

Bess Nkabinde Constitutional Court Oral History Project

Interview 1: 14th December 2011

Interview 2: 3rd February 2012

Interview 1:

Int This is an interview with Justice Bess Nkabinde and it's Wednesday the 14th of December, 2011. Bess, thank you so much for agreeing to participate in the Constitutional Court Oral History Project.

BN My pleasure, indeed, Roxsana.

Int I'm going to take you right back, I wanted to find out about your background, where you were born, your family structure, and what was the influences in terms of what made you interested in social justice issues, and put you onto the legal trajectory?

BN Well it takes me back, Roxsana. I was born in 1959, as you might have seen. I was born in Silwerkrans. It is a village in the North West between Zeerust and Swaruggens. It's a small village; it's not that big. It has sub villages. My father is a traditional leader in the village. Born, I think numbers, I think born 16th. My brothers passed away. A number of my brothers passed away, and sisters. And when I was born the twins who came before me were the last who passed away. I was born in 1959 and I have two younger brothers after me. Two years ago my elder sister passed away. My elder brother passed away, I think four years ago. At the moment we are six remaining. My eldest brother, who is now a traditional leader, who has taken after my father. I have two sisters now, and the two younger brothers remaining. So I happen to have been the eleventh child...eleventh child, I recall. No, there are fifteen, from the sixteen, I would have been the fourteenth child...yes, the fourteenth child. I grew up there, and I attended school at home. In a rural village, you know, basically no economy at home, my mother was not working. I took care of my father, in the sort of a royal homestead. My father was a cripple. He was not born a cripple but he had to attend the traditional school, he went to the mountain, and because, you know, when you are born in a royal family, you're the one who leads the regiment for the school. Either a boy (son) or a daughter. And he fell from a very high tree, broke his back. So when most of us were born we found him like that. He couldn't walk on his own, so he was walking on crutches throughout. He couldn't stand. So, ja, I grew up in that family. So my mother was a real rock to support the man, and as the chief, or as a traditional leader, much is expected of you in terms of, not only just leadership, you are the father, and your mother is a mother to the whole tribe. You take full responsibility of the needy. For instance when children were orphaned in the village, they would be taken into the family, and when a child gets lost and he's picked up in the village, he's brought at home. So I grew up, we were so many, I never...I just understood that these children are not my

siblings. I think at about seven...seven years old, yes, I think around there, we were twenty-three children, boys and girls. And my mother brought us up like that. So I never really knew until very late, I think when I was doing standard five, because some of the children started going away. And then I understood that they were actually not my siblings. But my mother wouldn't differentiate. I mean, you'll bring a big roll of material, one colour, and you'll make dresses and underwears, trousers and underpants, so we were like a choir, you know (*laughs*). Twenty-three children is a lot. And there's a big rondavel at home, so we all slept in there, boys and girls. So, we grew up in that kind of humbling environment. And I actually remain indebted to my parents because that has taught me humility, and that you have to share. And ja...and just to be thankful. So, yes, I grew up there, and when I finished my standard six, I actually repeated because I also had to go to a traditional school, which that time will take about...the girls it took about four and a half months, and so I had to repeat my standard six. And after that I went to just a neighbouring location in my district to do my high school there. My elder brother, who passed away, was a superintendent in that area, so I went to do my college...is that form one, two, form three? I attended there and when I finished I went to the Free State. I did my form four, form five, there. It was not very easy because after my father passed away I develop anxiety neurosis. Which nobody understood what it was at that time. But my father died almost in my hands, because I was the one who...I was quite close to him. You know in the rural setup before I went to my high school, my father was...you know, he would attend court cases, say, once a week, or twice a week, depending on the urgency of the matters, so I used to be the one carrying his chair and his water. You will understand that he can't just be given water by anybody else in terms of our tradition. So either my brothers...but at the time they were in Limpopo...that time, what was it called? Now, there was a Roman Catholic school there, my eldest brother were there. My elder sisters were in the farm. And my other sister was in a boarding school. So I was the child there at that time. Of course my little brothers...and I was the one to carry his chair and his water. And often I'll sit there next to him. And I suppose...well, I'll talk about that later, where the influence came from. Yes, so, after my father passed away, I had this thing that I didn't understand what it was. But it was later the...it was anxiety neuroses, because my head was shaking all the time and was hospitalised and in and out of hospital, but I finished my matric, nevertheless. And after that I decided to go to the University of Zululand. You understand that time, going to Wits (University of Witwatersrand) that would not even come into your mind. Because financially and...it was actually not even in our minds. Most of the students, it's like, you go to Turfloop, University of Zululand, or...which one? I think those were the two at that time. Most of my colleagues went to the University of Zululand with me, from Mariasdal High School. It's a Roman Catholic school. So I then went to the University of Zululand, and there where I read law. We were about...women, I think we were about one hundred and twenty, when we started first year. And this Professor Erasmus used to say, "In April, most of you girls will be out of here. This is not a place for women". And indeed, June, 1980, we were twelve women out of that number. And of course, it was not very easy, I mean,

women reading law, and you know...but of course the environment was good because we had colleagues that we started with, so male students, we were studying with them and we had these unrests in 1983, yes, just my last year, BProc, and we wrote exams and we left. Actually, no, no, no, we wrote at the beginning of the year because of unrest at Ngoya, University of Zululand then. And I wanted to go and study at Rhodes, to do my LLB at Rhodes University. But the results came late, so they accepted me, but I hadn't sent my results in February, so I decided to stay at home, get a job and study at University of North-West, which was UNIBO at that time, University of Bophuthatswana, 1984. Got my results, I'd passed my BProc, and then I registered LLB, University of the Northwest in 1984. I got a job as a State Law Advisor, the then Bophuthatswana government, basically to draft legislation. And '84, '85, '86, '87, I completed my LLB. '88, I applied to be admitted as an advocate. And '89, I had a problem with the former Minister for Justice, who actually took after my brother. My eldest brother happened to have been a minister in the former Bop government. My elder brother, who passed away, was the Chief Whip. So, I grew up in the family of people who were politically involved, in that time. My eldest brother resigned because he had a problem with the President.

Int Of Bophuthatswana?

BN Yes. It was closer to 1994. My brother was known to be somebody who was very forceful and, well, some people say he physically assaulted the President, and he resigned. He actually chased him away, so he left overnight, he just left. So he stayed in my house with his children. And 1988 I had a problem with the minister...not really the minister but the Secretary for Justice, because I was drafting...that particular year I was drafting the Defence Act, and I didn't have a telephone line that went outside because the Defence Force was located about five kilometres from our offices, and obviously I had to have pre-consultations with the then General who was responsible. So it was virtually impossible to get instructions relating to the legislation. I couldn't make progress, and at that time I had registered with Unisa, a Masters in labour law and company law, with Unisa. And I decided to study because I was not in a position to do anything constructive. I didn't have a car, they didn't give me a car. I didn't have a line to communicate with those people. So I decided to study. And the then Secretary (for Justice) used to do rounds and when he comes at the door, people used to stand up and I refused to stand up, so...because it was just disruptive for me. And he wanted to know, from time to time he'll come and see what are you doing. I'd say, well, I'm studying. But you can't be studying here, you're supposed to be drafting and doing that...well I can't draft because I don't...I haven't consulted, I don't have anything to do right now, I need a line. Well that never happened, and he had someone who was in the State Attorney's office, a lady who had a same degree with me, who was given a line. And I thought, that must be discrimination. Why can't we be treated the same? This woman has a BProc, I have a BProc, we started almost the same time, and why should she be given

a line, and we are not given outgoing lines? And so they summoned me and threatened to take me to the President. And after several meetings I decided to resign. And that was towards the end of, I think, 1998. I was admitted as an advocate then. Then I decided to apply, to serve pupillage in Johannesburg. I came to serve pupillage at the beginning of the year and, ja, I served here and when I finished...I didn't pass in midyear because I had problems with criminal procedure and civil procedure. And then I repeated...I finished at the end of the year. I went back to Mafikeng to practise. That was the beginning of 1990. So I started practising there law and I enjoyed practice. I was the only woman obviously at the Bar then. Not very easy, and...but it was not that difficult in the sense that the State Law Advisor; I was working with inaudible, she was also drafting, and a certain lady who is now with the Law Commission. So we were just few women there and, you know, you just get used to working with the menfolk. So I was there...Judge Kgomo, who is now the Judge President of the Northern Cape, he was a magistrate and then he came to join us. So he worked with us as well. Then of course I left, served pupillage and started practising. And (Judge) Kgomo was there already practising. Who else, who's now a judge? Judge (Mogoeng) Mogoeng went to serve pupillage after me, but he didn't practise with us, he was practising in Johannesburg. Who else was there...Judge Hendricks came later after me. The current Judge President of the North West came after me, but he didn't stay long. He left to...it was not that easy for her so she decided to go and lecture at a university. So I was there with colleagues and I was the Secretary of the Bar. And, ja, until 1999, when one of my colleagues, a former colleague, who was now a judge, Judge inaudible passed away. And one morning Judge Friedman phoned me, he was the Judge President at the time, he called me. And I was in an urgent application that morning, and I said, "I'll come and see you at twelve", because I was doing one urgent in the morning, and I had one at two o'clock. So when I finished one urgent application I went to his chambers and he said, "I'd like you to come and act". I was not very sure about that. I told him that, "Well, let me go and think about it, because I still have a matter in the afternoon." So he said, "No, no, you can go and do a matter, you see those files there, it's motion court on Thursday, I would like you to start now so that you take those files". I mean, he was not giving me an option to say no, let me go and think about it. But I was comfortable because I've appeared before them and I'd been in Mafikeng for quite a long time. I went to finish my second urgent (application) and then I came to collect motion court files. Obviously a number of those files were mine. I was going to move most of those applications, so I had to share them with some of my colleagues at the Bar. So they then constituted two courts, two motion courts. one my matters were given to one person, one judge, then I did one of theirs then. That's how I began my judicial work on the Bench, 1999, and I continued until the end of the year, when I made myself available for permanent appointment. October 1999, I was appointed, and 2000...I think 2000, Judge Friedman gave me an opportunity to go to the Labour Court. So I came to Johannesburg, did my acting stint at the Labour Court. I think I went again for the second time 2002, I can't remember. 2004, I was asked to act in the Labour Appeal Court. So I did my stint, 2004 until 2005. And whilst I was busy

at the Labour Court, and Judge Howie, the Supreme Court of Appeal, approached my Judge President, Judge (Mogoeng) Mogoeng and asked him to talk to me to come to the SCA (Supreme Court of Appeal). I was not really ready, you know, to go to the SCA (Supreme Court of Appeal) that time, because I had just been at the Labour Appeal Court. But (Mogoeng) Mogoeng didn't give me a chance, so he said, I've already agreed on your behalf, so then I then proceeded to the SCA (Supreme Court of Appeal), 2005. June 2005 until the end of the year. And at that time I had already been nominated. A lot of things happened that year, I was nominated for the position because Arthur was leaving. And I made myself available. Actually I attended the farewell function in June, 2nd of June, Arthur's (Chaskalson's) function, and in his speech he said, he thinks that more women should be appointed to the Court and at that time, we had just been sitting with Judge Dennis Davis and Judge President Ray Zondo. We were busy with a matter, so we adjourned and we drove together here. And after that speech they were driving back to the court, say, no, did you listen to that, we are going to nominate you when he leaves, so make yourself ready. I just didn't take them serious, obviously. Then, when they advertised the post, then Judge (Ray) Zondo urged me to make myself available. So he nominated me. Dennis (Davis) also called. So, I was not very keen on that, I thought, you know, here is now Supreme Court of Appeal coming, and I don't think I'm ready for all this. Things are happening just too fast for me. Well, at the end I decided to accept a nomination. Then I went to Bloemfontein, waiting for the October interviews. Of course, most of my colleagues in Bloemfontein were not really impressed. You're a young judge and now you've made yourself to be a judge of the Constitutional Court. But of course, you can expect that, especially in our country, because of our past. So I finished my stint and then in October I went for my interviews, which I think went relatively well. And went back to Bloemfontein to finish my stint. And the 30th of November I was delivering a judgment, after that I drove home, packed up my suitcases. As I was driving I got a call from the ministry to say I was actually appointed. Judge Howie had asked me to make myself available for a continuation in the SCA (Supreme Court of Appeal). But we had a difficulty because there was no word from Chief Justice (Pius) Langa, or the Ministry, whether I was appointed or not, so he could not allocate anything to me. And I said to him, "look, let's just wait, let's be patient. If we get any news in December I'll call you, then you can just send my boxes, then I'll be of assistance, if you'd like me to come back". So then I got the news as I was driving to Mafikeng and that was it. The beginning of January I came to the Court.

Int Thank you so much for that wonderful overview. I'm going to take you right back. I'm very curious, growing up in a family that you did, which was an important family in the village, in terms of traditional leadership, the issue of gender, how did that actually influence you?

BN Well, you know, in my family, obviously tradition, you'll understand issues of the importance of a male child. Particularly my family in the sense that

chieftainship, it was understood to be something for the males, so we knew that the next person to take over from my father would be my eldest brother. And so he did, whilst my father was alive. But in terms of treatment, my mother brought us up in a way that he never differentiated, because of the situation we found ourselves in. There were women relatives who were actually helping to take care of my father. So they will be there to do his laundry, cleaning up, but my mother actually made us to work for those women; when we did our laundry, we were doing their laundry as well. And when they were there and we are on holidays, they will sit and we will do the rest. My brothers were taught to cook, to clean, to do everything that all the girls were doing. you'll understand that my eldest brother, my elder brother, then there was the two sisters, so these two men had to learn all the roles, you know, of women, because they didn't have sisters that time. So we grew up in that family where they would wash for us, they would do all those kind of things for us. When I stayed at school, sub A, my eldest brother was a teacher, he took me to Rustenburg, on the outskirts of Rustenburg, I was staying with him in a cottage, a young girl at the time, six years old, and a man having to look after her, he was washing my underwear, doing everything for me. So I think it was that kind of a background, because my mother never differentiated. You know, he'll ask me, go and chop wood and cook. So I'll chop wood. I cut myself; I was actually telling Judge (Ray) Zondo and Judge (Chris) Jafta the other day, you know, the way we were brought up has been really an advantage for some of us. We are able to hold the ground with our feet. So my mother would just go, well, there's no wood, just go and chop that wood and cook. Whilst the ladies are there. And sometimes she'd just go, just go and shift that tractor. I mean, how do you shift a tractor, you're a seventeen-year-old girl, you have never even sat behind the steering, but she says, but somebody has to do shift it. So you'll learn all those kind of things the hard way. When you go to the farm, my brothers won't be there, and she'll tell you, go and slaughter that sheep. So we learned all those kind of things. I mean, I can slaughter a sheep if I have to. But she taught us those kind of values that you have to learn to do everything for yourself, you don't have to wait for somebody to do it for you, because these women, they're working for your father, you are not chiefs. You are just like all other children. So she never differentiated and with all those kids who were there, you know, we actually, sometimes you will even doubt whether she was our mother because she was so strict. And, but I think it has been an advantage. So I really don't think there has been those kind of issues that, because you are a woman you will be treated less, you know, as less important. We were given all the necessary respect, whilst we knew that our eldest brother is the head of the family. And as time went on, being the last girl, obviously, everybody understood that I was the most favoured for whatever reason, I don't know. Maybe because they say, because my twin brothers just passed away, and everybody was very protective of me, so they tended to put more focus on me and when I grew up I was, I think, the sort of favoured child. My sister says I was behaving well and she was the naughty one (*laughs*). She often says that. And now, when I was studying and I qualified as a lawyer, you see so much respect, even from my eldest brother. And at home, being the youngest

girl, when anything happens, I'm the one to be consulted, they want to hear what I think and so I've assumed that kind of responsibility, even though I'm the youngest, the girls. And so I am fortunate that I've never experienced those kind of...the discrimination that kind of a disrespect, and I grew up in a home where you'd be given respect, just as a child, and to be treated just like everybody else. So I...ja...you know, I don't know whether I've answered you, but...

Int Sure. Absolutely. I'm also curious, in terms of your choice of law, at what point did you decide that that was what you were going to pursue as a career?

BN Well, you know, the...when my father was about to relinquish his chieftainship, my eldest brother was teaching and he felt that he was tired, because he was actually ailing. And there were some challenges. The counsellors, some of the elders in the royal family, that is my father's cousins, wanted to take over, and there were some challenges in the sense that my grand grandmother, the husband had four wives, so when my grandfather took over from his father, there were some challenges, because he was not the first child, as I learned, he was the second child. And the first child was a daughter, was a girl child. And so people always believed that he was not heir person, real heir, you know, in that sense. And at that time, although there was still this kind of a belief that only boys could take over, you know, primogenitor, but there was always that kind of a tussle in the village. When my father was to relinquish the position, my eldest brother came home and there was a case of traditional healers who were believed to have been working together, including those people closer to my father...my father's cousins...were involved and they were planning to assassinate him. Assassination in the sense of using muti...

Int Poison?

BN Ja. And they then discovered one day that they had put a head of a person at our gate. And a magistrate came, because the tribe didn't want to go to that neighbouring location, that's where the magistrate's courts were – where I studied actually – and this senior...who turned out to be a very senior magistrate later and my elder brother's friend, because they were working in the same offices, he came to my village, and I remember the particular day when I took my father's chair and water to the tribal lekgotla, and the tribe was there, the women and men, and they were discussing this issue, and the magistrate was like a mediator, or something like that. And I, that time, I didn't know that he was a magistrate, but I was just wondering about this man, you know, who is this man...And then I later learned that he was my brother's friend. And he mediated, and I think at the end this whole thing just fizzled out, it was never taken to the court, or something like that. Because those people

were found, but they were never prosecuted, or something like that. I would imagine how do you prosecute them and say, what have they done? So, later when I went to do my high school, form one, form two, form three, this man was there. I saw him again now being very close to my brother. And I remember, this is the guy who came during the difficult time, and then I knew more about him, that he was a magistrate. And he was often coming at home and I inquired from him, "So what do you do?" And he said, "No, I'm a magistrate, I read law". And when I finished my high school I went to the University of Zululand, at that time the University of Zululand they had...I don't know what they called it, but most of the magistrates were studying there, studying B Juris, those who had diplomas. People like Judge Kgomo, he was one of those magistrates. Acting Judge inaudible he was one of those people who were studying. And this man was also studying there, to convert his diploma into B Juris. So most of them were studying at the university but not necessarily for a degree course, and so my interest developed at the time when I was doing form one, actually. And linking up this person with what was happening, and I decided I'm going to read law, I'm going to study law when I was finished my form three. Because I had to go to Mariasdal, Tweespruit, the other side of...just before Ladybrand, so that's where I did my high school, as I said earlier. And I knew, I just didn't have anything else that I was thinking about, I just want to study law. But I didn't know what I was going to become of that, I just want to study law to become a lawyer. And I applied the University of Zululand to be enrolled for a law degree, and there it was. Then I read law and that's how it came out. I didn't think of anything else. I mean, I never thought of social worker or a nurse, or being a teacher. I just had this thing in my mind since that time, and ja.

Int I'm also curious, growing up in the area that you did, how politically aware did you become and at what stage did you become politically aware of the conditions in South Africa?

BN Well, you know, I think because of ignorance, when you grow up in a village...because we didn't have much activities at that time, especially where we are located. But obviously, you know, in standard six, you'd be sent to town, which was Swartruggens, very close to my village, I think about fifteen kilometres from home. And it's a very small town, if you remember, if you know that area. You wouldn't use the bathrooms that are used by the white people. It was a very small post office and some bathrooms around there, but there was that segregation. And you know, you grow up understanding that you are less, different from everybody else. We used to go to the shops, which used to be owned by the Indian people on the outskirts of town, because they also have their area on the outskirts of town. And obviously most of them were known to my brother, they were friends, and those who owned businesses there. But we were more comfortable to go there rather than to go to town. Because even most of the doctors were in that small shopping centre, where we used to go and consult. And so it is something that will strike you and you grow up being afraid of white people obviously. You

see them as better than you and that became even more intense, you know, when you start growing up, even after matric, you start realising all these changes. During the Bop time, obviously, that transitioned from the establish of homelands and all those kind of things. You were not very much alive to the intensity of the politics in South Africa, as such. But we knew that this sort of a segregated groups, you know, we are meant to be excluded from the rest. And you went along in the sense that most of us didn't have choices. Where would you go? When you finish your degree you have to go and look for a job, and somewhat I was privileged in the sense that my eldest brother was a minister there, something that I do acknowledge. I benefited from that kind of a system. But as I said earlier, I just didn't like the way those people treated some of us and the way my eldest brother was treated by the former President. And, well of course, they had differences about his attitude when, you know, time for change came and he was resolute and my eldest brother was the youngest minister apparently then. And was conceded to be very confrontational to the president and disrespectful, so they say, and, ja, as I said, then he had to leave. So...well, I was not politically really involved in the sense of some of the people who got involved in, say, Black Sash, or those kind of things, I was not involved.

Int When you went to the University of Zululand that was during the eighties and there would have been a lot of political unrest at the University of Zululand...

BN Yes, indeed.

Int And I wondered if you could talk about how that may have affected you, to what extent you may or may not have been involved, etc.?

BN Well, there was quite a lot of that, as I say, in 1983 in particular. We used to go to meetings, but obviously I would not want to be too involved in those kind of things because of my background. And I mean, my eldest brothers would not take kind to me getting involved in those kind of things. I just want to study and get out of that place. So hence I just finished quickly and...but the 1983 unrest, very difficult circumstances, and the Inkatha people came to the campus and attacked us and it was a very difficult, very painful experience. Ja, so we finished...we had to run away actually, and as I said, we didn't write exams, and we were called in January to write, and some of us were not really keen to go back, but one had to go, you know, in the sense that you had to at least get your degree. So I went back January and wrote and went back home. So, ja, that's basically that.

Int When you talk about the 1983 attacks by Inkatha, I wondered, did you lose friends, did you witness atrocities at that time?

BN Yes, indeed. Actually my ex-husband, who was my boyfriend then, sort of somewhat related to the rector, Mr Nkabinde then, and I was at the hostels, the boy's hostels, because it was safer there. I didn't have many friends. I was spending more time with him, so I was that side, which was actually prohibited. But people were doing it, so I was there. And when they started attacking us, they attacked the boy's hostels first, so I was there, and there was blood all over in the passages, you know. That was a horrible experience. And people...there's a river there, just when you're at the university, there's a river and like it runs sort of on the side of the university, most of the students ran towards that. Some of them, apparently they got into the water and got drowned, but I don't know whether they died. And I know some of my colleagues, there were two students who were very seriously injured. And we escaped. There was a couple, a lecturer, who came from Johannesburg, Soweto, Mr Mati and his wife, they lived on the outskirts of the campus, and I used to spend the weekend with them, and their children. So I managed to escape and I went there, so I stayed there a couple of days before I came back home. So I didn't see the rest, but when I was at the male hostels, I saw that people were brutalised, men...I don't know how it happened, but there was just blood all over. When we got out of our room, we sneaked out and ran away. And when they assaulted these people in the early hours of the morning, because I think we left at about half past five, six, somewhere there, but people had been running around. So my boyfriend then, my former husband, sneaked out to keep on checking, keep on checking, whether it was safe to go out and we sneaked out and that's how I managed to get out. but it was so difficult to get out of the gate because there was a group of...you know these male Inkatha, they call them *amabutho*, and obviously come with their you know, bare bodies and then with these things that they wear. And I was so scared of those men, because, I mean, you know, they are big and hefty, so to get out of the gate, you know, should we go, should we not? There was a post office right at the gate, and my boyfriend said, just go to the post office as if you are going to do something at the post office. After that, just walk out. So I didn't have anything with me, I just got in there, and then I walked out. And I walked to the house, which was like a kilometre from the gate. So that's how I survived that.

Int I also wondered, when you finished, you decided to go to the Johannesburg Bar, and it was at a time where it was the cusp of change in this country, and I wondered whether you could talk a bit about that in terms of your experiences as a woman, being at the Bar, etc.?

BN Oh, ja, actually when I applied, I remembered Advocate Schalk Burger was very helpful and he asked me to come to Johannesburg, which I did early in the year. We had a discussion. He asked me, why don't you come to Johannesburg? And I explained to him. He said, well, because you don't have a criminal experience. I never prosecuted before. I've never been in court before. So, I suggest that you start early. So I did. I came, the following week that I came to Johannesburg, I started. My Master then, Geraldine Borchers,

who's now a judge downtown, she specialised in criminal law, and she didn't do civil work at all. That floor, there was Jeffrey Israel who was the foreign founder of Schreiner Chambers. And two offices from Geraldine's office was Jeffrey Israel, an elderly somebody, and there was the late Pitje, Legwai. And Advocate Hussain who's now helping the Department of Justice. And who else was there that I was so close to? There was Elmara Schoeman. But I was working closely with Jeffrey Israel because Geraldine didn't do civil work. So I'd go to court with Jeffrey Israel. I remember the other day we went to motion court, here in Johannesburg, there I am, as a young girl, wearing black white, with a senior counsel, and you know in Johannesburg, juniors sit at the back. So when they do the court roll. And there Jeffrey (Israel) starts with, "No, you come and sit next to me". Right in the front row. And people just didn't understand. What is this junior counsel coming to sit in front of all of us? So Jeffrey Israel stands up and he introduces me to the judge, this is now people who is now working with me, I've asked that she comes and sits with me because she has prepared these papers with me. I had prepared...there was a civil...a motion court, I had prepared an application. I think it was an interlocutory application we had lodged...it was an NBA thing, so we had lodged an interlocutory application, but I can't remember what it was all about then. There, some of the advocates, including McCaps Motimele, didn't take kind to this, that a black woman sitting in the front row, most junior, she's not even an advocate here, because I was admitted in Bop but not yet in South Africa. Remember we had to do dual. Ja, that was my first encounter with that kind of treatment, you know, at the Bar. Kgomotso Moroka, Judge Motata, Vincent Maleka, me, Judge Makanya, now who's in the Johannesburg High Court, we were studying together, we served pupillage together. So, you know the group, we were quite close. Kgomotso (Moroka) finished in June. Vincent Maleka, he started early. And it was okay...you know Kgomotso Moroka is that kind of sort of forceful somebody. She knew some of those people, so it was okay. But at the Bar most of the white people, especially the judges who were interviewing us at the oral in June, didn't really have regard for us. I remember one of my colleagues, she's a judge now in Johannesburg, she collapsed when she was going for the oral. She's an Indian lady, she just got so scared. Because, you know, in the oral room, it's sort of a horse-shoe, a very small room, there at Innes Chambers, they'll put you at the centre, and there's a light that comes right into your face, and these people are sitting around you in a horse-shoe kind of thing, and you sit in the centre, and it is so intimidating. I was pregnant when I was going for my first oral. One of the judges said, "This is not a place for pregnant women, you know". But I didn't take it hard, I mean, I just accepted that, you know, this is a tough world, you know, and there I was pregnant and when I was doing my final interview obviously I was very nervous. But it was okay, you know, I had people who supported me, I kept to myself, just to do my work, I passed and I went to Mafikeng, I practised, and it's an environment that I was quite familiar with. The judges were okay, and I remember...gave birth, I was in motion court...I gave birth on Monday, and Thursday I was back in motion court after my divorce. So it's just a difficult experience. But, ja, there has been those kind of challenges, because most were in Johannesburg, I used to see those people

who qualified before me, Vincent Maleka, Kgomotso Moroka, didn't have much work. And Vincent (Maleka) had an advantage because apparently he used to work with an advocate who helped him when he was studying, they were paying his fees, so he had somebody to put him under the armpit. But they struggled to get briefs. And when I went to Mafikeng, obviously when you start, people don't really have trust in you, and there's sort of a condescending attitude that I really hate, you know, and...

Int Is that because you're a woman or is it just general?

BN Mm, it could be...well, I think because you're a woman. You know, you'll understand when I started practising I was the only woman, so you get that kind of patronising attitude from senior counsel, and some of the advocates that will consider themselves to be better than you. And I remember one of the senior counsel...I used to be doing a lot of government work. You get a lot of briefs, civil work, and...I didn't do criminal cases because I didn't really have the heart for that. I know Judge Worthington who was the chairperson of the Legal Aid Board, used to summon me to his chambers and say, you have not appeared before me in criminal matters, why aren't you doing legal aid work? And I said, you know, judge, I don't have the heart for it, but I'll try to take briefs when time allows. So I used to do quite a lot of civil work, commercial and matrimonial matters, and often my opponent will be, whilst I'm acting for the state often, Advocate Lever and some of my senior colleagues, will be appearing on the other side. Especially in urgent applications, because I was typing my legal work, and obviously you get a lot of work because people know that you will be ready at any time, so he will say to me, "But why are you opposing every matter that I'm involved in?" I'd say, "But Mr Lever, just like yourself I'm also instructed. I'm not opposing you". And he'd say, "No, you like just opposing every case". And one day I said to him, "You know, when you started practising law, perhaps I was not born yet, so you have an advantage over me, but I think if you can just give me respect then I'll return it back to you. It's not like I'm here because I want to be here. I've been instructed just like you have been instructed". So there were those kind of challenges, you know. But it's not something that would have deterred me, you know, from just carrying on what I want to do. I must say I enjoyed working with them, we had a good relationship with my colleagues at the Bar. Go to court and fight a case, disagree and you stand up and say whatever, you go back the same door, and you go and have coffee, you know. So I really enjoyed practice and working with them. And the advantage of practising a small Bar is that everybody knows you and there's much work in that area. The disadvantage is the exposure is not as good as one would get in a big metropole like Johannesburg or Pretoria. But nevertheless I think I had an advantage of being exposed to cases that some of my colleagues in Johannesburg could not be exposed to. So ja...

Int Thank you. You also headed a Commission of Inquiry, this was in the 1994 period?

BN Yes. You know what happened during Bop, you know the transition...

Int I wonder whether you could tell us a little bit about that?

BN Ja...you know it was during the time actually when my brother was a Minister. I can't remember...I think he was a Minister of Justice at that time, because he moved from one department to another. And he...there was that Defence Force thing, who then came over to where the ministers and where the president lived. You know, there's a stadium adjacent to the residential area. I was not there at that time, I'd gone home. But then my brother called to say all the children must be fetched from the house. But we didn't have the reliable transport from home so we didn't go at the time. But then there was that attempted coup. And people were...some people were arrested and there was unrest, and people were apparently walking around...I was at home in Silwerkrans at that time, and we came a few days thereafter, but there was still some patrolling. And at the time when I was in Mafikeng, it was a time when the boere (Afrikaner) group came from Klerksdorp, and there was that shooting that happened around the township.

Int Did this involve the Eugene Terre'Blanche group?

BN The Eugene Terre'Blanche group they drove, and then they came, they took over Mafikeng and that's where the unrest was, and there was that shooting, you know, that we see often on television. Ja, that's what actually happened. But the environment was...it was very, very tense at that time, you would imagine, and there was no schooling and the university was closed, and we couldn't go to work because it was not safe to go to the offices, which were inside the residential areas of the president, the ministers. At that time our offices were there, the court was there. Almost everything was inside there, so we couldn't go to work. And, ja, so basically it was that difficult time because Mr (Kosi Lucas Manyane) Mangope was resisting, you know, the change, and people just didn't want him anymore, and he was the only person of all the group, you know, as I said, my brother, was one of those people who lost touch with him because apparently he felt that he was the one who was influencing other ministers and he chased him. So ja...ja, those were the times and it was a difficult situations in Mafeking.

Int And how did you then become involved in the Commission of Inquiry?

BN And when I was practising, Advocate Mpshe, who is now an acting judge to the Land Claims Court, and one of the attorneys...I was supposed to do the

investigation of that commission of inquiry, the mutiny, you know...this thing was not just in Mafeking, there was just unrest all over Bophuthatswana, and the prison where we did this investigation, the prisoners attacked the warders and escaped and there was just mutiny there. So we had to do that commission. The Commissioner was appointed and I had to do the investigation. So I moved to somewhere around Sun City, that's where the prison is, so I moved there to do that investigation to present the evidence.

Int What were your findings? What were some of the processes involved in that?

BN Well, what we did, we started consulting with the prisoners, just to try to...because most of them escaped, most of them were injured, were shot at by the warders as they were trying to escape. Some of the warders were also hurt or injured, because the prisoners disarmed them and started shooting, and some ran away. So we had to talk to the prisoners first. Because you can't go through the warders because then the prisoners will adopt an attitude that you are taking sides. So when we arrived there, we had a meeting with everybody and said to them, we'd like to talk to you about what has happened because we're trying to find the truth, precisely what caused this, because it was a juvenile prison, but there were a few adult prisoners there. And we spent the day, almost every day at the prison. You know, as an investigator you sit with almost everybody and sit in their cells there and talk to them. and they started trusting us and some of them knew us because they come from the area. I mean, it's not far from my village, so most of the prisoners knew me. And they volunteered information and we started...because first of all the learned about the political unrest, and everybody just get involved and the unhappiness of the government not wanting to follow suit and they just became unhappy, started complaining about the food, the treatment, almost everything that foiled into this whole fracas. And they planned to disarm the prisoners and that's how it all started. But of course, it was foiled by what was happening outside. I mean, they had radios and it's a very sort of modern prison, and they were quite familiar with what was happening outside, and they also just joined in, and...ja. So we did that investigation and our findings were that we made a recommendation that, my recollection that the prison should be closed for a while, and then some of the prisoners, the older ones, should be moved out of the prison and for some investigation into the murders of those who died and the families to be compensated or something like that. But I think, as I say, it was not really like dissatisfaction, I think everything followed as a result of the outside unrest during that time. So that's what we did.

Int I'd like to talk more about your acting experience of your time on the Bench, but I'm wondering whether that might be an occasion for the next interview, given that it's been quite long for you to sit in that chair.

BN Well, Roxsana, I'm in your hands, if time allows, I'm not sure what time it is right now, and...

Int Shall we continue a little bit more?

BN Ja, okay.

Int That would be great. So we'll continue till eleven. And I just wanted to ask you, in 1993 you attended a judicial training program. So this actually pre-empted your first acting on the Bench, and I wondered whether you could talk about your memories of that experience?

BN You know, believe you me, you know things just happen in a way that you...when you look back you say, it's like it was a plan. Because this program, NADEL (National Association of Democratic Lawyers) had been invited to undergo that judicial training program. And Selby Baqwa was the head that time of NADEL (National Association of Democratic Lawyers), and they invited BLA (Black Lawyers Association)...I was a member of BLA (Black Lawyers Association)...and BLA (Black Lawyers Association) decided that Judge Ngoepe, JP, and myself, should represent BLA (Black Lawyers Association). So from BLA (Black Lawyers Association) it was myself and Judge Ngoepe. But the whole program was a NADEL (National Association of Democratic Lawyers) kind of whole program. And there we travelled. I just took a break from practice and travelled to Canada. I must be honest, I mean, you undergo judicial training. What is this? Judicial training to do what? I just did not even ambition that I'll become a judge at any stage, at that time. I mean, 1993. And then we went to Canada, we did court mentoring. Spent time in Ottawa, because of the judicial council there. So we spent more time at the judicial council and we did court mentoring in Montreal and Toronto. So, I mean, that was an exposure to sit on the Bench with a judge, you know, mentoring cases. Unfortunately their program was for a very short period of time, so we could not even finish the cases that we were mentoring in. But that was my first exposure to be working so close with a judge, sitting on the Bench, just observing judicial proceedings and reading the material at that time. So it was a real eye-opener for me. And I worked with Justice McLachlin, who is one of the women judges there, and I was motivated indeed. But I had no...I mean, I just didn't even think that at any stage some of us would be given that kind of an opportunity to become judges. I was reading inaudible in my practice. Obviously I was doing quite a number of things in practice, as you might have seen. I was involved in some councils and as members of some of those legal entities, so there was much work for me, really. I had no reason to complain. But I didn't think that I would be invited to become a judge at any stage at that time. But as I say, that was quite an eye-opener, something that one looks back at and say, wow, it might have been maybe the divine plan for one to have that kind of an exposure, especially with the Canadian judiciary. Very humble judges, and as you'd know, we had that

Canadian...South Africa-Canadian Judicial Linkage Programme to train judges. I was involved in the sub-committee. Arthur (Chaskalson) was heading that. And so it's something that one could speak about because we had been there, seeing what the Canadian Judicial Council was doing and learning from the experience.

Int I'm curious, you went to Canada at a time where questions about South Africa's transition must have been very up on the agenda...

BN Indeed.

Int And I wondered whether you could talk a bit about your experience in relation to issues of the transition to democracy and concerns about the function of the judiciary; the role of the judiciary?

BN Yes, indeed. Actually when we were there, it's then that I realised that there could have been...there was going to be an opportunity for some people to be considered. Because Mr Moshe the late Moshe, was there. He actually, he was our host. And we had a meeting with them and we spoke about the judiciary in South Africa, and obviously those who were given more an opportunity to present were Selby (Baqwa) and Judge Ngoepe, you know, when we had meetings. But those discussions, you know, there were those discussions that, you know, we are moving towards change and then we hope that the most of you will make themselves available when an opportunity presents itself. Well, from my part, I was with Judge Nonkosi, she's now in Bloemfontein, and she was an attorney at that time. And...should I say this...I mean we just didn't see this happening, you know, for us, in the sense that, given the challenges that you find in practice and women will always be relegated to like...you'll be considered later, so we...personally I didn't see that happening. I thought those who were, at that time, quite senior, were going to have an opportunity when the opportunity comes and we knew that some of those senior people were going to be given opportunity. When we came back, myself and Judge Ngoepe had to write a report to BLA (Black Lawyers Association). He actually came to Mafikeng and we sat in my chambers and he said to me...I had a small chamber so he looked around and that, you know how you put your briefs, so there were briefs all around on top of the briefs. So he looked...he stood up and he looked around, said, so you are doing this pile of serious stuff as compared to some of the junior senior counsel in Pretoria. So surely you wouldn't want to leave practice even if you could be considered to become a judge. I said, what are you talking about? So, you know now when we reflect, and say, well, maybe he had heard something at that time. Obviously he was then elevated to the Bench and we submitted our report. And then I carried on with my practice until I was called in 1999.

Int When you were called in 1999, did that come as a surprise to you, a shock? Did you have concerns about your preparedness? I know earlier you mentioned that it happened in a particular fashion, but I'm curious about your own inner self and your own inner sense of readiness?

BN I...it didn't come as a shock because Judge Tsholo had just passed away the previous week and I had heard that they were thinking of a replacement. And issues of gender have always been very burning issues. Judge Khumalo, who was the only black judge before Judge Tsholo was appointed, had always been saying you must change and involve women on the Bench...I mean, on the judiciary, and apparently he had been saying to the Judge President then that they must give me an acting stint. When Judge Tsholo passed away, Judge (Mogoeng) Mogoeng was a judge...I think he had been a judge for one and a half years...Judge inaudible as well, and, you know, the Bench was becoming more male dominated and they were looking for an opportunity to appoint a black woman...or a woman on the Bench, and at that time I was the only one at the Bar. Judge Leeuw had wanted to come back as an associate member of the Bar, so we were looking at that issue at that time because I was the secretary of the Bar. But when Judge Friedman called me, I was quite comfortable because I had been appearing before him, I had quite a good relationship with all the judges at the time. And there was just that kind of respect and trust. So I was ready, but what came to mind at that time was like, will I be able to financially maintain my children, because I was a single parent, I had been divorced for a couple of...I had two young children, so as you probably remember, the salary was not very attractive on the Bench at that time, and my practice was good. So I was thinking is it really...am I ready for this in the sense that I'll be able to execute my duties as a single parent. That was something that really was dominating in my mind at that time. And so it's like you come in the morning just to do your work, you know, the mundane work at the court, move an urgent application, run back home for lunch, come back and do another one, and then you are called and you are told like, I want you to start on Thursday. I mean, it's Monday. And it's like, oh my god, I have an urgent application at two o'clock, let me come back to you. He said, "no, no, no, you are not coming back to me. You see that stack of files, I'd like you to take them when you leave to go and prepare for motion court". And you know, in Mafeking, motion court, you are on duty for the rest of the week. So it meant that I had to assume an urgent role immediately and do motion court on Thursday. So, it's like you are taken aback, you know, but I said, okay, let me go and do this matter, after two, then I'll come back. Then I came back, took the files and went home. So then I went to the Bar and then we start distributing my briefs. That's how I started. Ja...(laughs) Well, maybe because Judge Friedman was a kind of a no kind of a person, you know, quite forceful, he said, no, you can't tell me...oh, no, actually, when he was saying to me that he'd like me to start right away, I said to him, you know, I had been approached by Judge Ngoepe earlier in the year, that was about February, I think, and earlier in the year Judge Ngoepe had asked me to consider coming to act from April here in Pretoria. And I said, then what's going to happen to

my children? I said, I'm a single parent in Pretoria, and he said, no, you'll go home over the weekend and...but he was not sure what was going to happen about accommodation. So I said to him, okay, sort it out and let me know whether I'll be booked in, in a hotel, I don't have a family in Pretoria. He was going to come back to me, and then Friedman approached me. I said to him, "well, I've already been approached". He said, "No, no, no, you can't go to Pretoria, you can't leave your children here and go to Pretoria. You are a single parent". I mean, he's the one who's telling me about my personal circumstances. So I said, "well, I guess you're right. I think I should stay at home" and so that's how the whole thing started. He shut up.

Int (laughs) And pretty soon after that you actually served on the Bench at the Labour Court?

BN Ja.

Int I wonder whether you could talk about that experience. It was for one term, but I wondered whether in terms of labour issues and your sense of managing those?

BN Well, I think it was somewhat not really a challenge as such, I mean, if you've been a judge, you know, you're able to just deal with any sort of litigation. Because the rules are almost the same and just your sense of justice, you know, will actually make it easier for you. The court operates very differently in the sense that the lower court is really overcrowded, and you have a lot of matters. I mean, your motion court, your civil cases, your opposed motion, quite a lot. So it was quite easy for me...Judge Zondo, we were together University of Zululand, so I came to a turf, to environment where the head of the Court is somebody that I know very well. And I just adjusted very quickly. But it's quite a lot of work, outstanding judgments, so one had to make sure that when I went to Mafikeng I didn't carry any work with me. But it was fine. It was quite an exposure and I look forward to going back there again, because I had really wanted to do my Masters in labour law and company law, ja.

Int I'm also curious about your experience at the Supreme Court of Appeal. Because as I understand it, it is very different, and I wondered whether you could talk about that?

BN Roxsana, ja, very different. I think...and I'm saying this with the greatest respect, I think some of the judges in the Supreme Court of Appeal are slow to change. They still find it very difficult...first of all for a black person, let alone a young woman, to be appointed in that Court. Issues of relationships are very...unlike here, I mean, people just find it difficult to unlock themselves and to assist. When I arrived there, President Howie, who is such a wonderful person in terms of...I mean, socially, professionally and otherwise, he just

made my stay there more bearable because he'd come and he would talk. he had just started the mentoring programme, and Judge Carole Lewis was to be my mentor. I'm not sure precisely why they started that programme, but it was helpful in the sense that there was somebody that you could go to. But I think it's a very difficult place in terms of relationships. You still see that kind of black-white kind of challenges, you know, racial issues that we often don't speak about. You feel that condescension from time to time. Some of the judges will just simply not even bother to come to talk to you. If you are sitting in a matter, it's like, you are doing your work and I'm doing my work, I know you, you know me, but that's it. So it is a very difficult environment. Chris (Jafta) was there at that time. I worked with him in the Labour Appeal Court, so he was just...I was occupying the chambers of Ian Farlam, and Chris (Jafta) was just occupying a corner just in front of my chambers, so it was okay. Fritz Brant was okay. Piet Streicher was next to me. So there were some judges who were quite welcoming. Some of the judges were not at all welcoming. I think what made it difficult for me was the fact that I had made myself available for the Concourt, and most of them didn't take kind to that. And they sent some of the colleagues to talk to me whether I was ready, and I said to this particular colleague, the very fact that they think I'm ready is the very reason why I'm more determined to go for that position. You go and tell them that I'm saying that. I had some problems with some of my colleagues. Some of them I had to go to them. I always believe it's always good to go to a person if you feel there is some dreary air between the two of you. I had an advantage of having been in that racism, sexism committee, which was headed by Judge (Pius) Langa. I was approached to be a member of that committee. Apparently the heads of Court when they decided on this, they decided that I be co-opted as a woman in that committee. So it was just Langa, Judge Mogoeng, JP (Judge President) Mogoeng, Judge Dennis Davis, Judge Ray Zondo. I was the woman who participated in that Racism, Sexism Committee. We prepared our report after several meetings, and I had an advantage of knowing how to, you know, relate with colleagues on the Bench. Even some of those who don't have respect for you, you know, you tend to be more tolerant, more patient, but I have been able to use that experience to go to a colleague and close the door and talk to a colleague. So I've done that with two or three judges in the SCA (Supreme Court of Appeal), and we developed a very good friendship after that. So I think I've always felt that it is my duty to make it work for me. Nobody owes me anything, in the sense that, you come to an environment, you find it hostile, and my attitude is focus on the positive people, and ignore the negative people, and move on. With time, you will be able to form a relationship with them. In that sense I found that the SCA (Supreme Court of Appeal), difficult as...or challenging as the situation might be, but I think those challenges can be overcome. It's just a matter of time, or people have to come together and face their challenges and talk to one another, and tell people, I don't like the way you look at me. I don't like the way you talk to me. And it is that kind of communication that tend to relax people. So, ja, it is a challenge. Some of my colleagues still feel this challenge. Some of my colleagues are not sort of confrontational...not confrontational as such, but I think just to express their feelings. I've had also

problems with two black judges that I sit and talk to, that I don't like their behaviour, because you expect more support from, how should I say, your black colleagues. And if some of them don't even show that kind of support, it's really disappointing. But when they do some of the things that really make the work of a black judge more difficult, I really take offence to that. And ja, but it is a very enabling environment in the sense that the exposure there is quite good in the sense that you get exposed to all sorts of legal issues, and I would have been willing to go back despite those challenges that are there.

Int I wanted to ask you a question about constitutional jurisdiction, but I think we'll begin that for the next interview.

Interview 2: 3rd February 2012

Int This is an interview with Justice Bess Nkabinde and it's the 3rd of February, 2012. Bess, thank you so much for agreeing to participate again in the Constitutional Court Oral History Project, we appreciate the generosity of your time.

BN Most welcome, Roxsana.

Int The last time we did an extensive interview and we spoke right through to the point before your nomination. I'd like to start with the nomination to the Constitutional Court in this interview.

BN Okay, my nomination. You recall when Arthur (Chaskalson) left, our former Chief Justice, we had a ceremony in the Court, we were invited from the Labour Appeal Court, I was acting there at that time, and we drove to the Court to attend the ceremony, myself, Judge President (Ray) Zondo, and Acting Judge of Appeal, Dennis Davis. We were on a panel together that day in a case, so we adjourned and came down to the Constitutional Hill. And during the ceremony Arthur (Chaskalson) gave his speech, and among other things, very important points that he made, was that we have walked a long way, and among other things that needs to be looked at, you know, I'm just paraphrasing what he said, is the appointment of more women in the courts, particularly in the Constitutional Court. And he said he hopes that a woman will be considered for this position. And when we drove back to the court, Judge Zondo and Judge (Dennis) Davis said, "That's you, we will nominate you". I didn't take them serious, and then when the opportunity arose I got nomination letters from Judge (Ray) Zondo, and Judge (Dennis) Davis also sent support, telephonic support. And I was not very keen, I must confess. Because I felt I needed more time to familiarise myself with the jurisprudence of the Court and the thinking of the Court, and just to get more experience. And little did I know that immediately when I left the LAC (Labour Appeal Court), for recess, I was then called to at the SCA (Supreme Court of Appeal). And I just felt, I'm not very sure whether I'm keen to come to this court at that time. But things worked their way out and at the end of the day I ended up accepting the nomination and I made myself available. For one reason, I felt, well, I am sure I have the potential, I have what it takes, I have an attitude, you know, for change, to transform our judiciary, and I will learn more when I come over to continue making a contribution like all others at the Court. But I had some apprehensions, of course. I mean, this is a final Court of instance, and I just felt it's going to be really a difficult time. But of course I made myself available, as I say, and I went for the interview. My interview was, I must say, I didn't expect it to be like that, but it was somewhat smooth. And I waited for a long time after that interview. I was back in Bloemfontein, Judge Howie was a bit anxious to know the results because he wanted to consider me for a further acting position in the Supreme Court of Appeal, but the results came very late.

I remember when I drove from Bloemfontein at the end of the year, back to Mafikeng with my luggage, after packing my apartment and my books in the chambers, I got a call from now the late 'Lappies', Mr Labuschagne, saying I have been appointed. I was halfway between Bloemfontein and Mafikeng. Ja...so that's how it worked, and I looked forward to coming here. Fortunately I had been quite familiar with a number of judges at the Court. I had worked with the former Chief Justice, Arthur (Chaskalson), elsewhere before in one of the sub-committees on the South Africa-Canada linkage programmes...project, and just elsewhere. And knowing him to be a kind of a person he is, I just felt, you know, I'm coming to a home. I knew former Chief Justice Pius Langa as well. I had worked with him. Not actually long before the nomination because when I was at the LAC (Labour Appeal Court), I think there 2005, early 2005, I was supposed to join a sub-committee of the heads of Court, that was responsible for...to gather data, investigate the allegations of sexism and racism in the judiciary. So I knew him. And knowing him as well, the person he is, I felt really comfortable when I came to the Court. I had known Judge (Dikgang) Moseneke, the Deputy Chief Justice, I had known Judge (Yvonne) Mokgoro, obviously my sister from Mafikeng, I had known Kate O'Regan, not very closely, as a colleague. And Judge (Thembele) Skweyiya, I knew him before Judge (Tholie) Madala, so I came to a home, and it was quite an enabling environment when I arrived here.

Int I was wondering, in terms of prior knowledge and observation of the Court from '94 onwards, what were your observations prior to your nomination and acceptance of the Court and how it worked, what was your understanding of the Constitutional Court?

BN Well, you know, Roxsana, 1993, 1994, we all knew, especially those of us who came from a training and practice based on our past history, we looked forward to this exciting period, you know, the transition, and here we have this Court with new ideas, new face of the Court, and people who were driven by a desire for social justice. I mean, you could see it at a distance, when you meet the judges, and clearly knowing that these judges started from nothing. I mean, nothing. No toga, no rules, no chamber, absolutely nothing. And the Court, you looked at the Court with admiration, and you looked at the judges with admiration, you say, you know, these people started this from nothing, and there they are transforming our society in this way. When you look at *Makwanyane (S v Makwanyane and Another)* for instance, that's a case that tells a long big story for most of us. I mean, not necessarily lawyers. What does it say about humanity? A long story. I'm just saying *Makwanyane (S v Makwanyane and Another)*, because that's one of those cases where we really picked a lot of principles in terms of our transition into our new democracy, and how we should look into, or dispense justice, you know, to transform our judiciary, and the way we do things. So that was the beginning of saying, business is not going to be business as usual, we are now moving and changing our mind-set into the future. So yes, the Court was an inspiration and really something to look forward to. Not in terms of being here,

because I actually never even thought of being a judge in this Court, but as a lawyer, you know, knowing that we are all moving towards this change, we all have to participate in making the difference. Because as lawyers we really make a contribution into our jurisprudence. So from that perspective it was quite an experience, and an exciting experience, ja.

Int I also wondered, in the time that you've been here, what have been some of the key judgments that you have worked on, and that you feel have had a huge impact?

BN Well, first of all, my first judgment (*Prophet v National Director of Public Prosecutions*) here, is a proper judgment relating to POCA (Prevention of Organised Crime Act) and basically on drug dealing. You remember the production of methamphetamine, which they call 'tik' in the Cape area; the matter had been dealt with in the Supreme Court of Appeal when I was actually there, but I was not part of the panel. I actually dealt with another matter, the POCA (Prevention of Organised Crime Act) matter, but not necessarily on drug manufacturing. And when I landed here then I had to look at the judgment of my colleagues and for me that was also one of those judgments that made a big, big, big impact in terms of saying to society, we cannot use what belongs to us in a way that may violate the rights of others. Because, I mean, society, we are raising children and you know in the Cape, children are inclined to really buying these drugs very cheap, and you kill society in that way. So that judgment, I consider, has made a difference in the sense to society, we do not countenance that kind of a behaviour by you people who own your property, even though you have rights, property rights, you cannot use your property rights or your right, then to violate the other fundamental values of our society. I also wrote in *Masiya (Masiya v Director of Public Prosecutions Pretoria (The State) and Another)* judgment, as you would recall, relating to the definition of the crime of rape. I think the judgment has made an impact in the sense that you recall our definition of rape was very narrow, very lacking, and at that time Parliament had been looking at the Sexual Offences Bill legislation. But it was taking too long. And when this matter was adjudicated in the High Court, Parliament had not yet enacted the legislation dealing, among other things, with this aspect. And this matter came before us, and we had to then consider the development of the common law definition of the crime of rape. And we obviously then made an order to say, among other things we have to develop to include anal penetration. Of course there has been criticism to the judgment because some people feel that the Court has been...we tend to be more inclined to side with the executive in the sense that we did not go full-blown to say this offence will include many other forms of anal penetration, including anal penetration on a boy, for instance. Now, the challenges that we face, as you recall, as a Court, you know, we are developing our jurisprudence, and we're still heading towards that time when you say we are now settled in developing our jurisprudence. We have to change incrementally. You cannot just overnight do things and bearing in mind as well that the principles of separation of power where you have to be

very careful in how you intrude into the legislative executive domain. So there can never be total separation, and especially in that case where Parliament was in the process of finalising legislation. And here we are assisting with a matter on particular sets of fact. The question is, what do you do in that case. My view was, in those circumstances, it was more appropriate to do it incrementally and following the jurisprudence I think in *Carmichele* (*Carmichele v Minister of Safety and Security*) where Judge (Arthur) Chaskalson said, when you develop the common law, you have to try to do it incrementally and not simply to go full-blown, so you find yourself intruding into that domain of the legislature and executive. It has made an impact as well in that it does say, you people who molest our children, boys and girls, you stop it. Although in that particular case it was a young girl, who was anally penetrated. But obviously the dissenting judgment which is also adding to our jurisprudence sent a message, and finally the legislation soon thereafter was passed, and then giving even a broader definition to the common law crime of rape. So it's one of those two judgments. I also did another judgment in *Hassam* (*Hassam v Jacobs NO and Others*), you know the Muslim marriages, which is another burning issue in terms of issues relating to equality, because, you know, inheritance in some of these marriages are creating problems. We have a recognition of the customary law in our Constitution, and the question is, how far do you then go in relation to other cultures, especially when you look at the Muslim practices, you know, they have their religion and the Constitution also clearly protects religious values or cultures as well. So you have those issues where you have to tread carefully and do the proper balancing. And *Hassam* (*Hassam v Jacobs NO and Others*) was one of those cases where we said that this woman was not properly treated because the question was whether she was going to inherit from the estate, because she was one of the wives. And I think it's one of the milestones in terms of our jurisprudence, in protecting the values and the rights of Muslim women. Legislation is still pending I believe, and I'm hoping that, not in the near future, we'll have even a broader protection to those women.

Int Thank you so much for that. I was wondering, what did it feel like having come from the Supreme Court of Appeal where there's a smaller quorum of judges, to come here and have ten other colleagues to work with?

BN Oh, to sit with in particular. I must say sitting in bunk is not an easy thing because you have more voices, and I suppose the process is a bit slower in the sense that you have to defer to colleagues and have patience, tolerance, and a teachable spirit as well. I suppose this is the only way of realising the values of our Constitution. We must lead them as a Court, as people who sit in this Court. Sitting few, let's say three panel, five panel members, it's easy because you can just walk across and then you can come up with a decision. But at the end of the day, the beauty of being here and sitting in bunk as you do, with the wisdom of having diverse voices. And you look at all of us, we come from diverse backgrounds. We all make a contribution, because for me it is this diverse society where we come from, and you see not as good as one

would imagine if for instance when you look at the gender-wise representivity in the Court. We are not as well represented as one would have wished. But there has been at least some development, some changes. 1994 we had two women here, we have not made a good progress, I think one must say this. Sadly. We are now two still. We have just had Judge Maya being appointed to act here. Hopefully, in the near future, we'll have more women being appointed here, from all racial groups so that you have a well-represented Court. As I've said, you need to have voices, societal voices, on the Bench, and you'll give that perspective, whatever decision you make, you will have diverse voices so that you can have a rich jurisprudence at the end of the day. Ja...so, I think to answer you very briefly, I think the Court has made a very, very good impression outside, and also in terms of its jurisprudence, and also within itself. I mean, if you look and listen to our clerks, you look at the diversity among the clerks, I think the Court is leading by example as to how we should live as decision maker in the judiciary and role modelling in terms of leading in this branch of government. So I think we are doing well, as Court sitting in bunk, I think that's the only way.

Int What do you think of conferencing?

BN When I came here it was not very easy. But I suppose it has something to do with being new. You know, when you come to any new place, you have your anxieties and you see things being done differently. I like the conferencing in this Court. In the Supreme Court of Appeal, if you make a comparison, you inaudible of court, and after hearing a particular matter, and you will converge the senior judges, or the presiding judges chamber. And you'll probably sit there for thirty minutes or at most an hour. And just have a quick, quick discussion and you disperse. Here, that's where the brain of this Court is. That's where decisions are made, that's where you agree to disagree. That's where you ignore one another much better because once you come to chambers we talk on that box, but that's where we learn to accommodate one another, where we agree to disagree, still have a respect for one another, and that's where we produce that jurisprudence. And the process of writing a judgment takes long, you can imagine, because you have then to go back and listen to your colleagues when they say, we don't agree with you here. Nothing wrong with that. It's great, because you are not writing for yourself. Invariably when you write, you write for many, to give at least a very enriched decision, and I think it's a good thing. I don't think it should at any stage be curtailed.

Int Interesting. In terms of socio-economic rights, much has been said about socio-economic rights, and there's been criticism particularly from the academic and the NGO (non-government organisation) sector, that the Constitutional Court hasn't really done enough to satisfy socio-economic rights. What's your understanding of adjudicating socio-economic rights' cases?

BN Roxsana, very interesting question you are asking me now. And this is a debate that will go on and on, as long as our society. And when I say society, I'm including the other branches of the government. If all of us do not see the Constitution for what it is, we have to understand this book. We say it is a supreme law, the question is who made it? It is the South African society who made these choices. And you get all sorts of criticism. What does the Court do? The Court has been empowered to adjudicate on these very issues that are values of the Constitution. All that we are doing is to simply make the Constitution liveable. Now, the differences, because we are moving from the past way of doing things, a very conservative judiciary, for instance, with a constitution where the law is...sovereignty of Parliament is supreme, we have now stepped into another era where the Constitution is supreme. Now, our Constitution that entrenches socio-economic rights, some people say, how do you have a Constitution that simply says we protect your housing right, or your access to housing rights, if I may put it in that way? Access to adequate housing, what does it mean? What does it give you? Housing your protection of access to adequate food, health, and etc., etc. And some people say, to realise that value, or those values of the Constitution that protect rights, you must, when I demand a house, you must give me that house. But this is not what the Constitution says. If you look at section twenty-six, for instance, about housing, it has a built-in limitation where it says, the government, or the state, will have to have policies, or devise measures, reasonable measures, for the realisation of these rights. Now, you will then have to scrutinise as a Court, scrutinise the policies, and those measures that the government put in place, to ensure a proper realisation of the right to housing. Now some people think that we should just be dishing houses as and when people ask for that. It is the so-called minimum core content. And the question is, how far do you go? What is this content that you give? On what basis do you give this content because you need more information. And by the way, it is not the Court, which will go to the legislature and say, provide more money so that we can give you these many houses as are demanded. So it's...you understand the criticism...maybe one day, I don't think now...maybe one day we can talk that language, but as we speak now, the Constitution does not provide for the dishing of houses. We have also to take into our consideration things like the resources that are available. We have had cases like *Soobramoney (Soobramoney v Minister of Health (Kwa-Zulu-Natal))*, it's painful, you know, at the end of the day; here is this man who has not been eligible for a kidney transplant. But will government be in a position to just give that protection to everybody? You have to look at eligibility for instance. We have pronounced on matters, socio-economic rights, for instance, if you look at *TAC (Minister of Health and Other v Treatment Action Campaign and Others)*, the provision of Nevirapine, for the protection of the children. Okay. Government obviously was not very happy with that. You look at *Khosa (Khosa and Others v Minister of Social Development and Others)*, for instance, where these foreigners were given the protection to have access to the section twenty-seven rights. My mind is getting blocked. But this is precisely what the Constitution say, because these people, even though they are not citizens, they are in the country and the Constitution protects them as well. And you get all sorts of

criticism. And it is understandable, because, you know, there is that sort of a tension between the state, or rather legislature executive and the Court. As you will probably recall, in recent time, there had been statement that the Court are cautious in issues of policy. It is not necessarily so. It takes us back to the Constitution. We just need to understand what the Constitution says, and when you do that proper balancing. And it is that balancing that the Court deals with. It's nobody else who can do it. Neither the Executive, neither the legislature, but the Court, in terms of the Constitution. So the tensions are understandable, we are a growing, revolving democracy and I'm hoping that in due course, not before long, all of us will be learned to understand what the Constitution requires of us: executive legislature and adjudicators and judicial officers. Because it's not very easy also to adjudicate socio-economic rights. We still live in the past. If you look at some of the pronouncements, there tends to be that slowness in moving into that transition, so that we can achieve our transitional goal, you know, this constitutional...transformative constitutional objective. So I think it is an exciting period because I say what we do here, I should be able to stand at this window, and look throughout this window and see how these decisions that we make, impact on the ordinary person. On a child, on an elderly, on the disabled, on everybody, irrespective of where these people come from. So I think that's the task that...it's a daunting task, someone has to do it, and I think when we get this kind of criticism that comes our way, we should understand that these people are speaking from a very totally different perspective. I suppose sometimes it's lack of understanding, and education is key. I would imagine one day, there will be an opportunity of all of us, including the state, to allow ourselves to be educated about our Constitution.

Int I'm very curious, just to piggyback on that, how you grapple with the issue of power as a judge?

BN Power? Do you think judges have power?

Int Absolutely.

BN Roxsana, power corrupts. I see myself not really having so much power. I see myself as somebody who is a servant to the people of this country. Therefore I don't have power. I only do what is expected of me, by this country, the people of this country, because I serve them. but I'll serve them fearlessly, without favour, and when criticism comes, as it normally does, you take it in good spirit, knowing that you are here to serve. Because whatever we do, you can...only one person wins in the journey that we travel. You can't have two winners in the adjudication process. Obviously and invariably, losers often say a lot of things about the judges, about the courts, but it is understandable because of the tensions that I spoke about. Because we are in a transition. Transitions are not easy. Sometimes we step onto the toes of other people, and that's where the problem are. But for me is that education that I spoke

about. Back to the question, power, as ordinary people, I think if we humble ourselves, where we are, as judges, as role models, as people who shape, not only the jurisprudence, who shape our life, as a country, as a people, we have to dispense justice in humility, with respect to the people who appear before us, with respect to the litigants who come before us, and acknowledge where we make mistakes. And I think that will define us better in terms of character. So I hope I'm answering you.

Int Absolutely. You know, you strike me as a very composed person, if you don't mind me saying so, what's been your tense moment as a Constitutional Court judge?

BN You mean sitting in the Court, or...?

Int Just generally.

BN Tense moment...you probably recall that there has been certain challenges in the Court. You remember...the case that I'm not going to say much about that. Things happen when you least expect them to happen. And some of us have worked very, very hard to be where we are. And you would not want to do anything that will mess that history, that journey. And knowing that all eyes are on us, you try to do things right, and something happens that puts you in the spotlight, and that causes a lot of anxiety. But what has worked for me, I must say, is living for the truth, honesty, respect, and just knowing that I'm just as human as all others. Difficult tense moment happened when I came here obviously. We do face differences because we come from various backgrounds. I talked to you earlier about me coming from a big family, men and women, and being the youngest girl in the family. But highly revered. And when you come to an environment where you sense that some people don't have respect for you, that's very painful, because you come from a background where you don't know that kind of experience...is one of the challenges that most women face on the Bench, especially if you have few voices, women among a group of males. I won't generalise, but you do have those isolated instances where you find one or two colleagues who come from a background where they least expect a woman, perhaps black, perhaps young, to be among them, to do what they do, and that somehow can be very stressful for a woman judicial officer. But I've learnt to handle that kind of a situation. Because of where I came from. I've never worked with mere women, and I mean, to be my legal career, I've always been working with men, and I've always known how to handle those kind of challenges. You just go and speak to the person and tell him, it hurts when you do this. Still typical behaviour can be very hurtful, and they do destroy people's confidence. But I suppose it's because we are in a transition, we come from that society that spoke about where men never ever thought that women could do what they do. The so-called men dominated profession. So, ja, you do get those tense moments, stressful moments, when you experience those kind of things. But

of course, they don't happen all the time and you just have to find a way of handling them, and teaching people. That's my motto. You teach people how to treat you...yes.

Int I'm very curious, you were on the Gender and Racism panel with Pius Langa, if I'm correct?

BN Yes.

Int What checks were put into place, and what checks do you think are in place for you as a female judge, at the Constitutional Court?

BN Well, I hope I understand the question, will you just put it more simpler?

Int In terms of the outcome of the Race and Gender inquiry that you were on the panel, what were some of the safeguards, so to speak, or processes, or procedures, that may have been put into place that would enable someone like you who may have experienced gender discrimination, for example, or racial discrimination, to actually proceed?

BN Oh, thank you very much. One of the safeguards was to say...recommend to the heads of Court, we cannot deny the fact that we are a diverse society, we come from different backgrounds and we carry our own baggages, therefore, we must be more tolerant, we must be more accommodative. You know, having a thin skin sometimes can not be good sometimes, because we become overly sensitive. But I think the solution...one of the solutions was that in the event you are suspicious or we have a perception of somebody being...having an attitude of...a sexist attitude towards you, or being race...having a racist attitude towards you, or using a language that you considered to be racist or sexist, walk over to the person. You know, the easiest thing is to go to the person and talk to an individual. Just the two of you. And some people are not able to do that kind of thing. But I find it, in my experience, that's the best way. Make an appointment, go to the person, sit, look at each other in the eyes, and say, this is what you have done, and it hurts me, did you mean that, or...? And the person will explain himself or herself, and it works wonders. Because sometimes we are too suspicious, and we tend to interpret particular behaviour to mean this when it actually doesn't mean that. So, we also thought that if a particular individual is not in a position to go to someone who has shown that kind of an attitude, go to someone that you trust to go and speak to the particular individual judge. And that works as well because someone whom you can trust can go and be a sort of a mediator and you resolve whatever challenge that you might be facing. And I think it is important to get that right at this level, Roxsana, because the judiciary is setting the pace for our country. We cannot have judges not being able to talk to one another. I cannot imagine for the life of me

that when my next brother, Edwin Cameron, says something, I cannot go and sit and have coffee with him and talk to him about it. You can imagine the impact of not even talking to him. The hate, the resentful attitude towards him. But when you go and talk to the person, if it means screaming at each other, there's always peace after war. So, it is very important to talk to people so that you understand their perspective and you stop assumptions. So I think that was one of the good recommendations that our sub-committee made to the heads of Court, because this was the sub-committee of the heads of Court.

Int I also wondered, in terms of judicial transformation as being more than just demographics, what are the broader issues concerning the country in terms of judicial transformation?

BN You know, I think...let me say this to you, when I was in the US with Arthur (Chaskalson), he attended this conference, the 60th anniversary of the Universal Declaration of Human Rights. And, you know, University of Maryland you do a public speaking, and he was giving his speech there, and they were asking him questions about, but why in South Africa do you still face these challenges? Socio-economic rights, and poverty, so much poverty, and this gap that we have in this country...and he said one thing that I say over again and again and again. And he said, paraphrasing him, education. We still need to educate one another. You know, he said, when my children grew up they were the most privileged children. I often look back and see them going to libraries that were well resourced and I look outside, and see other children who do not have those kind of resources. So education, we have to educate one another about our laws, about our Constitution. So I cannot see how we can really achieve these promises and live our Constitution every day, when some people don't even know whether this Constitution exists. Because you still go in the periphery, in rural areas, some places where I come from, I told you...I don't know whether I told you that I think some of us have a big responsibility to go back and plough back in our societies. So we have to educate our societies, we have to talk to our societies, we have to educate decision makers. I mean, and you know administrative action challenges in this country, decision makers are making decisions that are unconstitutional. And for me it is limited knowledge about the project, this constitutional, our transformative project. Which I believe all of us have a responsibility to be involved in. All of us, meaning all those who lead. All those who make decisions that impact on society, on our people, we have to do so to achieve and realise these values that you always talk about.

Int Thank you for that, Bess. In terms of transitional democracies and the role of the Constitutional Court, what do you think are the challenges that remain for the country?

BN Well, I hope I will be able to answer this question, but I think the challenges that remain is to...is first of all, a proper understanding of the Constitution

itself. Because once you understand what is expected, what the Constitution promises, then we will work towards living it, a realisation of those values. The challenges, as I see them, is where you still have the judiciary, the three arms of government having these sort of tensions, because as long as we have this...okay, tensions maybe are acceptable, but maybe the degree of the extent of the tensions. If they go to the extent of...this reminds me of the paper that Arthur (Chaskalson) was presenting the other day before Sunday, and it was one of those speeches, it's one of those talks, that Arthur (Chaskalson) was speaking about that will take us to the next level. Because it is the education that I'm talking about, is simply saying, no, this is not this, this is this. So that people can understand. Because at the moment they seem to be misunderstandings amongst some of the decision makers, and as long as we have that, that is going to impede this project that we all have embarked upon. So, these tensions are creating difficulties. But I'm grateful to leaders like Judge (Arthur) Chaskalson, our brave leaders, our seasoned lawyers...jurists, who will go out there and speak to clear the air, and help move forward. Because if you remain stagnant, we cannot really achieve our ideals. And just that, you know, to have that cohesive society, to be able to live with one another, to work. Now instead of focusing on the work that is required of us, it's kind of quibbling that is creating unnecessary tensions. Yes...do I answer you?

Int Yes, absolutely. One final question, in your estimation, what are some of the limitations or failings of the Constitutional Court thus far, and what are some of the greatest achievements of the Court?

BN The achievements are so many, I don't even need to start even...I mean, you look at this where we are right now, it's a big achievement and I give...you know, my respect really goes to those who started the Court. All the eleven judges who were appointed in 1994, and starting the Court from basically nothing. And to have created what we have inherited...I mean, some of us came here when everything was just the comfort that you see. And the jurisprudence that you see right now is because of the resilience and the dedication, the hard work, the commitment of the best eleven, I call them. You look at the judgments, for instance, you look at *Makwanyane (S v Makwanyane and Another)*, *TAC (Minister of Health and Other v Treatment Action Campaign and Others)*, *Grootboom (Government of the Republic of South Africa and Others v Grootboom and Others)*, you know, most of those inspiring...inspiring decisions despite the challenges. I mean, you know how some people reacted to *TAC...TAC (Minister of Health and Other v Treatment Action Campaign and Others)* judgment. Ja, we still get criticism; I think we have challenges that are ahead of us. We still live in this society that is still the poverty as we see it every day. Ja...you know, very emotive issues sometimes you talk about...I mean, as I speak to you we still have people who drink water from the dam with cattle. You still have children who go to school under trees or in mud houses, I mean, in this day and age. It is the most painful thing because when I went to school I used to go to school under the

tree. And when it rains, you go home. And an improvement was to have a mud house. A mud school. When it rains, it melts, or it falls apart. So when you see it happening now, it's very painful. And for me, if you really want to build a society, you start there. Because these children are our future. Now, you cannot expect to have a child who goes to school under a tree, with no book, and you expect to have a child who will give something to society one day. In terms of confidence, what are you doing to this child? So, we still have challenges. But the challenges as judges, we see these things. We cannot make it happen. Somebody, institutions like the Human Rights Commission, our civic bodies, and I must say, I must hasten to say, Roxsana, they are doing very well. Legal Resources Centre and others, these amici curiae's who are really bringing these dispute issues for determination, they are doing their best. But we still have a long way to go, because, as I say, education, basic, basic, basic needs, water...people don't have water, and we say we live in democracy. I'll go to my house, I press the tap, I wash my hands with how much water, I flush how many times? And people just drink dirty water. So it's difficult. I'm not even talking about electricity, at least electricity you go and fetch wood and cook. But water is life. And without water what do you do? Ja, education, what do you do without education? I'm very passionate about that, because I know where I come from and I expect others are looking at me and they want to be where I am, and I would wish I could make a difference, and also touch those who experience what I have experienced. I've been most privileged, I must say, most privileged indeed to be one of those who are given this opportunity to serve this country at this level. We may not be doing enough so far, but most of us are committed to trying to do right, and for the people to realise these promises of our supreme law.

Int Bess, thank you so much for such a moving interview. I really appreciate it. I was wondering if there's something that you'd like to add that I've neglected to ask you?

BN Let me think...I don't think so. I think you've covered everything, Roxsana. I must thank you, I must thank you, and your team. I must also thank those who have made this interview...contributed to making this interview a success and who pilot this project, because you...I would imagine we will have at least a memory of our fifteen years. You know, I know my contribution has been very limited, but most of what I tap from the experience of those who came before us. And I'm hopeful that some of the things that we say will perhaps teach many others who come after us, not necessarily in the Court, but also generally in the country, especially those people who assist with the responsibility of leading, of making a difference for all people.

Int Thank you so much, Bess.

BN Many thanks to you.

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