

Bernard Ngoepe Constitutional Court Oral History Project 24th January 2012

Int This is an interview with Judge Bernard Ngoepe, and it's the 24th of January 2012. Judge Ngoepe, thank you so much for agreeing to participate in the Constitutional Court Oral History Project, we really appreciate the generosity of your time.

BN You are welcome.

Int I wondered if we could start talking about early childhood memories, where you grew up in South Africa, and your experiences of social injustice and the formative influences that may have led you down a legal trajectory?

BN Like many black people at the time, I obviously went through Bantu education, right through. And I grew up actually in the rural areas of Limpopo, and went to boarding school, like most children would do at the time and eventually enrolled for matric in Pretoria at Hebron Institute. And really up to that time I had no fixed idea as to what I was going to do with my life. It was only, I think, during the second half of my final matric year that the idea came to study law. As a result of some people that had made an impression on me, like the late Mr G.M. Pitje (Godfrey Mokgonane Pitje), and a few others at the time. And at the time there were very few black lawyers and I thought I could try that direction.

Int In terms of growing up where you did and your own experiences and observations of social injustice, I wondered whether you could talk a bit about the experiences of apartheid for you?

BN Oh, yes. I grew up, like I said, in the rural areas, and the impact of influx control was quite devastating on many people. You would see adult people, able-bodied people, not being able to move to bigger towns to go and pick up some employment, even if they had such opportunities. So it had a tremendous effect on the lives of many people. As you can imagine, if a breadwinner with some dependants is not employed, that impacts negatively on the rest of the family. But it was a singular injustice against black people to restrict their movement within their own country.

Int I also wondered in terms of the law as an instrument of social justice, how you thought you could use the law as an instrument of social justice?

BN Yes, indeed. One reasoned that by constantly litigating, you might make an impact on the establishment. In fact if you consider the effect of some of the judgments given by some of the progressive judges at the time, they hugely

ameliorated the condition of black people in this country, by trying to put on restrictive, unjust legislation some interpretation that would as far as possible be favourable to the oppressed people.

Int I also wondered whether you could talk a bit about going to university at the time you did, what were the challenges, what were the types of law that you studied?

BN Yes, at the time, going to university was quite a challenge. Particularly in my case because like many others at the time, I came from a poor family, and of course you had to take some study loans and so on. And it was not easy to study at the time.

Int And where did you study?

BN I studied for my junior degree at the, now the University of Limpopo. At the time it was known as the University of the North, for my B. Juris degree. After which I couldn't continue with an LLB degree, I didn't have money to do that. I looked forward to some employment, which came in the form of articles of clerkship, and then I read privately for my LLB degree with Unisa.

Int Right. I also wondered, Judge Ngoepe, in terms of your legal trajectory, did you join the Bar, what sort of work did you do?

BN Well, like I said, I did some articles after having been a prosecutor for three months...after completing my degree I prosecuted for three months. And then I had always wanted to be a legal practitioner, so that's why I left and then got into articles of clerkship and got admitted as an attorney. I practised for about seven to eight years as an attorney, and then realised that I had reached the climax in that particular profession. Then I decided to go to the Bar to be admitted as an advocate. And I practised as an advocate in Pretoria for some years, until I was appointed senior counsel. Shortly after which I was appointed a judge at the beginning of 1995.

Int So prior to that, having been an advocate during the height of apartheid, during the eighties, what were some of the cases that you felt that were key in terms of a form of legal resistance?

BN Like many black practitioners at the time, most of the cases that we were dealing with, had to do with human rights. For example, applications against detained people, defending people charged with political cases and so forth. And I think that made an impact on the establishment in the sense that people knew that they would be arrested, they knew they would be charged, but they

would also know that there would be some people to defend them to the extent possible. And that kept the spirit going.

Int I'm very curious, you mentioned being appointed as a judge in 1995, had you been appointed during apartheid, do you think that would have been an appointment you would have taken gladly?

BN No, I would not have taken it then, leave aside the question that in any event I would never have been approached, given the colour of my skin. But it would have been highly inappropriate for me to have accepted at that particular time. Because I would have found myself restricted in more ways than one in the proper execution of my duties as a judge.

Int I'm also very interested, Judge Ngoepe, in terms of the period from 1990 in transition, did you think that apartheid would end in your lifetime?

BN You know, one always hoped. But you obviously always felt that it might just not be within your lifetime. But the hope was there. And when 1990 arrived and things began to unfold, the dream was beginning to become a reality.

Int I wondered whether you could talk a bit about your observations of the Constitution making process, CODESA?

BN Yes, I was one of the...initially we were nine, but later dropped to eight, very early, at the beginning. Eight, shall I say, so-called experts, who were identified and agreed upon by all the political parties as a team of experts to draft or help them draft the new Constitution. Some of the people who were in that team included the former Chief Justice and the first president of this court, retired Chief Justice Chaskalson, Deputy Chief Justice Moseneke, Professor George Devenish, and myself, and Professor Venter, and others. Initially we were to spend a month or so, and we started some time in May, but it was not until December when the Constitution was adopted.

Int And what were some of the key issues?

BN Well, some of the key issues were, for example, whether or not it should be a unitary state, that was an issue in itself. There were other political parties who did not want a unitary state. And then also there were various concepts which were not properly understood at the time, for example, people argued for special mechanisms to protect the minority, as against an argument which said, all you have to do is to protect an individual. Once you protect an individual, automatically you have protected everybody else. So there were all those kind of debates going around.

Int I'm very curious, in terms of the placement of African Customary Law in the Constitution, what were the arguments for acknowledging some of the rights of Customary Law?

BN There could not have been a very diligent argument about that because it would have been a very sensitive issue. I think everybody started from the premise that it is recognised, it is respected, it's to be recognised. Subject of course to it not being in conflict with the Constitution. But as a debate about whether or not customary law, traditional law, should find place in this country that was not and could not have been...there could not have been a debate about that.

Int Right. And then you were appointed in 1995 to the Bench, is that correct?

BN Correct, yes.

Int And at what point then were you appointed to the Constitutional Court? I think it happened in the same year?

BN It happened in the same year, I think it was somewhere in the second half of 1995.

Int And did you find that appointment a surprise?

BN Well, it did. Quite frankly it was a surprise because I had just been appointed as a Judge of the High Court.

Int But you'd been nominated previously in 1993 for the first Bench of the Constitutional Court.

BN I was interviewed with the first lot, the first group, that was appointed, yes.

Int And you were talking about the surprise in 1995...

BN Yes, I didn't expect the invitation, and it came as a surprise. In the sense that I didn't expect it.

Int Right. I wondered if you could talk about that term when you spent at the Constitutional Court, of course it was in Braampark at the time.

BN Yes. Well, you know, as I say, it was not long after I had been appointed a judge, and my judicial experience was minimal, if there was any at all. So it was quite an exposure, because I quickly found that the way they did things was quite different from the way a judge at the High Court level operated. They worked as a team, they sat together en banc, and then after argument had been closed, they would retire into deliberation. And sometimes the discussions could just be quite a little bit excited, and quite heated, about usage of law, which was not surprising because we were only just beginning to develop our constitutional jurisprudence. So there was a lot of debate about almost everything.

Int I'm wondering also, I know that you knew Justice Chaskalson, but apart from Arthur (Chaskalson), did you know other people on the Bench, on that first Bench?

BN I did...many of them, not at a close range. I knew, for example, Judge Didcott, Judge Kriegler, I had appeared before him as an advocate while he was a judge. And also the then Deputy President of the court, the late Chief Justice (Ismail) Mahomed. And Judge (Laurie) Ackermann, who had left the Bench and came back, I had appeared before him years ago while I was still young. And Albie Sachs, I had not known him that much except to read about him and the like. But I met some of them during the CODESA process. So I can't remember some of them now but I think I knew quite...almost all of them...yes.

Int I wondered, as you mentioned you had gone to the Bench and shortly thereafter you got to the court, but in terms of the lack of formality and difference in this court, what were your experiences, given that you had experience of the High Court?

BN Well, one of the things I noticed was that whereas in the traditional judiciary there is a high level of observance of seniority, at this court it wasn't. Except for the President of the court who obviously is the leader of the court. But I noticed an attempt to try and not grade the rest of judges. Even in terms of how they sat in the court. Sometimes they would change positions, and that's the kind of, as you say, lack of formality that I noticed. And the atmosphere was quite relaxed amongst colleagues, yes.

Int Much has been made about the fact that there was a lot of collegiality, and I wondered whether you experienced that as well?

BN Precisely, that's part of what I've just said that it struck me that as part of collegiality, an attempt was made not to categorise the justices in terms of seniority. Which could have been done, in fact, because some of them were, in terms of judicial tradition, senior to others. They had been judges of the

Supreme Court of Appeal, like Judge Kriegler, and so on, and some of them like Judge Didcott had been on the Bench for many years. But that was not practised.

Int I also wondered in terms of the cases that came, I know that Makwanyane (*S v Makwanyane and Another*) was the first judgment were you part of that judgment, or were there other cases?

BN No, I wasn't part of that.

Int What were some of the cases that you were part of during that time?

BN Oh, that's a good question, do you think I still remember? But I do remember one of the cases, which really, a case that particularly troubled me was when somebody was charged with possession of what at the time, and I hope even now, is still regarded as unacceptable pornography *Case and Another v Minister of Safety and Security and Others, Curtis v Minister of Safety and Security and Others*), which would have been highly offensive to many people. And really I'm talking blue pornography. And the question was whether or not a person could be allowed to possess that. And if I remember correctly our judgment in the end was that, as long as that person did not distribute that, and as long as it's not child pornography, that person could view it within the secrecy of his or her house. But remember, that was 1995, and like I say, at the time the country was really not ready for such things.

Int You mean in terms of sort of the openness, the discourse?

BN In terms of openness, considering where we, as South Africans, where we came from. Remember we came out of a period where there was very strict censorship. Nothing of that kind could have seen the light of day. So we were moving out of that kind of past into a more liberal, progressive, open society, and it required some transition.

Int Right. I also wondered, Judge Ngoepe, in terms of a law clerk and the differences in your experience of being on the Bench, what were some of the other differences of being at the Constitutional Court? Did you get a legal researcher?

BN Yes, I think the...my impression with that Court is that the Court was better equipped than other courts. For example, I think...I'm not so sure that there could have been two, possibly, but you had researchers, who would help you draft documents, go and look into things and the like. At that time that was an unknown phenomenon at the High Court level. Now lately, of course, they're

beginning to introduce researchers at the High Court, but the level of qualification is a problem. And also, if I may proceed, in terms of the library, the quality and standard of library, the facilities were generally better.

Int And after your experience at the Constitutional Court, you returned to the Bench?

BN I did.

Int I'm wondering what your observations have been of the cases that have come before the Constitutional Court?

BN My personal observation? Oh, you mean subsequent thereafter?

Int Yes, subsequently...

BN Well, some of the cases...I think, let me make a general statement to say that generally one is quite happy with the progress that we have made. Considering that we started from nothing. There have been difficult cases, but the judgments did their best. Generally speaking I think we did very well, in terms of our constitutional jurisprudence. There may have been one or two other cases, which I might say, well, perhaps if I had sat in that case; I might have taken a different view. But then you need to be very careful in saying that because you did not sit in the case, you don't know all the facts, you didn't listen to all the argument, you just read it, for example, in the law report, and you say, well, I might have come to a different conclusion. But yes, there have been some cases, which I thought I might have had a different view, but generally speaking we did very well. Expressing not my personal view, but the views of the general populace as I sense it, there may be some cases in which some people might feel that we...the Constitutional Court moved a little bit too fast. Some people, in certain areas, say that the court moved too fast and left the population behind a little bit. There are such cases. But it is to be expected. And I don't think anybody can pretend to say that every judgment you give must please everybody and will be pleasing to everybody, and is as perfect as it comes from King Solomon. I would imagine that there won't be anybody who would think like that. We are all human.

Int I'm very curious what you think have been some of the criticisms of the Constitutional Court?

BN Well, it depends on the constituency. It also depends on whether one is a disgruntled party who has lost in that case. They come from all different angles, and they take different colours and shapes and dimensions. I've also

read about people...comments, about...comments from politicians and so forth. So it really depends where the so-called criticism or remarks come from.

Int As a member of the judiciary, let me be more specific, what do you think have been some of the concerns from other parts of the judiciary about the Constitutional Court?

BN I don't think there have been any serious concerns. Except for odd situations where perhaps one or other judge might just look at a judgment of the Constitutional Court and say, well, really, shouldn't they have gone this way? But it's a normal thing. It's a normal thing. But there hasn't been any serious criticism from the judiciary of the Constitutional Court and the like.

Int What do you think of the criticism that's been made about the fact in terms of socio-economic rights, the Court hasn't done enough to satisfy socio-economic rights in this country?

BN I don't agree with that criticism. In fact, sometimes I wonder whether in some instances we haven't gone a little bit too far in the sense of trying to manipulate the fiscal purse. I think the courts have gone quite a long way towards realising those rights...yes.

Int I also wondered...

BN In fact, if I may interrupt and add, I think the courts have gone...in some instances, the courts have gone so far as to even cause some uneasiness on the part of the executive to say that you are trespassing on our territory, we are in control of the budget, you are not in control, be careful and so on and so forth. I'm not saying that those criticisms are legitimate; I'm just stating the fact that in some instances there have been such concerns.

Int You pre-empted my next question, which was to ask you, which cases you felt may have come very close to perhaps transgressing that line?

BN Now that I will not tell you.

Int Okay (*laughs*), fair enough, fair enough. I'm wondering in your close observations of the Court, what are some of the cases that you have found have been landmark cases, in your opinion?

BN I found important judgments, both at the High Court and also at the Constitutional Court level, and indeed Supreme Court as well. But let me just

restrict myself briefly to the Constitutional Court. I think, like I've said, we started building from nothing. The case that you have mentioned, like the Makwanyane (*S v Makwanyane and Another*) case, there have been important cases which in the sense that whether you agree with the judgment or not, the fact is it clearly takes us out of the previous...from one era into the next. Imagine an era where you could sentence people to death and hang them, you move into an era where irrespective of what they could have done, you just can't hang them. It's a completely different era. So there's cases like that, which have been of importance; I have given as an example also a case where a person...a court pronounced that a person could view with pleasure in their own private rooms blue pornography (*Case and Another v Minister of Safety and Security and Others, Curtis v Minister of Safety and Security and Others*). The issue is not whether that judgment is right or whether or not viewing pornography is good or not, that's not the issue. The point is you move from an era where that was taboo, into an era where that is allowed by the court. Nothing can be more drastic than that. So those are some of the judgments that I can just mention, and perhaps stop there.

Int In terms of the role of the Constitutional Court, and in the transition to democracy, what were the challenges that were then when you were acting here in 1995, and what are the challenges that remain?

BN I think the challenges were to educate people, the whole nation, into accepting that in terms of the new Constitution, the Constitution is the supreme law of the country. We have done away with parliamentary sovereignty. Something to which we had been enslaved for many years. Now you have got to educate people in terms of accepting that. You also have to educate people into saying, well look, there are three tiers of government: the executive, Parliament, or the legislature, and the judiciary. And each one of them has got a role to play. This is a new Constitution, we need to recognise that division of authority and conduct ourselves in accordance with that recognition. So all those were new things, which as a court you had to implement when you interpret the Constitution, in a manner that people will understand and begin to see the practical meaning of all those things. Those were the challenges at the time. I must add that, in my view, those challenges are still there. It's a continuous process. Maybe it will never end. Maybe it shouldn't end. But the challenge is still there to make everybody understand this Constitution and what it means, and so on and so forth. So the struggle to educate everybody still continues.

Int I want to piggyback on that, in terms of, you know, I asked you earlier about African traditional law, customary law, do you think that in retrospect, fifteen, seventeen years down the line, do you think that the values of the Constitution with respect to African Customary Law, have in some ways reflected the values and aspirations of people on the ground in society?

BN Well, it depends who you speak to, but generally speaking, I think so. I think it has really addressed...tried to address and reflect the values of the people on the ground. But again, like I said, you do find instances where people feel uncomfortable about some of the judgments, and they don't feel...or rather they feel those judgments are not consistent with the values as they understand them. Let me give you an innocuous example, which is not controversial. There are others which are controversial and I don't want to put my foot in it. For example, you'll find a judgment which says a woman can be a chief, head of a tribe (reference to *(Shilubana and Others v Nwamitwa)*). That is a judgment, which everybody must accept and everybody must respect. But, there are people who still feel uncomfortable about that. Now the issue, what you are asking me is not whether they are right in so feeling or not, we are just trying to say, as a matter of reality there are people who are uncomfortable with that kind of judgment. So yes, generally speaking, there's been that compatibility between the Constitution and the values of the people as they understand them, but there are instances where people frowned upon some of our judgments. But it's, like I said, it's a process, we need to continue to educate people about this. Maybe what we should be careful about is not to leave the nation far too behind. As judges we need to take the people along with us...

Int How do you do that?

BN Well, through the process that I've said about, educative judgments and in the way that you interpret the Constitution. I think we must also deliberately strive to interpret the Constitution in a manner that would be compatible with the values of the people as they conceive them. Let us not as judges think that we know better than everyone else and then arrogantly try to impose our own values on the people. We need to be careful, we must deliberately strive to find that compatibility, that reconciliation. I think that is the task of a good judge. It is not the task of a judge to arrogantly impose their conceived and perceived values on the people without at least trying to bring about that kind of reconciliation.

Int I'm curious about the issue of power. As a judge, how do you grapple with power?

BN It can be quite frightening, and one needs to be very careful. Let me give you an example, how I felt in my first case as an acting judge. I had a case at a time when I could impose a death sentence.

Int This was on the High Court?

BN 1995, at the High Court. It was a horrible, horrible, horrible case. But, the minute I sat in that case, and I was acting for the first time in my life as a

judge, I realised...it struck me that...by the way, there were two accused people...it struck me that by the way, I had the authority to kill these people, to sentence them to death. Now, that is frightening power. It is true there is no longer a death sentence, but you can still sentence somebody to life imprisonment. That is frightening power. You can deprive somebody of their liberty, whether it's for one day or two days, or for a year or for life, that is frightening power. So you need to realise that you have got that kind of power, and that realisation must make you humble, careful, considerate, and objective, and above all, very, very careful in what you do. Because a judge does have a lot of power.

Int I'm also wondering about judicial transformation. What are the broader issues around judicial transformation and what are the challenges facing South Africa?

BN The broader issues are that the Bench should be representative in terms of demographics and gender, and so forth, but the challenge at the same time is to be careful not to exclude other sectors of the community. You have got to keep that balance as you go on transforming the judiciary. But also those who sit on the Bench need to understand the kind of power that you have talked about, which they have in their hands, they need to be sensitive to the sensitivities of other people, to the views and perceptions, but importantly also to the hopes, fears and aspirations of the powerless, of the people upon whom we make pronouncements; we need to be sensitive to that. Transformation means a judiciary that is alive to all those things.

Int I'm also wondering in terms of what you think are some of the failings of the Court?

BN Yes, there are some failings of the court. Sometimes cases take longer than they should take. Maybe we should have been more strict in terms of enforcing management of cases so they can be terminated quickly. Sometimes we delay in bringing out our judgments. And sometimes in prolonging cases, or rather we prolong cases because we pay too much regard to the rights of, say, the accused person. Yes, the accused has got the right to a fair trial and legal representation, but these rights, if a judge is not careful, can be abused. An accused person can decide on the first appearance that he will represent himself, then next appearance say, I need a lawyer. Third appearance, fire that lawyer, fourth appearance say, I don't have money for a lawyer, and so forth and so on. There are cases, which have gone on and on because an accused person thoroughly abuses the right to legal representation. So sometimes, as judges, we need to restrict that. But in some instances we have failed to do that, to the extent that the victims became disillusioned, witnesses disappeared, witnesses got discouraged, because of the many postponements that we do. So in some instances we

could...I wouldn't say we have failed, but I'm just saying we could have done better.

Int In terms of the achievements of the court, the Constitutional Court, what are some of the achievements?

BN I think, as I said, considering that we started almost from nothing, we have built a formidable constitutional jurisprudence through our Constitutional Court, and also through the feeder courts. We have built the kind of jurisprudence which is respected in many countries, and which many people have commented positively about the world over. Yes, I think we have managed to lay the foundations, but that process is still going on, and maybe it is too soon to congratulate ourselves. And I've always become worried when South African judges and people take too easily...accept too easily a compliment from outside, which says, you have got the best Constitution in the world, you have got the best jurisprudence, one of the best jurisprudence in the world. I just think that the danger with that is that we may just end up trying to impress, so as to live up to those compliments, which to me we could do without. They do no harm provided we know how to handle them. But I just don't think that we should allow ourselves to be propelled over...to go overboard in order to try and live up to those expectations and those compliments to the point where we may just find that we rush ourselves too much ahead.

Int Judge Ngoepe, I've asked you a range of questions, which you've answered very generously, I'm wondering if there's something I've neglected to ask you which you'd like included in your oral history?

BN No, really, I think we've covered everything.

Int Are you sure?

BN I'm sure. There will always be one or two other things but I think we've covered the substance.

Int Thank you so much for your time. ... We were talking about your role with the Truth and Reconciliation Commission, where you were one of the three appointed judges; I wondered whether you could talk about that significant experience?

BN Yes, it was quite an experience. Indeed I was one of the three judges who had been appointed to go around the country hearing applications for amnesty. It was quite an experience. And remember, as you say, I was already a judge

and the task of a judge, if the fact says somebody is guilty, is to find them guilty and sentence them to prison as a...well, punishment for the crime they have committed. But in the Amnesty Committee that we were sitting in, perhaps true was the reverse. A person, in order to get amnesty, had to admit, to make a full confession and admission of what they did. They had to tell you...to give you the gory details of what they had done, and you are only allowed to give them amnesty if you are satisfied that they had told the truth and all the details. And lo and behold, they'll do precisely that. Some of them at least, mostly...they would tell you how they killed and murdered and maimed, and at the end of their story, you say...you don't say you are found guilty, you go to prison: you say, you have told the truth as to how you killed and maimed, and because you have told the truth, you are hereby absolved. Go home. Now, it's unusual. But we all understood, at least speaking for myself, I understood precisely what I had been asked to do and what that process entailed. That process entailed trying to help the nation reconcile with itself. It needed courage, it needed unusual methods such as listening to a criminal tell you how they committed crime and then say, go home, you are absolved. There was a greater purpose to serve and that purpose was to try and find some reconciliation within the nation. And that was the importance of the process and that is why I wholeheartedly took part in that.

Int I understand that you had a good and close relationship with Judge Tholie Madala, I wondered whether you could say a few words about him as a person and as a judge?

BN Yes, I knew Judge Madala, well before he became a judge. I knew him while we were both in practice and he was one of the founder members of the Black Lawyers' Association and a very active member of the Black Lawyers' Association. That is the level at which we started to meet each other, and thereafter, as I say, we were both advocates, we began to communicate with each other. In fact, when I decided to be admitted as an advocate in Transkei, he's the person who moved the application for my admission as an advocate in the then Transkei. So we knew each other quite well and you could hardly think of somebody more of a gentleman than Tholie Madala. He was such a humble person. A very happy person all the time, and of course, for the period that I acted in the Constitutional Court, I found him here and the collegiality continued. I may just say on a light note, that if you were to go through the law reports, you may find that in one of the judgments there is a portion, inside the larger judgment by other judges, where he and I fashioned out a particular view, only the two of us, as part of the judgment, that particular judgment. But anyway, he was a competent judge; he was a very humble person.

Int I also heard he had a great sense of humour.

BN He did, absolutely, yes.

Int Thank you so much.

BN You are welcome.

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