

Ben du Plessis Constitutional Court Oral History Project 12th December 2011

Int This is an interview with Judge Ben du Plessis, and it's 12th December 2011. Ben, thank you so much for agreeing to participate in the Constitutional Court Oral History Project, we really appreciate you taking the time.

BdP It's a pleasure.

Int I wondered if you could start the interview by... if you could talk about early childhood memories in terms of where and when you were born, your family background, and your experiences of growing up in South Africa at the time that you did?

BdP I was born in 1947. We moved to Pretoria when I was three years old, that's where I went to school. It's a little town outside of Pretoria called Silverton where I grew up. I was born into a conservative Afrikaans family. Conservative but also we were taught tolerance as well, I think. We went to the Dutch Reformed Church, and we went to Afrikaans schools and so on. So that I think makes my later actions, or acting stint in the Constitutional Court all the more interesting, because that was my background. I grew up in the 1950s and sixties, I went to school I went to the Afrikaanse Hoër Seunskool, which is a boy's school in Pretoria. And you can imagine that one didn't have much contact with the other people in South Africa. You had contact with white people and not with the other people. Except cursory contact and then of course with the people who worked for one. My father was a businessman and there he had many workers; he was a building contractor so he had many workers of all colours in his employ. So that was the background that I grew up in.

Int I was wondering, in terms of your high school and in terms of your intellectual development and your aspirations to do law, where do you think that came from?

BdP I don't know. I think my mother said that I was born a lawyer. There's nothing in particular that made me want to study law. My choices were either to become a dominee or a preacher, or to become a lawyer, and I think I just opted for the lawyer part. But I think it just suited my personality. There was nothing from a political point of view that motivated me, no.

Int And also in terms of high school, I was wondering whether there were any like, in terms of an intellectual development, whether there was a special high school or teacher who may have served as a role model for you, preparing you for the Bench eventually?

BdP Ja. I went to a very good high school. It's still one of the good schools in Pretoria, so...and I think my parents took trouble to send me there. At first what did motivate me, now that I think of it, is my father being a businessman, I had lots of contact with people whose whole life, livelihood depended on the work that they're doing. And for instance, when times were hard and my father had to lay off people, it was always in our house something. It was not...so, I think that may have subconsciously, I suppose, played a role in wondering how does one weigh the interests of people. But to an extent I'm looking back and thinking that's possible. But that is something that struck me from childhood, is the importance of weighing people's interests one against the other because that's what the law is about. And then at school...I think...

Int You went to Pretoria Boys High, is that right?

BdP No, it's Afrikaanse Hoër Seunskool, it's an Afrikaans Boys' High. It's just across the road from Pretoria Boys High, but it's called the Afrikaanse Hoër Seunskool. Ja, from teachers, I think incidentally the teachers that had the most influence on me were the languages teachers and possibly the history teacher, but the languages teacher. And I think, ja, language has always been one of my interests. But there's nothing I think in particular, I just knew that I was going to become a lawyer.

Int Interesting. And at university where did you go, and what was your experience at university?

BdP I went to the University...I first went to the army, as was the practice in those days. And then I went to the University of Pretoria. And there too, I went...the day I enrolled, I simply went to the legal students' row and stood there and enrolled. And, yes, at the university I spent, I think, most of my time, either with friends or studying, I didn't do much of the community stuff at university. I wasn't that...I'm not sure why, but it just worked out that way.

Int I was also curious, in terms of the period that you were at university, would that have been during the sixties?

BdP Yes, I went to the army in 1965 that was my year of army. And then so I enrolled at the university in '66, and stayed there until '70. I graduated the end of '70, and then married in '71.

Int I'm just wondering in terms of political turbulence in the country, that was really the period where it was starting...?

BdP I think that's maybe a regret that I have, is that, you know, one was so protected, you lived in such a protected world, that while you had almost an academic interest in these things. I think the one thing of going to a university like Pretoria University, which was a relatively conservative university, one didn't have so much contact with the problems first-hand. Your contact was, as I say, academic. We would discuss these things, we were very interested in politics, but I don't think we really lived it. I think that was one thing that...ja...

Int In terms of discussions of politics, what was the predominant view and what were the fears and concerns for the future of the country at the time?

BdP We were working out how to do it. I think that was...we were working out...we all had a sense...at the time, one man, one vote, wasn't an option that we thought of. Maybe indoctrination, maybe that's just the way we grew up. But...I didn't feel indoctrinated, that's just the way we grew up. So what we were looking at is solutions. We were then already realising that apartheid, or separate development wasn't an option. We knew that. And we were looking at possibilities and different scenarios that one could work at. But those were the discussions that we had, is fears, and there were friends who had fears of the future and some of them have emigrated long ago. But I think the general view was that we will work it out, we will work it out somehow. And of course, one must remember that at the time, we felt quite strong, the position we were in, militarily speaking, because it was quite strong, and politically speaking as well. I don't think we realised, and that's what I'm trying to get across is, I didn't grow up in an environment where one really realised all the implications, all the ramifications.

Int And then once you graduated from law school, from university, what did you go on to do?

BdP I first became an attorney. I got a job with a state attorney in Johannesburg. And as an article clerk at the time. I did, I think, about eighteen months. And then I went to a place, which is now Polokwane, called Pietersburg, where I did the rest of my articles. I became an attorney. But I knew that I wanted to come to the Bar, so by 1975, which is about four years after I graduated, I came to the Pretoria Bar, and I joined the Bar and became an advocate.

Int What was the atmosphere at the Bar at that time, in terms of human rights law or the fact that you were operating within a system that was legally structured but that was racially discriminatory?

BdP I think there we...that's where I suppose, became more aware. Because there one saw much more views, much more different views of people, and I became good friends with people who held completely different views to mine.

Which was, I think, a good learning curve. And at the time, the Pretoria Bar, when I joined, was...its Constitution didn't allow black people to become members of the Bar. So soon after I arrived, a debate started as to whether we should change the Constitution. I must say there was never a problem to get the majority, because the majority view was that...as I've said earlier, we realised that we must work out something better than the separate development. But the struggle was to get a two-thirds majority to change the Constitution. So that I think was an important debate at the time, was to change...but that happened...I can't remember, but quite soon, we did change the Constitution, and then black people started coming to the Bar.

Int I also wondered about this debate was happening around the mid-seventies?

BdP Mid to late seventies. Mid to late seventies, yes.

Int And in terms of your progression thereafter legally, what were some of the steps in terms of what you did?

BdP I then...I didn't really do politically high profile cases. I was more in the commercial field. I did one or two criminal cases, which was politically involved. But again, my contact was then, I would say, I'd like to think more of an academic. I think I started emotionally to understand the problems because I had much more contact with many different peoples. It's never been...I have never had a difficulty with things like having black people at the Bar. I didn't grow up that way, although I grew up conservatively, that was...so those weren't issues for me. And politics to that extent wasn't an issue. I was still not convinced at that time that one man, one vote, is the answer, that I must say this. So one must acknowledge that. So my practice wasn't really political. When I became senior counsel later I did do one or two cases for the Nationalist Party, but also I wasn't a high...I also did, I think, one case...yes, I did one case where there was a navy officer held for treason. And then PW Botha announced that everybody who forswears violence may be released. And he wanted to be released, and I acted for the government in that case. But again, I'll tell you the story in more detail if you wish.

Int Sure, of course, I'm interested.

BdP There is a little detail that, I think that may...not a turning point but it was something that made me realise all the more that we're not exactly on the right road. Because when I got this brief to act for the government, we started preparing, my junior and I, and within about two days we just got a message that there's going to be another senior appointed to lead both of us. And we were told that this message came from higher political authority. So they obviously didn't want people that they didn't know that well to do the work. I can't suspect more than that. But at least...so I wasn't in any circle, that's

really the fact of the matter. Ja, we've now sort of already progressed into my life at the Bar. But again it was, from a political point of view, quite uneventful.

Int I was also curious, in terms of... at what point did you then get appointed to the Bench?

BdP I was appointed to the Bench in 1989. I took silk in '87, I was appointed in 1989. So I was appointed by the de Klerk government, the Nationalist Party, and some people would refer to me as an apartheid judge. But, ja...at that time politics didn't play that much of a role in appointments, because you know, that's the way governments are. If they become relaxed, they don't (*laughs*) have too much interest in political appointments.

Int You joined the Bench at such an interesting time because soon after that there was transition. And I wondered how then, what were some of the adjustments in terms of your method of operating within a system that had been legally unjust and then having to then accommodate different viewpoints and a transitional society?

BdP That was a very...I think that was one of the most interesting times, is, when I was appointed in 1989, already the...you will know that the Berlin Wall had then fallen, so things were developing very fast. And I remember that I was never against these developments. It wasn't...I didn't have a difficulty with it, but I thought it was going very fast, and I was amazed once, FW de Klerk made his speech in February 1990, whereby the ANC was unbanned and so on...I remember my sense was, well now he's done everything. And then he just went on and he did more and more and he was able then in the end to call the referendum to mandate the government to negotiate the one man, one vote, system. So I wasn't against it, but it went much faster than I thought it could.

Int I wondered, what about your friends and colleagues, what was their stance? Was there great fears in the country in terms of the Afrikaans community? How do you understand it?

BdP No, no. My understanding of the Afrikaans community is that we were really ready for change. That's why...ja...ja, I can make political speeches, but I think we were ready for change, and we understood it, we knew it. It's been a discussion point for a long time. maybe I should go back, there's something that I don't know whether you know, is, I was a member of the Afrikaner Broederbond, which is...I don't know whether you know what it is?

Int I've heard, about it but you can explain a bit...

BdP It was a secret organisation that was initially established in the 1920s when it went economically very bad with the Afrikaner people. And the idea initially was, I think...and I can't say more than that, because I wasn't there...but I think the idea was as more a social one. But it became a politically very influential organisation. And the Afrikaans people who showed some promise in some direction, and incidentally people may have thought that of me...so they were invited to join the organisation, from a perspective of an individual member like myself, we didn't do much other than attend meetings, but we got, what they were called, précis or study documents. And I can say that from the early eighties to the mid-eighties, things developed very fast, and the whole thinking in the Afrikaans community, was we can't go on like this. This is not going to work. We've been realising that for a long time and we were looking for alternatives but in the end I think we all realised there's only one alternative and that is a real democracy. But the way one grows up and your culture makes it (*laughs*), your adjustment is slow.

Int In terms of legal adjustment, the early nineties, there was negotiations; there must have been great uncertainty, and I wondered how you operated on the Bench during this time?

BdP From our point of view in the Bench as such, we didn't play that much of a role...in formal terms we didn't play much of a role. In other words, we were also looking at the developments. We had contact with the people who are doing it, and we were concerned when there were possibilities that the negotiations aren't going to work. But I think from our point of view, we knew, this is going to be a huge adjustment because the rule of law, constitutional democracy wasn't part of our thinking, even at university. It was something that you were taught as part of many other possibilities of government, so I think we had to adjust to that, we had to understand the Constitution, because you must remember from a legal point of view, and as a student even, one grew up with the Westminster idea that the legislature is supreme, and that's it. So, yes, there were those adjustments.

Int I'm also very curious, it's often been said that under apartheid you were operating under a situation, where as you say, Parliament was supreme, but there was this real adherence to the rule of law, so often sometimes where cases came forward and they may have been against sort of the apartheid ideology, but the judges actually followed the rule of law. And I wondered what the anomaly is in terms of the community that you were operating in, in terms of the adherence to rule of law? I hope I'm making myself clear?

BdP No, you are making yourself clear. There were signs of rule of law all the time there...ja, you see, first of all we must remember that initially before 1948, the judges were schooled in a much more liberal tradition. So that is, I think, the first reason why it happened. Then there was a brief period where judges were appointed with strong political considerations, but that also then

stopped. And I think we all, you know, once you're a lawyer you understand that you are part of the balancing trick between government and the people. So I can remember that when I was on the Bench in the late eighties, maybe the early nineties, the government still had the ninety day...or something like the ninety day, I can't remember exactly how it worked because...but I knew that I was there...had to do one case where a person, a right-wing person in that case, was held without trial. And I really didn't have difficulty, it wasn't a big move to find for him and say that they can't do it. So I think the answer to your question, I haven't answered it, but the answer to your question is that, somehow we all grew up with this idea. We just thought that we could do it differently. I think we thought that with apartheid, or separate development, we would be able to set up different states all with the rule of law, and that's why I think we never abandoned really the idea. But it became more difficult to apply obviously.

Int I also wondered, when the Constitutional Court started, what was your impression of the Court, because you were obviously a keen observer as someone who was operating from the Bench?

BdP Ja, I must now admit, this is going to be an admission, or a confession, initially my thoughts were that the Constitutional Court is not a good idea. The reason being that I thought that the Supreme Court of Appeal could do all that work. In other words, apply the Constitution and my initial thoughts were that if you have a Constitutional Court the government may always wish to interfere with it because it becomes a very powerful thing, it moves on a political terrain. So those were my initial thoughts, and I'll tell you now how they changed but I was cautious of it. I was of the view that our Appeal Court could deal with these matters and you don't need a separate court for it. That was my initial view.

Int And in terms of the initial appointment of the judges and the President, and then also the idea that the President then became the Chief Justice, I wondered how that was viewed?

BdP By the time that the president became the Chief Justice I had been here, and my views were quite different. It didn't change radically overnight but they gradually changed very, very radically. So I'll come to that. But the initial appointment process, we were very glad, I think in the circles where I moved, we thought it was a good idea to have a commission, like the Judicial Services Commission, handling judicial appointments. Because otherwise they become very politicised, we thought. But that's a different debate at the moment. So the initial appointments, we thought it was not as balanced as from our Afrikaner point of view we would have liked it to be. Not that there weren't any but we just thought it was more...it was...I don't want to use tags, but it was a bit liberal, we thought, at the time.

Int I also wondered, from someone who was on the Bench at the time, what your concerns were... that the Court had a different set of rules, there were different robe colours, there was lack of formality compared to the Courts that normally operated in South Africa?

BdP No, I didn't have any difficulties with that. That's a question of taste. I really think that's not...it's a question of how do you do it, I understand the thinking behind it, so I didn't have any difficulty with that, I thought that's the right thing. And as things developed, I realised that, you know, that the Court must be a separate court. Even that changed. They very soon established themselves as an exceptional Court.

Int I'm curious, the first case was a very high profile case, the Makwanyane (*S v Makwanyane and Another*) on the death penalty, and the debates in the country were rife, I wondered what your experiences were on that issue in particular and how you felt that the judgment was handled?

BdP Can I go back to what I started with and we may have to edit this out, but (*laughs*)...my initial view, as I say, and I think shared by many of people in my environment, was that the appointments were one-sided. As I have said, if I have to give it a tag, too liberal. But I prefer...that's not the right...it's people of the same view, and when that judgment was considered, I was interested in the outcome, in the reasoning, but my criticism of it was that, the outcome was really a foregone conclusion. Because you knew that eleven people are going to do exactly that. So that was a criticism I had of the...is it the compilation of the Court...the way the Court was...

Int The composition...

BdP The composition of the Court, ja. So I still think it's an interesting debate and the reasoning that the followed, it's good reasoning, it's sound reasoning, but I can see that there may be other views on the death penalty. But my criticism was really that eleven-nil didn't reflect the problems that one has with the death penalty. There are many issues and so if eleven judges think the same, then you realise but they're not really reflecting what all the people in the country think.

Int Between 1995 and 2000, before you were appointed here as an acting judge, I wondered whether you could talk about some of your observations of the Court, in particular with regard to judgments that they handed down?

BdP Yes. I became quite interested in constitutional law, because I realised that that is something that...you know, that is what is really...what the courts really

are about, is about checking government on that level. So I was interested in the judgment, they were too long, but they were very learned. I think that's one thing that...I wouldn't say surprised me, but one thing that I...a plus point of their judgments is that they really took trouble with their judgments. I didn't realise at the time how much work they do before I was here. I will come to the time that I was here, but...so I was interested in it and I became gradually more and more, as I say, I started off saying, well, it's really a job that a separate court needn't do. And as the judgments came out I began to understand why one needs a court dedicated to doing these things, why it is important that they must do all these things.

Int I'm curious, before you were appointed to the Constitutional Court, had you served on any other Court besides the one you were at in Pretoria?

BdP Yes, I did. I served with the Labour Appeal Court. And there also I...you know, I...one learns a lot. I learnt a lot and I learnt new thinking, which was very interesting because you suddenly realise, but if I can now go back to where I was in the beginning, you know, I saw now in practice how do you deal with the problems of people whose real...whose only asset in life would be their work, so I enjoyed that, I found it very interesting, and it also, I think, shaped my thinking, I suppose.

Int I wondered, did the appointment to the Constitutional Court come as a surprise to you?

BdP Completely. It was a complete surprise. I was...if you're interested, I was at the time with friends, incidentally quite conservative friends, they have what we call a bushveld farm, it's out really in the lowveld, a game farm, and it was over the holidays and I got a telephone call from our Judge President saying that Judge Chaskalson wants to speak to me. And he asked me whether I could come, and I must say, I was quite surprised. I still don't know how it happened.

Int What did your friends think of your appointment?

BdP And the interesting thing was that...they thought it's a good thing, but soon after that, in some circles I did have people who was very negative about it, so I experienced the new world, once I accepted the acting appointment. It sounds a bit silly but I did experience that at parties people would come to me and say, but how can you do that? I think now still people don't realise the importance of having a Court that looks after the interest of the minority. That is the important point that most people, or lay people I think, miss. And that was the one thing why I was glad I could come here is to take part in that...in the important balancing process.

Int And in terms of your arrival at the Court, what were the differences and what were some of the adjustments. You mentioned you didn't realise how much work has to be done, and I think you're referring to the conferencing of judgments?

BdP Ja. That I wasn't very...I was computer literate but I wasn't on email yet. Those things were, at the time, not everywhere. So when I came here what they did is you would prepare your judgment, they never discussed judgments or the cases before they've heard it, which I thought was a very positive thing. And after that they had the conference, and then the person drafting the judgment would circulate his judgment on the internal email system, and everybody would give their input. And I found that hard work, very taxing and stressful. Because, you know, you are suddenly looking at this judgment and preparing the next one, and then I realised, but these people work very hard. And they did their work very thoroughly, I must say that. They do their work thoroughly.

Int Sure. You're also very fortunate because you were here during the time of Arthur Chaskalson as the Chief Justice, and I wondered whether you could talk a bit about the experience you had of him, as leader of the Court?

BdP Of him as a person? I've known him...he wouldn't have known me, but I've known him for a long time because I took part in the activities of the Bar Council and the General Council of the Bar. And I was quite a junior delegate to the meeting of the General Council of the Bar when I first met him. He was then, I think, the President of the General Council of the Bar, or the chairman...chairperson, I should say. And so I knew him and respected him. I've always had a lot of respect for him. Because I saw what he did, I saw his work and I knew that he'd gone over to the Legal Resources Centre. But my experience meeting him...and I then, just before I was appointed there was a time that I did do a training of newly appointed judges. I took part in the training and there I met him more...I got to know him a little better. But I must say when I was here, I think...this was a learned place, under him, I was amazed at the learning that I found here. Not from him only but from all the colleagues. But speaking of him, he was a very firm leader, in the sense that he wanted judgments out, he wanted them properly done, he wanted them properly researched. And he saw to it without ever me feeling that this person is...how should I...he did it in a very even-handed way and in a very soft way. You never felt as if you were being governed, but the management of the Court was done excellently I thought.

Int And in terms of other colleagues that you had to work with, did you develop any sort of difference or commonality with people?

BdP Ja. It was amazing. I had known Johann Kriegler, from...because we'd been at the Bench, I was his junior when we were still at the Bar, so I'd known him. I knew Laurie Ackermann a little bit because he was also at the Pretoria Bar; but they were my seniors quite far. So I knew what I had in them. I knew Richard Goldstone because he was a judge while I was at the Bar. So I knew him as an advocate would know a judge. I didn't know Kate O'Regan and...I don't think I knew any of the others. Oh, Tholie Madala, I knew, because he was also active in the General Council of the Bar. But what I think was for me the...let me say this, my year in the Constitutional Court is professionally spoken, I think the best year of my life, I really enjoyed it. Because I learnt a lot. I didn't think one could learn such a lot in such a short time. Because the people here knew amazingly...well, that's not the right word, that's a teenage word...but they knew a lot. I was amazed at how much these people knew. So the interaction, the knowledge...well, I think it was less of an interaction, more of a one direction flow of knowledge, but that I found, you know, that was a very good experience. But, as for the people, I found it...why I liked it so much is because there were people of all views from all backgrounds that you could think of. People that had good reason to hate me for my past, not for my person, but for my past. And I never experienced anything like that. On the contrary, I saw that...they had different views, and we debated different things and we looked at it from different points of view, but it was a very open discussion that we had. It was not...no, I never had...I didn't have a minute's problem. I was well received and I enjoyed it.

Int Besides racial background differences, your experience of gender, because probably at the Bench...

BdP Ja, there weren't any women. It's as simple as that. Sorry, your question was?

Int Yes, I was wondering what the adjustment was to having female colleagues as judges at the Constitutional Court?

BdP Again, I thank my parents for that. It wasn't much of an adjustment, because I was brought up really, conservative as we were, that respect the other person for what that other person is, that was the way we were brought up. Respect his culture, respect the fact that he's different, expect of him to respect that you're different, so no, women colleagues weren't a problem at all. And now still, and I have many women colleagues, and I really don't...or female, I suppose, it's not a problem for me.

Int I also wondered, when the judges were initially appointed at the beginning, there were only four sitting judges and the others didn't have judicial experience. And I wondered when you came on board, did you find that that was still an issue, or by that time had things changed?

BdP By that time...I think we still had many of those who hadn't been judges for a long time, and I held the view then, and I still hold the view, that it is important to have experience, judicial experience, in the Constitutional Court. But I didn't find it a problem. It was more of a problem for me before I came here than it was after I'd come here. Because once I had come here I realised that there's such an exchange of views that as long as you have enough people with experience, the experience comes through. You do now and again, but that happens in every court that people do things that in practice doesn't work very well, but that changes again. So, no, that was not...it was a concern, it was a serious concern before I came here, and once I'd been here it was...say it's a non-issue, because I still think experience is important but it wasn't a problem to me, and judges who did not have judicial experience...I don't want to single people, but there were judges without any judicial experience that were really excellent. And excellent judges at that. So that was not a problem.

Int You served in the latter part of 2001, and the early part of 2002, so a period of six months each, for a total of a year. I wondered during that time what cases you actually sat...?

BdP Ja. We sat in the...the important ones, I would think, would be the one where the two ladies with the single sexual relationship, wanted to adopt a child (*Du Toit and Another v Minister of Welfare and Population Development and Others*). The other one was where the two judges, Judge Satchwell and her life partner wanted the pension that married judges get (*Satchwell v President of Republic of South Africa and Another*). And we also...oh, the Nevirapine case, the Treatment Action Campaign (*Minister of Health and Other v Treatment Action Campaign and Others*) case, yes. So I sat in those. They were very interesting. Because that, I must tell you, for me, with my religious background as well, and my religious beliefs, not only background because a religion permeates...so with my religious convictions, I had to think very hard about the adoption case, whether one should allow two women life partners to adopt children. Because you can understand...well, maybe not (*laughs*), but my view was that you need a husband and a wife as close as possible to nature and then that's the best adoption. But in the end I didn't convince myself...I was really convinced that we're doing the right thing, because if you look at it from...so that was a mind shift. And now that I speak of it, I realise that it must have been quite a mind shift that I'd made.

Int In terms of the judgment, did you dissent on that, or did you agree?

BdP No, I did not dissent, because I agreed with it. I don't know whether I should say it, but with the pension one, where the two judges wanted the pension (*Satchwell v President of Republic of South Africa and Another*), I did not dissent, and on reflection I should have. Not because of any gender issue or

of any sexual orientation issue, but I think we could have made more sounder law. I think we were looking at the result and not at the development. I'm a very stickler for development. So I think, if I would criticise myself, I should there have possibly have written a dissenting judgment. Because...am I explaining myself?

Int Sure, yes, yes. I'm curious about the development; how do you think the development would have been different?

BdP I think there...you know, we had an Act that says if you're married you can have this pension. Those people couldn't marry at the time. And we just sort of did the quantum leap of saying, well, then they can have the pension. And my sense of development would have been, first allow them to marry, or if you...you needn't call it marriage, because I'm not very...I would have said, allow them to form a relationship. And once that has been formalised, then they can get the pension. But the way we did it was the other way around. We said they can get the pension because they can't marry therefore they're entitled...so, as a sound developmental process I think we didn't go the right way. But I agreed (*laughs*).

Int Why did you agree, do you think, at the time?

BdP Because I also thought the result is a foregone conclusion, that's the one reason, and we'll have to edit this out too, but we were under such pressure that I didn't think it important enough, my developmental view, to write a minority judgment on that, I didn't think it's going to make any difference. I now know that I was wrong. I should have done something.

Int You didn't think it would make a difference because everyone else had the same view?

BdP Ja. And I'm not going to change the view, I'm not even going to make it developmental. And the end view, I didn't have a difficulty with. But I think, and I see that the judges do that, and I think it is important that you state your views if you have different views. So that's my regret (*laughs*).

Int Fair enough. In terms of the TAC (*Minister of Health and Other v Treatment Action Campaign and Others*) case, I wonder whether you could talk about that...it was such a high profile case and I wonder what your views were at the time and now?

BdP Again there, there I think we treaded on very, very dangerous ground because we were very close to the separation of powers. Again, I think the judgment

was right, but I think it is important to...especially in view of developments as they are now, it is important for the Court to tread very gingerly, the closer you come to that dividing line between the executive and the Court. It was a judgment with, I think, budgetary implications. One should tread very carefully when you go into that area of the law. So, I'm not sure I have the same view as I have with the Satchwell (*Satchwell v President of Republic of South Africa and Another*) case, that I should have written differently, but at the time I thought, and I still think, it's very, very close to the dividing line, where one shouldn't transgress.

Int The Court prides itself on saying that it hasn't imposed itself on government; I'm wondering whether you think that case in some ways did? Or nearly did?

BdP I'd prefer to say nearly did. I'll tell you why I'd prefer to say nearly did. Because I had that concern at the time. And my questions in Court also, I think, showed it. Why I think it didn't was, it was such an obvious case what should be done. But I still have concerns with ordering government to do a thing like that, and I don't practise the, what do they call it...the report back type of judgment, where the government must come and tell me how they've done it. My view is that the Court gives the judgment and the government then must and will do it. That's how democracy works. I don't think the Court has the function to tell the government to come back and tell it what it has done. I think the Court must show faith in the government, and it may be misplaced, and if it's misplaced then further steps must be taken, but I'm a strong believer there in the Court must say its say and then get out of the picture until it is approached again.

Int I'd like to come back to on reflections on your year at the Court, but just moving on in terms of your observations of the cases that have come subsequent to your appointment as Acting Judge, there have been a number of socio-economic cases, Grootboom being one of them. I wondered whether you could talk about some of your observations?

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BdP Ja, I'm not going to go too deep into it, but for instance Grootboom (*Government of the Republic of South Africa and Others v Grootboom and Others*) goes very far towards governing from the Bench. It goes...you know, it's such a difficult debate that I don't think that I have the knowledge or am in the position to say that it's right or wrong. My personal view is that there are many...these socio-economic cases one must be very careful because in the end government is the representative of the people, the Court just checks its legal...the way it does it. So I think the Court must be very careful. And that it is a concern, and I don't say it because that's the present view of the ANC, I don't share that necessarily, but it has always been my view that the Court must be very careful to interfere, especially when it has budgetary implications. Because government in the end, Parliament must make its decision. If it makes the wrong decision the Court can tell it.

Int I wondered, in light of what you've just said, in terms of your time at the Court, what do you think are really the challenges of adjudicating constitutional democracy cases?

BdP This...making sure that you stay a Court. Because if you don't stay a Court you invite disaster really. I've told you in the beginning, right at the beginning, my concern with the Constitutional Court was also that if you have a Court like that you invite either interference or the government may ignore the judgment. So, I think the most important part, or the most difficult job of a Constitutional Court, is to ensure that things are done constitutionally correct, but not to transgress on the government...can I...I did give one judgment about two years ago, where an Afrikaans person applied to order the government to make a law in terms of section six of the Constitution, to regulate its use of languages. Because in terms of the Constitution it had to do that, and fifteen years later it hadn't yet done it. So there was a case before me and I was asked to make an order that the government must make such an Act, or pass such an Act, and then report back to the Court, tell the Court what it's done about it. I, in accordance with my views, I didn't give the order that it must report back. I simply phrased the order in terms of the Constitution, and I now see that that is what the government is doing. So, it remains a way of cooperation. There will be difficulties; there will always be difficulties, if there weren't we wouldn't have needed the Constitutional Courts (*laughs*). But I think it's important not to overstep that line.

Int Fair enough. In terms of your judicial philosophy, do you think that your time at the Court may have in some ways helped change or evolve it in some way?

BdP Ja, I came to understand better different views, I came to understand better the way the Constitution works. Because you must remember, we didn't grow up with a Constitution, so the year...that's why I say it was one of the...it was my best year professionally spoken, because I learnt such a lot about democracy and the rule of law, the way it works; I had to read many cases while we were doing all these cases. So I learnt a lot and it did change my philosophy. I became...because I had to make the move, although maybe superficially I've made the move from the supremacy of Parliament, I think this helped me to really make that change, really...ja.

Int I also wondered, in terms of the issue of pragmatism and principle and the binary relationship, I wondered how you, in some ways, negotiated that?

BdP I think the Satchwell (*Satchwell v President of Republic of South Africa and Another*) judgment is one where I negotiated it. I think there I went a bit too far towards the pragmatism. But I think it is important to do it, but I suppose I'm a nerd because (*laughs*)...my children say I am...because I think that if you are

going to be practical you must be sure that your practical result fits in with the entire system. And I'm a firm believer that a judge should never have to say, I'm sorry that this is the result, but this is what the law says. One should, in most instances, be able to fashion the law to get the just result. But that's hard work. It's hard work and that's what I enjoy about my work, is I look for the answer within the system as I understand it. So, it is important to balance pragmatism and the law, but I think that really the law should always be able to accommodate pragmatism. It's an ideal.

Int Sure. I'm also wondering to what extent a non-legal consideration has ever come into play in judgments?

BdP No. No. I don't think that should ever play a role and I'm not saying it's never happened with me because I'm a human being, but I never consciously think one should allow that.

Int What about the issue of society and society's conditions, how do those come into play in judgments?

BdP No. If you want to do it differently than in terms of the law as it stands, then the law is not the place where you should do it. So I think the judge must...it's important for the judge, because back to my childhood, one sees one's father, he has the business, they are in trouble, he has to do something to survive the business, so laying off is the answer, but you're laying off people. It's human beings that you're laying off. So you have two interests that you balance. And I think if you go too much in the socio-political, into that field, you forget to balance the other interest. You forget, as I like to say, to be tolerant also towards the intolerant. Because it's important that tolerance must also be tolerance of those who are intolerant. And their views must also be accommodated and thought of, not necessarily always vindicate their views, but you must consider them. So I don't think there's much place for activist judicial, if that's the right answer. Does that answer the question?

Int Yes, absolutely. I was wondering in terms of judicial transformation, have you been party to that process within your job...?

BdP I did the training but not otherwise, not. Well I didn't have occasion to be part of it. But I see it of course. I'm part of it in the sense that I work with the people...ja.

Int What are your concerns about judicial transformation, not just demographics but more broadly speaking as well?

BdP You know, I think...I don't have...I have a bit of a problem with the demographics, I'll come back to that. The way we apply the demographics, not to the demographics at all. But I think it is important that we must have all thoughts on the Bench, to the extent that people may say that now you get less experienced or possibly less trained, I don't think so, but less experienced people. So be it. So that doesn't concern me that much and, you know, I've been on the Bench in the old days and in the new days, you get good judges, you get bad judges. You always get good judges and bad judges. So my father taught me, he said, "Jesus picked twelve disciples and one was a traitor, so how can we do better?" (*laughs*) So that will always be there. So that's not a concern. If you are interested, my concern is that we're applying demographics not exactly as it was intended, because we have a non-racial Constitution, and that is a founding principle of our Constitution, so the demographics of, what's it, section 176, cannot refer to race, it must refer to people's ability to understand the views and the culture of people in a particular area. So I think we're applying it racially. I don't think that is actually what was intended. Of course, race will incidentally, especially at the beginning, race incidentally had to play a role. But that must be incidental, it cannot be the important part. So I'm not in favour of saying that we must have a black, a white, or a pink Bench, or a woman or a man Bench. We must have a Bench, and they must be able to deal with all the interested...all the things. But that's my philosophy.

Int And I appreciate that. I'm wondering, in terms of the training that you've done, what your experience has been, what are some of your concerns?

BdP There was much inexperience with some of those that I did the training for. But that was the one side. The other side...and some...but people are like that...some didn't realise how inexperienced they are. But that's people. But I think the upside of it is that I've had contact with people that I did the training for and it was very positive in the sense that I think one was able to at least impart to them some of the things that are important, I think, generally accepted important aspects of being a judge. And I didn't find any resentment or resistance in that regard, so no.

Int In terms of judgment writing, I'm aware that you take a keen interest in those, and I wondered in terms of the judgment writing that you had to do at the Constitutional Court, how did it differ from your experience, and what were the things that were interesting?

BdP Well, maybe...ja, the first thing is, I've told you how we sent judgments on email and I was very happy to criticise other people's judgments, but once mine came on and I got the criticism, I realised it's not so easy. So...there the judgment writing, that is quite a different...

Int Process...?

BdP Ja, because you write the judgment your way, but then there are ten other people, each have their input. So, in a sense it's difficult and sitting in your chambers and writing your own judgments, it's much easier, because you do it the way you want to do it. and then you get criticised afterwards. But here you get criticised before you do it, and then you have to do it again, so I worked here much harder on a judgment. And then Arthur (Chaskalson), as I say, he didn't...you had to get your judgment out before the end of term. So...people don't understand it, but I experienced pressure, and I think people here do experience pressure. Because you've got to get a good judgment out in a relatively limited time.

Int There's been criticisms that the Court doesn't actually see enough cases and hand out enough judgments. In terms of your experience here, what do you think? Is that a valid criticism?

BdP I don't think so, no, I don't think so. I think if you have the apex Court, and I'll be glad if it stays the apex Court the way it is now...if you have the apex Court, the fewer judgments they do, the better. Because they must do it properly and very thoroughly and being a stickler for the rules I think it's important that they be well researched. Which they are. And so, no, I don't criticise them for that. I did before I came here (*laughs*).

Int Right. I also wondered, Ben, in terms of rules; when you served on this Court, what were some of the things that may have been lacking, that you felt could have been done differently and perhaps would have had a better outcome?

BdP I don't want to be too kind to them, but I can't think of anything (*laughs*) at the moment. It was such a new experience that I was learning all the time. So looking back...my criticism is, and will always be, that we must be careful not to be too socio-economically orientated. I think what we do do, and all of us do that, is instead of the proper logical inductive reasoning, we tend to reason deductively. In other words, look at the answer and go back, instead of not looking at the answer. We all do that, but in socio-economic cases I think the...what's the word...one falls into that trap easier, if you really want the result. So my criticism...it's not a criticism, it's more of a, please (*laughs*), make sure that you don't look at the result but look at the...and sometimes, but that also, one could criticise some of their judgments on the basis that they aren't very practical. I'm not sure that I criticise the judgment but the practical effect, for instance, of leave to appeal and that judges must read the full record, because in criminal cases, if you leave to appeal is refused by the court of first instance, then the accused person can apply to the High Court for a...and there they said you're not allowed to do it without the full record. Now I understand that but the pressure of work is such that you have to sort of work

out how you're going to do it. Maybe that's not a good example. Another example would be where they said that only a court can allow a person's residence to be sold in execution. And the registrar cannot do it. I mean, the amount of work that that entailed for us in Pretoria, is amazing. It's a question of about sixty cases per...no, even more, per day that we have to do the extra. Now I can't criticise the judgment, but I'm not sure that the practical effect has really been properly considered, or...no, that's not a fair criticism, fully considered, or fully appreciated, I think that's the word that I'm looking for.

Int In terms of the transition to democracy and the role of the Constitutional Court, what were the challenges then, when the Court started and during your time, and what are the challenges that remain now?

BdP The challenges then were to educate the people into...and people, I mean, lawyers, professional lawyers had to be educated into understanding the Constitutional democracy principles. Because we didn't grow up with them. So I think that was done quite successfully by the first Constitutional Court and the judgments that came out. Because they were good judgments. The challenge now is to maintain that, of course, and to maintain the high standard of learning, and I think the real challenge is to maintain a high standard of objectivity.

Int What do you think have been some of the failures of the Court?

BdP No...the failures would be instances where there is a divergence of opinion, where there should be, where that was not reflected. And I think another failing is the judgments are too long. (*laughs*) I don't know how they're going to change it, but it makes it difficult in a busy practice for an advocate, or on a busy Bench for a judge, to read everything. So you start reading selectively, which is not a good idea. I think they can try and get a brief judgment and maybe further learning in other judgments, or something like that. That's been a problem. It's been a problem to get to the gist of what they have decided. And I don't know what the answer is, I don't have it, but that's the problem.

Int And what do you think have been some of the greatest achievements of the Court?

BdP I think this...I'm thinking in Afrikaans now (*laughs*)...the establishment of the idea that the law is supreme. I think that has gone through very well and I think the first Court has very clearly established that. And it's always from a political point of view, politicians have to, it's their work to try and get as much power, because they work for the people, and I think it's gone a long way towards checking and balancing that. And being independent. I think it was really independent.

Int What are your concerns for the future of the Constitution and the Court. My mandate is to ask you questions between '95 and 2009, so during that period have there been many concerns?

BdP Up to 2009, not really, no, no.

Int And in terms of exercising power as a judge, and how it sits in terms of state power, what are some of the considerations and how do you balance that power?

BdP Your power against the...?

Int Power as a judge against state power...

BdP I think the first important thing as a judge is to be modest, and to realise that the power that you exercise is not a democratic power. It is a power of reasoning. You have to be able to reason it within the confines of the law. I think it's very important not to...and we're actually back to what we've already discussed, and I think that is important, a judge must be modest and understand that the power that he or she has is nothing more than first to decide the case there, this case, nothing else, and secondly to understand that he doesn't have any power other than to interpret. That's really his power.

Int Ben, I've asked you a range of questions, which you've answered so admirably, is there something I've neglected to ask you which you'd like to actually be included in your oral history?

BdP No, I've said that, and it was an experience and I can just trust that the Constitutional Court will go on, on the tradition that has been set in a relatively short time, by Arthur and the first judges.

Int Ben, thank you so much for a wonderful interview and a very candid interview, we really appreciate it.

BdP I hope I wasn't over candid (*laughter*).

(Continuation of Interview...)

Int Ben, one of the key features of working at the Constitutional Court was actually working with law clerks, as they were known, and I wondered whether

you could talk about that experience, given that it was a unique feature introduced by the Constitutional Court?

BdP It was a unique feature and I must say, you see, I came from an environment where you had one Registrar, but then there used to be law students. But not at a level where you could actually use them to help you. You could maybe ask them a very simple...do simple tasks in terms of legal, but they couldn't help you. So it was a quite new experience to have the two researchers, as I call them, because...and what I found difficult was to use them. Because I was so trained in doing it myself that I was unable to formulate the duty and the task. And it remained like that for the full year. I was just not able...I did use them, but I was not able to get them to save me time, in the sense that, the questions I asked them, they would come back and I would do the research in any event. It's my fault, not theirs, because I had good clerks, but...so it's an art, it really is an art to be able to use a law clerk.

Int And what about relationships, because the law clerks they come from diverse backgrounds, some of them are foreign law clerks, I wondered what relationships developed, how they may have learnt from you and you may have learnt from them, if at all?

BdP The law clerks I had were...I'm trying to remember them...I remember one was a girl of Indian descent whose father called me; she came from Durban. And the other one was a black man, young man...and I think a white woman was the other one, I can't remember exactly. But again, one had the experience of being able to work with people that you've never really had close contact with. And what amazed me was that they are people like me (*laughs*). And that was, I think, the important thing, is they...and they were keen, they were really keen. Because it was an...I don't know whether it is still, but at the time it was a very...it was a prestigious job for a young person. And they were very thrilled to get the job. So I had to give them work, but as I say, I think if you ask them they'll tell you, I was most ineffective in giving them work.

Int Have you continued to maintain any contact with your law clerks?

BdP One of them I did afterwards. He went to a law firm in Johannesburg, but we've also now lost contact. The one...well, the person who was my Registrar, who came with me, we still have contact. He lives in England but we still have contact. But with the researchers, as I call them, to distinguish them from the Registrar, I had little contact but not much. And that's my fault.

Int So your Registrar came with you from the court, to help...?

BdP Ja. He acted as my Registrar here too. But it's my fault, but let's not go there, but it's something in my person that I do.

Int Well, delegation is an art as you say. I do want to ask you one further question about the building. It's a very different building to operate in. When you did your stint, you wouldn't have been in this building... ?

BdP No.

Int You would have been in Braampark. And I wondered how you managed that, given that it wasn't an established Court, in a sense, it was more an office building?

BdP No, I think it was very well adapted. And it was very well structured too, because we had very good computer, or electronic infrastructure and so on, so, no, I think it was very well run. It was different in the sense that it's not the old court building with the wood panelling, but it was still, I think it was well done and it was...atmosphere to me is important in a court as it is in a church, or in a church as it is in a court, but it is important, and I think they did have that atmosphere. One thing that I maybe should say that I learnt very quickly, is that if you're alone in your court you can ask questions. If you sit with ten other people, you do that the first and the second day, and you realise, no, but we can't have it like that, so you learn to listen to what the others say and only ask a question if it hasn't been dealt with yet.

Int I also wondered, the choice of this site for the new Court, what you thought of it and now that you are here at this building, I wondered whether you'd been here before, but what your thoughts are about the actual building itself?

BdP No, the building is very well done. I think it's well done, it's a very restful atmosphere, and I think that's good. My criticism isn't...well, I suppose, that's not of this Court, but it is important to remember that it is a Court for all the people and the choice of the venue may be regarded as one-sided towards those who suffered under apartheid. While I think, in a sense, a more neutral venue may have been a good idea, but that's hyper criticism, I don't think that's necessary really (*laughs*).

Int Was it strange to come back to the Constitutional Court, have you been since your appointment?

BdP I haven't been since my appointment, so I was actually looking forward to it, and to see it, ja. I have looked at the building and it was in progress when I was here, but...ja...

Int Well, may we take this opportunity to thank you for coming on such an auspicious day, because you are about to become a grandfather again. So thank you so much for taking the time.

BdP It's a pleasure. Thank you.

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