the salary. I know, you know, whether or not a salary is sufficient is something relative, and some people used to take me to task and say, but at that much, can you say that's not enough? But for me, my personal circumstances, it just wasn't. That was the only reason.

Int I'm also wondering, in terms of the decision, when you left the judiciary, did you continue in some ways to observe what was happening, whether it was within the judiciary as well as the Constitutional Court in particular?

MM Observe what exactly...?

Int Observe the types of cases that were coming before it and the issues?

MM Agh, as a practitioner it sort of has to happen naturally because you really cannot practise if you don't keep abreast of legal developments.

Int And did you ever appear before the court?

MM I do, I actually do from time to time. Yes, I do.

Int Can you tell like what were some of the cases that you've appeared before this court?

MM One that has quite exercised many a judicial mind is the matter of Chirwa versus Transnet (*Chirwa v Transnet Limited and Others*), on the jurisdiction of the labour court as against that of the High Court. So that was...I think it was the first major decision of this court on that subject. There have been a few others following on Chirwa (*Chirwa v Transnet Limited and Others*), but that was really the main one, and it must really have exercised the mind of this...or the collective mind of this Court, because it took quite a long time for the Court to come out with a judgment in that matter. I have appeared in a few others. One other matter, which was also quite a big matter was...you're probably aware that there have been changes to the Road Accident Fund claims and also a new dispensation has been introduced. There was quite a huge multipronged challenge by the Association of Personal Injury Lawyers and a whole lot of other persons, against the constitutionality of that new dispensation. I was part of...I was one of several counsel involved for the Minister of Transport in that matter. It was Wim Trengove and I, the seniors, and Johan de Waal, and then Ms Pillay of the Johannesburg Bar.

Int Kameshni?

MM Kameshni Pillay, of the Jo'burg Bar. Four of us. But when it was argued in Pretoria, I was lead counsel. Wim (Tregove) was part of the team but on the day it was to have been argued he had a matter here, and I led the team and argued for the Minister in Pretoria. When it came here on appeal, then I...Wim (Tregove) was part of the team and he was leading us, ja.

Int I'm also wondering, in terms of your observations of the Court, what are some of the main criticisms that one can level at the Court?

MM ...difficult one (*laughs*).

Int Let me ask you a specific question, some have argued that socio-economic rights, the Court hasn't done enough to satisfy the socio-economic rights of people, through legal means...

MM I don't know that I could go that far. Because, you see, it's not really *carte blanche*, as it were, in the sense that inbuilt in that right, perhaps not so much inbuilt but sort of detracting from that right, is the fact that you also look at resources. So that has in a sense the effect of taking away or detracting from the right. And to my mind why that is in the Constitution itself, aside of what the court then does with that, it's quite understandable why you have that. In fact, it's quite a milestone already that you even have that right in a national Constitution. So I don't know. I mean, take cases like...I forget the case name, but relating to these evictions from the inner city buildings and all that, where the Constitutional Court has come up with innovative reliefs, like saying, go back, talk to each other, if you don't come up with something sensible, then we will decide for you. And then the people come back and they come back with resolutions that satisfy everybody. And that too, in a sense, is in a context of social justice...ja, but...of course, I mean, people will criticise.

Int What about the criticism that the Constitution...the Constitutional Court don't have a sufficient understanding of African customary law and hasn't taken that into account?

MM Is it not an advance enough that for instance they've gone so far as to say in institutions where the views are so hardened as you can never, never imagine any woman holding a position? But the Constitutional Court has been bold enough to say a woman can be a traditional leader.

Int You're talking about the Shilubana (*Shilubana and Others v Nwamitwa*) case?

MM Ja, ja.

Int I agree with you. I'm just wondering about what you think about some of the general criticisms levelled at the Court?

MM Ja. Of course, I mean, yes, you...one, in one's own mind, we'll have certain difficulties that you have...or rather, there will be certain hurdles that you find it difficult to jump over. For instance, you know, having grown in a rural setting, where there are traditional leaders and all that, you grow up with this idea that, among amaBhaca...amaBhaca are the tribe of my area, the entire Mount Frere, it's amaBhaca. And the traditional leaders of amaBhaca come from the clan of the Zulus, amaZulu. So all of our traditional leaders are Zulu, Zulu, Zulu, Zulu. Now, if it a traditional leader is to be a woman, and the woman gets married to a Madlanga family, I'm not Zulu. I'm Radebe. So she gets married to the Radebe clan, and her children are going to be Madlanga and Radebe. So all of a sudden, after, you know, centuries of this understanding that this is how the institution of traditional leadership is made up. So all of a sudden, you have to make that mental...if you see...that mental jump and accept that, okay, let's forget about this idea that the institution goes with the clan, those are our...it's that family, that clan. So it can be a Madlanga today, it can be a Bhele the next day, it can be...so, yes, one, we'll have those difficulties and those mental gymnastics, but the simple point I'm making all the same is that, one cannot say that the court has not, where it has seen necessary, made strides. It has actually, by this one example, made strides by leaps and bounds.

Int I'm also curious what you think about criticism from judges, as a former judge, what you think of the criticism from some of the judges in terms of other courts that certain cases or judgments have in some ways transgressed that fine line between the executive and the judiciary...and there are specific cases that they talk about.

MM I think there are times without getting into any specifics, I think there are times where I think that one criticism, I think I would share on some.

Int And are there specific cases that you feel that that has been the case?

MM Glenister ((*Glenister v President of the Republic of South Africa and Others*))
I would want to say yes, but...ja...ja, I wouldn't want to ...

Int As someone who's been so part of the judiciary, do you think that...do you have concerns for the independence of the judiciary in South Africa?

MM I don't. Not in the least. Not in the least. I mean, yes, the President of the country has made, you know, and others, certain pronouncements, but our judiciary...rather the executive in the country is at the same time quick to say that they will accept the findings of the court, and I don't in the least think that the judiciary is under threat. I think those views are exaggerated.

Int I also wondered, having acted at the Constitutional Court, you are aware of the particular methodology within which the Court operates, for example the conferencing. So what do you think are some of the challenges of adjudicating constitutional cases in South Africa?

MM Challenges and adjudicating...constitutional cases in particular?

Int Yes.

MM Well...unless you might want to ask me if you have any thoughts around it maybe...

Int Sure, there's a criticism that the judgments take too long, for example. Having worked here, what do you think...do you think that that criticism is valid, for example?

MM In terms of taking long, I...my own view...I hope I'm not...talking or sounding too pro this Court, but my own sense when I was here, was that it was more the exception rather than the rule, that judgments would be delayed. There will, naturally, in any court be the odd case that is more difficult than your normal run of the mill case, and it requires time, a lot of research. Besides that, sometimes it may happen, eleven people have to sit en banc, so there will be instances where, but for differences, the judgment would have come out fairly quickly. So out of the eleven people you will find differing views and at times it may be quite difficult...because writing dissents is not a ready option. The Court first tries as much as possible to see if the differing views, or rather, those behind the differing views cannot find each other, so that we are able to produce one judgment. So that process of engagement may take some time and, you know...so in those instances and as I say, I think it's more the exception rather than the rule there will be delays. And in any judicial system, I think, as much as the adage, the tired adage says, justice delayed is justice denied. But it's something that should be understood to actually be part and parcel of the judicial system or the justice system itself.

Int What do you think have been the greatest achievements of the Constitutional Court?

MM Starting from nothing and within a relatively short period of time, to have produced the body of constitutional jurisprudence that it has produced, a body of jurisprudence that I think is respected elsewhere in the world, that in and of itself, in my view, is quite an achievement.

Int I've asked you such a range of questions which you've answered so generously, I wondered whether there was something I've neglected to ask you, which you feel ought to be included in your oral history?

MM *(laughs)* While I think of...

Int It'll come back later. *(laughter)*
Mbuyiseli, thank you so much for your time, I really appreciate it, and it's a pleasure to meet you.

MM Thank you very, very much. Thank you.

End of Interview

Interview resumes briefly.

Int Thank you for your patience. We were talking earlier about your relationship and your friendship with Justice Tholie Madala, who's passed away, and I wondered whether you could share a few words about him as a person, as an advocate, a justice member, and also a member of the Constitutional Court?

MM Oh, I was quite close to me, and he to me as well, and I had known him way back from my student days. He was a practising advocate in Umtata, and he actually moved my application for admission. He was the advocate who moved it. And when I came to join the Bar he was still at the Bar, at some point and for a considerable time thereafter he was the Chairman of the Bar, and it was quite a pleasure to be part of the Bar under him. In fact, I think I should say this. He and I actually were in the same group, you know, as advocates you practise as groups of advocates, and we even, he and I shared a secretary. His chambers were right next door to mine. So he would pop in my chambers anytime, and I would do likewise. And he had this thing he liked to say, he would come in, there I am sitting behind my desk, busy working, and he never failed to come in, stand at the door and say, are you working hard, or hardly working? *(laughter)* And, you know, he even insisted that I should also be part of the leadership of the Bar and under him I became honorary secretary of the Bar. And at a later stage when we had a huge influx of new people joining the Bar, he again told me...he wasn't really asking me, told me to stop taking on *pro deo* matters, because, you know, as new entrants, sort of as something to maintain your income, you would do *pro deo*

matters on the side and whilst your brief practice was growing on the side. So I guess he thought I'd reached the stage where my brief practice would sustain me. And he told me, stop with these things now, leave them for the new guys. And so I was sort of, you know, his 'son', in quotation marks, at the Bar. And when I came to work with him here, it was such a pleasure. He, Sandile Ngcobo, and I, used to have lunch together almost every day. And oh, what fun we used to have, we would talk about a whole lot of things. And it wouldn't just be lunch. I mean, we just, the three of us, really socialised together. Even certain evenings we would go out for dinner, the three of us, together, and I remember on some occasions, Judge Somyalo of the Eastern Cape, also came to act here, so the four of us would go out to different places for dinner, and so it was just such a pleasure. The fun we used to have. I remember...oh, it was Judge Somyalo, he wanted to get out of the Rules Board, he was in the Rules Board, and now he was saying, hey, my time for membership of the Rules Board is almost up now and he was saying, and the Minister is saying nothing. I'm also going to keep quiet, you know, let sleeping dogs lie. And I don't remember who between Sandile and Judge Madala, but one of them said, hey, Doc...Doc is how we used call Judge Somyalo...hey Doc, you should be careful, you might think that a dog is asleep and yet it's there, it's biding its time, and it will just go for your leg like that (*laughter*). So we really used to have a lot of fun, ja.

Int And his appointment, Tholie Madala, was that something of a surprise to you? He was one of the first members...

MM Those were the four who were just appointed like that, and not having to go through...yes. Surprise, yes, but acceptance, I readily accepted it, yes, yes, yes.

Int His passing away, was that a shock?

MM Oh, it was, it was. He and...it was, it was, it was. And in fact I spoke on behalf of the legal profession or the legal practitioners, both attorneys and advocates, at his funeral, and even when he took ill, I used to visit him at his house, and you know...and ja...

Int What sort of a person was he? In your understanding, how would you describe him?

MM A very serious-minded person. Quite a fatherly figure. Willing to go out of his way to assist. Quite humorous as well. Quite humorous, yes. I remember (*laughs*) now, something slightly...or rather not slightly, it is work related...when the gay and lesbian cases were decided, of course he was part of the court's decision, but I guess it was more, you know, trying to address himself to how people out there feel, you know, about these sort of issues. He

said to me, hey, Mbuyiseli, just think what the rural people from Tsolo, where I originally come from will say, they'll say, hey Tholie have you gone mad? How can you accept this thing of, you know, homosexuality and all that? But the way...it's very difficult for me to express it when I'm expressing it in English. But when he said it in our language, you know, it was quite graphic and quite funny the way he put it. But I guess it was more saying that with the sort of work that we do here, and having to uphold the values of the Constitution, at the same time it may cause one to grapple with the impact that that has on the views that one's society may hold on the issues that we grapple with. I guess that was the point that he was trying to make. But at the same time, having decided the way he had done here, shows how true he was to the values of the Constitution.

Int I also wondered, everyone talks about the special relationship that he had, you know, with you as well, but also with Sandile Ngcobo, and I wondered whether you could talk a bit about the two of them?

MM *(laughs)* The two were quite close, and in fact when I found them and joined in this lunch club, it was the two of them who used to have lunch together. And there's a story that Sandile used to tell about a judgment that had taken a bit of time to be delivered, it was Tholie Madala's judgment, and he says, when Tholie was asked about when the judgment would be delivered, Tholie would say, it's in the pipeline *(laughs)*. And then when asked, but Tholie, can you give us some sort of indication? And he would then say, it depends on how long the pipe is *(laughter)*.

Int Thank you so much, that was great. I'm very grateful to you for sharing your memories of Justice Tholie Madala, that's most appreciated.

MM Thank you very much. Thank you.

Collection Number: AG3368

CONSTITUTIONAL COURT TRUST ORAL HISTORY PROJECT

PUBLISHER:

Publisher:- **Historical Papers Research Archive**

Location:- **Johannesburg**

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