

# ALBIE SACHS INTERVIEW: CONSTITUTIONAL COURT ORAL HISTORY PROJECT

## INDEX

1. THE FIRST MEETING OF THE JUDGES: NOVEMBER 1994	1
2. A MOMENT ON THE ROAD TO BECOMING A JUDGE	3
3. A SECOND MOMENT ON THE PATH TO BECOMING A JUDGE	4
4. A PAINFUL INTERVIEW	5
5. SETTING UP	10
6. THE CHIEF JUSTICE DELEGATES TASKS	12
7. THE LEADERSHIP OF ARTHUR CHASKALSON	14
8. WORKSHOPPING DECISIONS	15
9. HEARING ORAL ARGUMENT	16
10. LAW CLERKS AND FOREIGN LEGAL DECISIONS	17
11. SOME EARLY CASES: <i>Capital punishment, Certification of the Constitution, Gay rights, Housing rights, the Rastafari matter, sex work and others</i>	24
12. DIVERSITY OF THE JUDGES	30
13. ON LEAVING THE COURT	60
14. THE ISSUE OF RACISM	67
15. THE MEDIA	73
16. HUMANISING THE COURT	74
17. THE BUILDING	81

**Albie Sachs      Constitutional Court Oral History Project**

**Interview One: 15<sup>th</sup> November 2011**

**Interview Two: 16<sup>th</sup> November 2011**

**Interview Three: 10<sup>th</sup> January 2012**

**Interview One: 15<sup>th</sup> November 2011**

THE FIRST MEETING OF THE JUDGES: NOVEMBER [?] 1994

AS      That first meeting, eleven very excited people...the word motley comes to mind...what a motley group we seemed to be. We didn't look like eleven judges to me. And in my own case, the first time I heard a voice saying, Judge, I didn't respond, but looked behind me. I wasn't used to being called a judge. But we really came in different sizes and shapes. There were the deep booming voices of the guys who'd made it through the Bar, sharp elbows, hearty laughter. John Didcott, very forceful, very brilliant. Johann Kriegler, quiet until suddenly his voice came through, boom! Laurie Ackermann, waiting for his moment and then creating a space in front of him and coming through in a very authoritative way, a distinctive cadence in the bubble of silence he had created in a crowded room. Yvonne and Kate, quiet, listening, smiling, but not thrusting themselves into this kind of hearty conversation. Pius, very assured but also very, very thoughtful, very quiet. Tholie Madala, who's the only one whom I'm now meeting for the first time, the word stately comes to mind. He just had a stately presence and style. Quite a rich voice. At that stage Sydney Kentridge was an acting judge, and Sydney would time his melodious interventions impeccably - somehow, when he started talking, others stopped talking. There was just something about the moments he chose, the mellow voice and the sense of enormous experience and sly humour always there.

I have no idea how I sounded to the others. I know that at one stage Ismail Mahomed, perhaps the most striking figure and complex personality of the whole group; spark, who could lapse into deep silences, and suddenly burst out with brilliant observations, berated me unceremoniously: Albie, he said frostily, that's not the kind of suit a judge ought to be wearing! And this was, I think, in November, it was hot, and I had on a suit I'd bought, fairly stylish, in London, made of a summery poplin material. And I thought, what kind of suit ought a judge to be wearing? And in a way this was part of the theme that was going to preoccupy us. A new judge, newly appointed for a completely new court, in the new South Africa, with a totally new Constitution. What does it mean to be a judge? How do you conduct yourself? How do you appear? How do you work? If I remember correctly, it was at that very first meeting that we went through a long agenda of decisions that had to be taken, all revolving around what a judge should be like in the new democratic South Africa.

Maybe we didn't reach finality in relation to each one of them at that moment. They were all specific: how should we be addressed, that was one issue. It

seemed very simple, very banal. And yet there's so much history laden onto that simple thing of, are you called, "My Lord"? And now, because we have women, it's "My Lady". And "Honourable". All these were, to my mind, leaden, antique imported forms of purportedly honouring the judge, but I found actually dishonouring the person, as if to say, you can't make it on your own without the title, somehow you're not deserving of respect simply as yourself. And very quickly we decided we didn't want to be called "My Lord", or be referred to as Honourable, it would interfere with our work, the new democracy, to have these honorific impediments to natural, open, and direct dialogue and conversation.

Another question: How should one dress? Should we wear a gown or not? That was more difficult. And many of us were, I suppose, super democrats, and thinking, well, you know, the gown is a symbol of authority, it cuts you off from ordinary people. But I think intuitively we felt a gown would be appropriate. I suppose the usual arguments came up: that the gown shows that you're not just a subjective person, you're an incumbent of an office; it displays equality between all the people sitting up on the Bench, because you're all wearing the same gown. And in the end, without much difficulty, as I recall, we decided we would wear gowns, that somehow it fitted in to a South African, African sense of acknowledging the role, the special role, kind of a status role if you like, of the incumbents, you would wear a gown. It's not like...or perhaps in some ways it is, akin to the skin that the elders and the leaders of the community would wear. So we should have a gown. But then we decided we wouldn't simply take over the gowns that were being used by the other South African judges, black for criminal matters and scarlet for civil matters. We were a new court. And we weren't simply a branch of the existing judiciary. We were a court that was established specifically to ensure that the values, the principles of the new democratic era, would seep in to and infuse the total functioning of, not only the judiciary, but all exercises of public power. So it seemed appropriate to us to have a gown of a different appearance to signify the special role, function and status of the Constitutional Court. And we chose green, a kind of dark green, with black and red on the cuffs and a white bib. I might say, anticipating a little bit, it wasn't super elegant! But at that stage the question of style and being spruce, wasn't uppermost. And I think the green gowns became a distinctive feature, and sometimes our critics would speak about those people in the green gowns up on the hill in Braamfontein, in a slightly dismissive way.

We had a whole series of other little foundational questions like that, and to the extent that they appeared to be banal, sometimes it's these banal details that are more telling than the grand gestures, because they are everyday and ordinary and become distinctive. Well, that's just like a little aperitif in a way of how we started.

I'd like to deal with two themes before moving on. The one is the different roads we took getting to the Court. And the second is, how we started conversing amongst ourselves.

## A MOMENT ON THE ROAD TO BECOMING A JUDGE

So first of all our different roads of getting to the Court. I won't repeat the long interview that I gave you as part of the oral history of the Legal Resources Centre. I don't even remember what I said in it, but I'd like to focus on my personal journey to becoming a judge. The first moment that comes back to me was, I'm in exile, I'm completing my PhD at Sussex University, I'd tried to get out of law, been there, done that, at the Cape bar for almost ten years, it was exhilarating, testing, battling, exciting, horrible, marvellous work, and now I'd wanted to do something different. So I thought I'd do a PhD, that will give me time to find a completely new career. And the theme that pounded in my head was the contradictory schizophrenic nature of the courts where I'd worked. We'd used the words of justice, fairness and equity, there would often be very polite discourse with reason running right through everything we did. On the other hand, the law had been responsible for a hundred people being executed every year, thousands being flogged, beaten, in the name of the law; a million people prosecuted under the Pass Laws each year; hundreds of thousands going to jail; huge numbers evicted from their homes, all under the law, as being enforced by the courts. How could that same institution manage both? And so my PhD was entitled: Administration of Justice in a Racially Stratified Society, South Africa 1652-1970. 1970 was my last year at Sussex University. And the dissertation is complete and I have to write the closing words, what should they be? My thoughts veered from the one hand to the other. (I still had two arms then!) This was not long after the student rebellions in Paris, and the powerful demonstrations in the United States against the Vietnam War, a time of critical, alternative studies in all sorts of different academic areas. And part of me was saying: damn the courts, they are part and parcel of the instruments of oppression, and worse, they give a veneer of fairness to what is gross discrimination and violation of fundamental rights, and need to be denounced and exposed. And the last words of my thesis should be: away with the judges! The other side of me is saying, no, there's another side that I'd experienced in the courts, that was respectful at least of the idea of liberty, and the idea of equality, and the ideas of fairness and of reason in public life. And some of the judges were in fact using what tiny space was available to them to avoid imposing death sentences, to strike down certain laws, to impede the forward movement of apartheid regulations and administrative actions. And maybe it was more important to encourage them...I wasn't even thinking about a future democratic South Africa, but about encouraging them...and they were really a small minority, but an important minority of decent judges. And should I end on a softer note, emphasising the capacity of judges, even within the apartheid framework, to do something to maintain a certain level of integrity and decency in public life! And I decided eventually to choose the second, more generous approach.

Maybe it turned out to be prophetic, because we came to have four judges from the apartheid era on our Constitutional Court. And they were terrific, they were strong, knew a lot of technical stuff, about procedure, awarding costs, aspects of evidence, structures of judgment-writing, a whole range of things that were very valuable for our new Constitutional Court. But more than that, was the notion of

retrieving from the past what was positive and useful. And so we would have a clean-slate Constitution, with totally different values. But the people applying the Constitution didn't land from Mars, we weren't parachuted in, we had grown up through that old society and we had functioned in resistance to apartheid in different ways, each as individuals and often belonging to different groups. And to sustain what was positive would give a greater texture and rootedness to the society...to the new Constitutional Court itself.

## A SECOND MOMENT ON THE PATH TO BECOMING A JUDGE

In the late 1980s Oliver Tambo convenes the members of the constitutional committee of the ANC in Lusaka. I think I spoke about this in my interview with you, so I'll just do a short summary. The Ford Foundation have asked the very distinguished American law professor, Ronald Dworkin, to convene a meeting between ANC lawyers and judges on the then South Africa apartheid judiciary. What did we think? And of the ten or so of us in that room, OR and I were the only two who said, let's give it a try, only good can come out of it. But OR, in his very quiet way, not forcing the issue, gets the committee to go along with the idea. I'm in London, I work with Ronald Dworkin in doing much of the planning. And then, to his utter dismay, at the very last minute, some of the South Africa judges said, they will go to the meeting but not if Albie Sachs is there. He said: of course we must call it off. And I said, of course we mustn't call it off. So the meeting went ahead without the one member of the Committee who had supported it! But I was able to meet some of the braver judges, as well as some top South African lawyers, at a social function afterwards. Tambo was there, in his element. The last public function before his stroke.

So these turned out to be little stepping stones, to something that I'd never personally imagined, myself being a judge. Though I had appreciated the fact that we had some decent judges, so it wasn't a dishonourable occupation in itself, but it had never crossed my mind that I could ever aim to be one.

And so the next moment on my pathway to becoming a judge arrives. We were about to have our first democratic elections in South Africa. Mission accomplished. A constitutional democracy. And suddenly we are aware there are four members of the National Executive Committee of the ANC from the constitutional committee, but there will be only one Minister of Justice. We're beginning to look at each other: is it going to be Dullah? Is it going to be Zola? Is it going to be Kader? Is it going to be Albie? And I thought, I didn't join the freedom struggle to worry about what job I'm going to get when freedom comes along. I didn't enjoy electioneering. I took part in some 'vote for us' meetings. I was on platforms with Allan Boesak, he was fantastic, he adored the crowds, the audiences adored him. I spoke quietly, I don't know if I looked convincing at all. I enjoyed little house meetings where I could discuss things frankly and openly with interested groups. And I decided, just before the elections, that with the achievement of democracy, I'm going to leave the ANC and make myself

available for consideration as a member of the Constitutional Court. And I remember being at a meeting in a hotel in Braamfontein, I can't remember the name...the Devonshire, I think, and it's jam-packed with delegates from all over the country, to choose the lists for the first elections. We had come up on a very early plane, and the hotel was hot, and crowded, (everybody wanted to be at that conference), and the air-conditioning was very limited, and we're all dozing a little, and I'm scared that if I fall asleep, when it came to my name, I'll be sleeping and I'd wake up effectively a member of Parliament. So I'm pinching myself: stay awake, stay awake, Albie, and then somebody announces: 'Sachs, Albert', and I say: Please take my name off the list. That was a couple of weeks before the first elections on April the 27<sup>th</sup>. I had burnt my boats. I'd decided I'd either go to the Court, or get involved in making a movie. As it turned out, resigning from the National Executive, was more difficult. There were other issues on the agenda, such as the threat of civil war in KwaZulu-Natal, what to do about a possible coup by the right-wing in the military? So the item of Albie Sachs saying, please can I resign never got reached, before we rushed for our planes. So I unilaterally announced my resignation, and gave members pictures of me doing my one enjoyable electioneering thing, repeating a ten kilometre run I had done thirty years before, after my release from prison to the sea, with Basil Coetzee playing his saxophone as I jumped into the waves wearing an ANC cap. So now I'm out of politics.

#### A PAINFUL INTERVIEW

I'm waiting for the nominations to the Constitutional Court. I remember saying to John Dugard at some stage, John, if you and I both don't get on to that court, there's something wrong. John Dugard had fought for decades inside South Africa for a Constitution and fundamental rights. And he pioneered many different interventions, putting the idea of a Bill of Rights on the map, I'd been Mr Constitution, if you like, on the outside, asked by the constitutional committee to promote the idea of a Bill of Rights, and encouraging the membership to embrace the notion of a progressive, emancipatory Constitution that could be empowering for the people and promote...we didn't use the word transformation then - but promote better lives for everybody.

I remember going up to the Ford Foundation office, to brush my hair and calm myself down, it was just around the corner from the theatre...I think it's now called the Nelson Mandela Theatre – with a little theatre at the side where the hearings were held. I was feeling confident that the work I'd been doing towards the Constitution was well-known; I'd published two books on protecting and advancing human rights in the new South Africa, my doctoral thesis had been published, I'd been external examiner at different African universities, practised at the Bar in Cape Town, taught at Southampton and Columbia, and spoken at many conferences.. And I thought, well, I'm going to really enjoy the proceedings. Wow, was I wrong. Wrong, wrong, wrong! It was very abrasive, it was wounding, it was harsh. Looking back now it's clear that people had done certain calculations and worked out, given the balance on the court, it's either John Dugard or Albie Sachs. And to ensure that John Dugard got on, I had to be

kept off. And the charge was led by Advocate Wim Trengove, together with Professor Etienne Mureinik. Etienne had been very active in negotiations with the Democratic Party, and we'd got on exceptionally well. I had a huge regard for him. I think he had, the description that pops up is a beautiful mind. He would find thoughts and express them with a clarity and an ease that nobody else in academia could equal at that stage. Looking back, I suspect he became very upset with me during the negotiations period, when the ANC delegates and the National Party government delegates had agreed that the members of the court would be chosen by the cabinet in a government of national unity. And he came up to me very, very agitated, and said, Albie, that's totally impossible, it's terrible; what are you going to do about it? And I mumbled something about not being on the group working in that area, and not knowing how the decisions had been reached. And he expected me to take a very strong stand. And I think he was deeply disappointed that I appeared not to. In fact, I was able to help when Colin Eglin, the Democratic Party leader, came to me and said that they could go along with a whole range of things agreed by the ANC and the government, but not having the Court chosen by **the Executive**. Could I arrange a meeting between him and ANC chief negotiator, Cyril Ramaphosa? Which I was happily able to do. And out of that meeting a completely new approach of having a Judicial Service Commission emerged. But I don't think Etienne knew about that.

It is not necessary for me to go through the hearing, because the hearings were all recorded, and I think mine was possibly the only one that was transcribed and published afterwards in the Wits Law School journal. So Wits wasn't heading the cheerleading of Albie Sachs. The transcript might be something you can annexe to this interview as a separate document. Two things were specially disappointing to me. One was, I had thought that my experience in Africa would have been seen as a plus, working as professor and researcher in independent Mozambique, external examiner in Dar es Salaam, and Harare. It didn't seem to count for anything. It didn't fit in with that notion of, you know, the only legal mind that counts is one attuned to the latest jurisprudential debates in Oxford, Columbia, Berlin, and Leiden, universities which, of course, I happened to respect very much. And then the other part that was particularly distressing to me personally was, an implication that somehow I'd condoned abuse and ill-treatment of ANC captives. In fact I'd been involved in exactly the opposite way in helping to stamp out torture.

My very first meeting at the University of Cape Town, shortly after I had returned from 24 years of exile, sitting quietly on the platform while everybody is singing about the exiles returning, and they're expecting a fiery speech, and I'm feeling very quiet. My first words were: "There are stories in the press that ANC guards used torture against prisoners. Those stories are true." And then I explained how we heard about them, how we dealt with them. So this was, to me, in a way an attack on my honour. The attack on my mind had been in the first detention, from the regime. The attack on my body had been the bomb, also from the regime. The attack on my honour came from my friends, from my side, from people I admired and respected. And it was a very lonely time for me, very lonely. I couldn't get support from my political friends, I'd severed ties with them. I couldn't hobnob with the legal community people because it would look as

though I'm trying to schmooze them. I only heard years afterwards that in fact Chief Justice Michael Corbett had supported my candidature, and that there had been a clear bloc that had strongly supported me. The relevance of this is not simply to raise old stories of hurt - I think everybody remembers their hurt more than they remember their joy. But it's because of its effect when you're functioning, that if you're hurting, you're not as relaxed and easy as you might otherwise be. You feel you've got to prove something all the time. And a little bit of that followed through into my work as a judge, which I'll deal with a bit later.

But for all that, I felt that the process of interviews before the Judicial Service Commission was tremendous. And far rather go through that bracing and abrasive process – if that's what people think, so be it – than the old system of selection behind closed doors, followed by all sorts of rumours. And I might mention, that there were two editorials saying: Albie is an honourable guy, he will stand down knowing that if he gets on the Court he will tarnish the reputation of the Court. These came from English language newspapers that would call themselves liberal. The Sowetan, on the other hand, sold almost exclusively to black people, said that I was an appropriate candidate who would strengthen the legitimacy of the Court.

Two important decisions concerning the membership of the Court were taken in the period after President Mandela was sworn in. First, he had to choose directly the President of the Court, now the Chief Justice. Then he had to appoint four people who were then serving judges. That made five. Finally, he had to select another six from a list of ten names given to him by the Judicial Service Commission. So he directly appointed Arthur Chaskalson as President. There's a very strong story that I've heard that in fact he was intending to appoint Ismail Mahomed, but was persuaded to change his mind. I'm a bit sceptical of that story, without knowing all the ins and outs. Arthur was so manifestly indicated in terms of his all-round qualities to fulfil the role of pioneering top judge. Ismail was absolutely brilliant, but in a way his very brilliance would almost interfere with the managing skills, with the need for an organisational brain that the new top judge had to display. His role was to establish a whole new court and institution. It was not simply to create a new jurisprudence, new ways of legal thinking where Ismail was without parallel, but to start a new and unique institution from scratch.

But the other important decision taken early on that I don't think has been commented on at all, was that Tholie Madala should be one of the four sitting judges to be on the Court. And here I see the hand of Dullah Omar. Dullah insisting that we've got a white male President, and we're certainly not going to appoint four white men to represent the existing judiciary. All right, we'll appoint Ismail Mahomed. But it doesn't just mean Ismail plus three. Tholie Madala must be included as well. There was a long delay. People were expecting the announcement much earlier, and I was concerned by the delay because my job had come to an end - the South Africa Constitution Studies Centre, with international finance, first based at the Institute for Commonwealth Studies in London, now at the University of the Western Cape. I didn't apply for an extension of the grant in the hoping I would get onto the court. Mandela

becomes President early May, and it's June, and it's July, and it's August, the months are passing. We're waiting, I'm not exactly sure when the four existing judges were appointed, but it wasn't very swift. Dullah would have known Tholie from his days when Dullah had belonged to what had earlier been called the Non-European Unity Movement. And Tholie had belonged to a group in the Transkei aligned to the Unity Movement. And Tholie had good credentials, a person of great dignity, very, very thoughtful and progressive in his broad outlook, who'd been involved in the struggle for democracy. My guess is the delay in getting the Government of National Unity to agree to his appointment delayed that portion of the proceedings for some time. It also had a knock-on effect, because Judge John Didcott was not appointed at that stage. The other two judges were, if I remember correctly, Laurie Ackermann and Johann Kriegler. And I remember seeing John Didcott before the announcement was made at some function or another, and noted that he was down. He was so down. John was normally a lively, spritely person and must have got news that he wasn't going to be on the Court as one of four existing judges. And clearly he longed to be on it.

So now, the President of the Court and four existing judges having been appointed, the Judicial Service Commission has to appoint six more people. Sorry, it has to send up ten more names, six to be chosen by the President from ten names. And people are doing their calculations. There have to be at least two women. Then John Didcott has to get on because of his marvellous work, absolutely deserving on the Natal High Court Bench over many years. So that's three out of six already. Looking at the number of white men tending to dominate, what will the choice of women be. Would it be June Sinclair? Would it be Yvonne Mokgoro? Would it be Kate O'Regan? There's strong punting for June from the Wits University contingent, to the extent that rather unpleasant things are being said about Kate and Yvonne. It didn't do credit to the supporters of June Sinclair, that they were pooh-poohing Kate's competence and ability. They were a little bit softer with Yvonne, because she comes from a rural African background. Pius Langa was an obvious candidate. Richard Goldstone another. (I am not sure, thinking back, if it was he or Ismail who was one of the four sitting judges to be appointed.) The last slot appeared to be up for competition between John Dugard and Albie Sachs, and the feeling was that if John was nominated, which he was in the end, and Albie was on the list, that the President would choose me, because of his long association with me.

Now the Judicial Service Commission was composed then slightly differently from the way it's composed today. What I recall is, it was presided over by Michael Corbett, who was the Chief Justice. And Arthur came onto it, as an important and respected member, after he'd been nominated as President of the Court. There were also four representatives appointed directly by the legal profession. And, I think three persons, maybe four, nominated by the President of South Africa, for their legal experience and expertise as the President's nominees. Add to this The Minister of Justice, which would be Dullah, and then about nine members of Parliament on a proportional representation basis. Wim Trengove was one of the legal representatives. Wim it was who tore into me. A brilliant, progressive-minded advocate, his line of questioning was to suggest I

wouldn't be independent on the Bench. Also an attorney from Durban who was quite harsh with me, although I believe afterwards he supported me but with a bit of big finger-wagging in my direction. I forget who the others were. Etienne Mureinik, representing the law professors, was also hostile. And I know that Kgomotso Moroka was there. She actually came up to me after the whole proceedings, and she just sort of touched me on the shoulder; it was very gentle, it was very nice, I needed it, it had been a rough interview. She didn't say anything. So it was quite a broadly-based body of diverse voices. I was told afterwards that as a result of the cross-examination to which I had been subjected, the Commission took a decision not to allow ambush questioning of any future candidates. Years later, I should add, I met Wim Trengove, ten years later, at Woolworths, shopping, and I thought: Wim, there's something I want to say to you. But we passed each other and I just nodded. I didn't have the courage. And then eventually he filled his trolley, I filled my trolley, it was Saturday morning, and I ended up right next to him at the cashiers. And I said: Wim, you know, I've been meaning to say to you for a long time, that I found the cross-examination at the Judicial Service Commission session very hard, but it happened, it's over, and I just want you to know that. I forget the exact words I used. And he said, thank you to me, as though somehow I had been gracious to him. Wim had often appeared before us. And I'd been wanting all that time to say, okay, Wim, it was sore, but that really belongs to the past. So I was pleased now that it took me ten years to find the moment and the courage to actually say that to him. I had been part of a shortlist, a long shortlist of twenty-two, from about a hundred names that were sent in...a hundred and twenty. And we were interviewed over a week, at the Tesson Theatre in Johannesburg, given about half an hour each. And I was a bit thrown by the very first question from the Chief Justice: well, tell me, Professor Sachs, why do you think you ought to be on the court? And I said, well, you're asking me to blow my own trumpet. And I felt uncomfortable with that. And then sometimes when you're not prepared, you go on too long.

I also recall that the week before, two weeks before, Kate O'Regan and I met with the then Dean of the Law Faculty, Hugh...

Int Corder?

AS Hugh Corder...at his house in Cape Town. Kate claims she has no memory at all of this, but I remember her saying: why should I allow my name to go forward? I don't want to be fighting with all those men all the time, all so over-confident. And I said: Kate, that's the very reason why you should be on the Bench, to change that whole culture. Kate doesn't deny that the conversation happened, says she has no memory of it at all. And so Hugh gave us a bit of a briefing, about why we ought to believe in ourselves, we ought to be on the court. And then the hearings were held, and after another long delay, and it was October the 12<sup>th</sup>, I was actually at the Thursday night symphony concert at the City Hall in Cape Town, when Gerald Friedman, who was the Judge President of the Bench in the Cape, leaned over from his row, and said, congratulations, Albie! And that was the first that I knew.

It had been a very awkward time for me, six months of waiting, very, very lonely. And it took me some time to get over it. I recovered very quickly, with the actual meeting with colleagues and the work and the excitement and the joy of being on the Court. But at a deeper level your confidence gets hit a little bit, in terms of how you function. This happens particularly when you're functioning in public, and unconsciously when there are things that you say and do, you're looking over your shoulder, and you're not working as well as you ought to do.

Okay, so that's the one theme of getting there. Now I assume each one of the interviewees will have his or her own story, and for most of them it was sweetheart treatment all the way, easy interviews of natural candidates, who turned out to be terrific members of the Court.

Two last comments on this episode which affected me much. The first is that John Dugard made a great mark as a lawyer in the international domain, but he would have been even more brilliant on the Court. The other is that after leaving the Court fifteen years later, I happened to meet a newly-appointed member of the US Supreme Court who had also survived a rough interview. I advised her to take her time, not feel she had to make her mark immediately.

## SETTING UP

I'm sure some of our very first meetings were about setting up. Who would have which **offices**? We're in temporary accommodation, BraamPark, quite elegant, fairly modern, quite nice outlooks. Well, the experienced judges knew what to do. The minute the announcement is made and the meeting is over, you run and you grab the office that you really want. The rest of us were a bit bemused. I didn't think it was very seemly actually, but I managed to get a decent office corner office that had lots of light, and views two different ways. But that was purely random. Arthur had his office, near the security gate, for him as Chief Justice to meet a lot of people. And it turned out that Laurie Ackermann was his neighbour down the passage, and I further away in the corner. The offices had nothing. We had to get furniture. We were given an allowance, and some basic furniture the same for everybody. We all got the same desk, rather ornate, not ugly, quite stylish, even if an old-fashioned type desk and chair. We could choose our curtaining. I think there was wall-to-wall carpeting. I pushed very hard for pot plants in my office, and I had some pictures, and the pictures were put up, including many Dumile Feni drawings that I'd brought back from London. I'd say, within three days each set of chambers had a different personality, even though we had started with the same basic equipment of desk and chair, not a huge range of difference in curtaining. Some amazingly neat, organised. Thus, the office we're in right now for the interview is well organised, I think it's Arthur's office, post-retirement with a bit of interesting art. Others were more florid and messy and effervescent, such as one which happened to be mine, from the beginning, and for fifteen years.

We had to get a **secretary**, an extremely important person for the judge. It's not just for managing phone calls and timetable, lunch, and a lot of typing. The secretary becomes your representative, your liaison with other judges, with the world outside. And I'm not sure of the process we followed, I think some names were suggested to us, or somebody might have recommended people. But I interviewed Fatima Maal, very timid, yet quite sharp, quite pert. I'm not sure what the qualities were that I responded to, but I had a strong feeling there and then, that if it hadn't been for apartheid, she could have done so much more than she'd accomplished in her life. Her typing wasn't very good, her spelling wasn't very good, her English wasn't all that good, she was kind of English/Afrikaans speaking. But there was a sharpness, a brightness there that I saw, fighting with her lack of confidence. And she turned out to be a terrific secretary, an office organiser, friend, and companion at work. Not well organised; I'm paying the price now, I can't find things. But terrific on the telephone, warm with people, and sussed about the world. When I interviewed law clerks I would make sure that they spent a little time with her before or after seeing me, just to get her opinion, as a human being, of the applicant. And almost invariably she and I responded in the same way. She had a very good sense of the humanity of people. She was always getting into scrapes, in her family, single parent, looking after her son. That would be okay, but it would be a niece, who, I think, vanished. And she would spend hours and hours searching for that person. Somebody else in trouble, she'd spend hours and hours. And sometimes it impacted on our work, she just wouldn't be available. She would use my government-supplied car to fetch things, but then she would use it for other things, once when she was driving it had a bad prang. She was good at organising the production of food for court functions, but then she messed it up being late and charging too much, and...so there was something both organised and disorganised about her. She had great sensibility and was very, very helpful. And she improved very rapidly. She mastered the computer quickly, became a good typist. She had lots of common sense and was decent and responsive, and gave a glow and a sense of warmth to my chambers. And became very popular, I think, amongst the other secretaries, and would often pass on, not gossip, but you know, problems and complaints and difficulties, hoping that sometimes I could intervene to improve things. She got seriously involved with my artwork activities for the Court, a sideline that occupied a lot of my time. And in the end Fatima trained as an arts administrator and left when she got a better job...I encouraged her, because she had kind of reached the ceiling of what she could accomplish as a secretary to a judge. She'd never be well-organised in a formal sense, always be spontaneous with a great memory, great on the telephone and with people.

The secretaries were important personalities, and because they were all chosen new, made up a very diverse group. All women; I think only one man has been employed as a secretary. They came from very different cultural backgrounds, and created a lot of the ambiance that became the Constitutional Court as a home, as a place, as a habitation, depending very much on them. And some would get flowers for their Chambers, just little touches like that. In my case, I was very keen on my coffee, strong, black, just a touch of sweetener in bright little coffee cups. And I would have beautiful contemporary-style, colourful vases for the flowers. They didn't last very long, not because they were knocked over,

they were stolen. And that's another little wrinkle story of the new Court. Things were disappearing. And it turned out that one of the chief security officers was responsible. I don't know how he was caught; in the end he was sacked, though I don't think he went to jail. And he was a very breezy guy, a bit of an athlete who I think has been in the security force in the apartheid times, a white guy, who actually arranged the security for my house in Bellevue, the alarm system and everything. It was really wicked that he took advantage of his access to the building to steal goods from our offices.

We got to know the **security personnel**. They were important to the set-up. There were lots of difficulties, problems amongst themselves. Old-guard, white South African security officials worked with African personnel - I'm not sure if there were any ex Umkhonto we Sizwe combatants but with people sent by security firms, all of different cultural backgrounds. The hierarchy, the arrangements, were not easy. All the time we judges feeling, well, we'll leave it to the chief executive officer, Mr. du Plessis, he's got to attend to that, we want to get on with our jurisprudence. But he himself, his manner was...he was a very good administrator, he was very dedicated to the work, he did a good job, but his manner was very 'white South Africa boss' in style, in his dealings. Even when he dealt with the judges, it would be almost over-unctuous in the way that quite a few people of the old guard were, respecting authority, respecting the judge, die regter, they would be over-polite, almost unnaturally polite. And then even if they were polite and correct with the African personnel working under them or with them, somehow their stiff body language of the past would come through. Looking back, we were in BraamPark, in a relatively secure place and building, but I don't think we had really good security if anybody was really out to get us.

The **administration**, I've mentioned Mr du Plessis, had been seconded from Justice, and I enjoyed working with him, because he took notes, he followed through, he got things done, he was a mover and shaker at a time when that's exactly what we needed. Martie Stander was completely different in style, very gentle, naturally gracious and warm, very keen, not nearly as productive, not nearly as pushy, if you like, or as demanding. But she lent a touch of grace that was important to the personality and the face of the organisation. I think she got on well with the secretaries and with the admin people. Computers...right, let me go back to the distribution of tasks now at one of the very first meetings that were being held.

Int Sure...

## THE CHIEF JUSTICE DELEGATES TASKS

AS Arthur now delegates tasks. As I remember it, Ismail Mahomed is asked to draft the **rules of court**. Absolutely vital. And we're not a branch of the existing Supreme Court or the High Judiciary. We're a new court at the apex of the Judiciary, with special functions. We want our own rules. And Ismail's a brilliant lawyer and technically very powerful. It's a boring, tedious job- except for

somebody like Ismail, who really loved the law to death, was devoted to the law, to legal words. Nothing could be too technical for him. And in saying that, I mean nothing...There was no scope for his immense bravura and passion and a sense of humanity. But the technical side for him was a source of rationality and beauty in itself. So that was his big task, and he would come up with texts, and we'd debate and discuss the procedure, how to bring cases, how cases should be heard, whether people should pay, the number of copies of documents that we needed, the nuts and bolts that would enable us to function fairly and efficiently. And the question of appealing from other courts, how to get to our court, and how we should function in deciding what matters to hear.

Laurie Ackermann was asked to help create the **library**. Laurie loved books, and we didn't have a single book. As Napoleon said, an army marches on its stomach, so a court, particularly a court of appeal, marches on its books. And we had to build up a library, starting with nothing. The government provided us with statutes and with basic law reports, and, from time to time, certain textbooks and a fairly modest book-purchasing grant. And then we got a very big grant from the Norwegian Embassy. We might have different memories about its origins. My recall is that I had done a lot of work with Norad and Norwegians in my exile days. And I met with people from the Embassy and they had a free-floating grant that would need to be connected somehow with human rights. And I suggested donating it to the library. It was ten million Norwegian kroner. It was a big sum, a lot of rands. Because the Court had a very small budget for purchasing books, competing with all the other courts and all the other needs, this was a very valuable addition. We also got donations from the American government of American Law Reports, and later a set from India, and one from Pakistan. I remember the meeting that we had with the Pakistani representatives. We would always have a little ceremony, and Ismail Mahomed spoke. It was such a beautiful speech about Pakistan, the country with the icy waters flowing down to the ocean. He really went to town, it was poetic. It wasn't just thank you, we can do with these books, it was a meeting of souls. So we got a fair number of donations like that. We got one important donation of old South African law books, which to this day is a separate portion of our library...gosh, I'm forgetting the name, oh yes, it's the Welsh Library, given to us by people from the family of the former lawyer, Rex Welsh, and by a firm of attorneys. We were always anxious about receiving any gifts from the legal profession, because they appear before us. But here this was honouring somebody who'd been a great lawyer. So that was another element of the library. So the library has been built up section by section. And a librarian was appointed, and that's when Ms Sheryl Luthuli came onto the scene. A very important figure as far as the functioning of the court is concerned, she went on to lead a team working under her. Kate O'Regan is the one who will give you special information about the library, with which she got very involved.

Kate was given responsibility for guiding us on **computers**. I think almost all of us had used personal computers, but none of us were very familiar with them. Kate was just a little bit ahead, and we had some training programmes. But at that stage all our documents would be photocopied and big wads of paper would be distributed. And if we did a note, it would be photocopied and distributed. So

maybe you can find out from Kate when we started using the PCs for sending out minutes, for sending out drafts of judgments, for sending out critiques. But it certainly was a great boon for our functioning being able to use computers. We were in fact relatively advanced compared to many other institutions.

Tholie Madala was asked to attend to the **gown**. Partly because his home was in Umtata, and the place that made gowns was in Grahamstown, relatively near. They'd been making gowns for judges and bishops since the 1830s, and I think the styling of our gown showed that -it would have looked very modern in about 1838.

Only Yvonne Mokgoro and Albie Sachs were left without tasks, so Arthur said: can you look after **décor**? And he gave us ten thousand rand, and we bought one tapestry with that. I'm going to give a whole separate thing on how that ten thousand rand and décor ended up with the new Constitutional Court building. But now I'll refer to other things, like the refurbishing of the temporary accommodation that we had. In a low-ceiling building, with quite bright lighting, Public Works were now consulting with Yvonne and myself, and we didn't want it to look like a stiff court with wood panelling, intimidating, a strange sort of sealed-off space. So we managed to get a lot of curtaining put in, with fabric that's soft and it's got different colour. We had quite attractive seating, and the Bench couldn't be very high up even if we'd wanted it to. We in fact wished the Bench to be low down, to be at the level of counsel. We managed to get nice wood with a decent grain. So it's a pokey room in terms of size and space, but reasonably stylish and reasonably soft and reasonably welcoming. So that was working together with the Public Works. The person from Public Works was delighted to find judges who wanted a little bit of style, and we were delighted to find a Public Works official with a creative imagination.

Then we had to get a new Court **logo**, and I'll deal with that when I deal with the art and the artworks. In those days we used envelopes and letters. Remember those things, where you licked an envelope and you licked a stamp? (*laughter*) And the envelopes we were given had the seal of the old South African government on them. It had quite an attractive heraldic design with, I think, a lion and a unicorn, a zebra-looking unicorn. But this logo had accompanied death sentences, the Group Areas Act, forced removals. It was so associated symbolically with the past that we wanted our own new one. And we got ultimately anew logo depicting justice under a tree. And then Public Works arranged for a plaque to be unveiled by Nelson Mandela at the inaugural ceremony of the court, with the event being marked in a bronze statement in the eleven official languages. And that was all part and parcel of décor that Yvonne and I were tasked to attend to.

## THE LEADERSHIP OF ARTHUR CHASKALSON

And that's where really I want to offer undiluted praise to Arthur Chaskalson. He had natural authority. He was just so damn good as a lawyer. Astonishingly

good. But it was more than that, more than just being a smart lawyer. He was diligent to a degree. Pius Langa mentioned at Arthur's retirement, that he found it so forbidding, Arthur was always at work before him, and always left after him. He decided one day he was going to come in even earlier, and he came in at seven o'clock, and Arthur was there. So he gave up trying to be more diligent than Arthur. But it wasn't only that. He was also meticulously well-organised. He would keep minutes, he would structure things, he would make notes, attending to detail. But it wasn't only that. He had a sense of collegiality, of organised collegiality, that was fundamental. He believed in delegating. He didn't want to do everything himself. We didn't have an Office of the Chief Justice then. So he had to delegate. But he also felt that that's part of the team and the teamwork. It's not only that people are specialising and concentrating in a particular area, and you get better results. It's also for everybody to feel that they are doing something special and contributing to the whole. Everything he did came with a sense of rectitude, of doing things correctly. It came from, I'd say, that mixture of his, I don't know if he was at Hilton or Michaelhouse, you know that correct upbringing of British schoolboys translated to South Africa, coupled with a powerful moral vision and the rigour and discipline of the law. Add to that a very humane nature and personality. Not ambitious. Proud, but not ambitious. Made him an absolutely ideal leader for the establishment of the court. And the fact that somehow he had possibly the best organised legal brain amongst all of us, added to the authority that he had in relation to everything else. He would usually be the last one to speak. We would all be waiting to hear his take, his analysis, and usually we all went with Arthur. But not always; sometimes we disagreed. And when I come to the cases I'll mention some important cases where we differed. For me the two most important participants in our debates, would be Arthur and Pius. Arthur because of that astonishing legal brain and sense of authority and justice and fairness. And Pius, because of his extremely rich and thoughtful sensibility, it was very, very special; in the end you could find technical answers to any question, but you needed something else, it was at the level of rightness and sensibility, tipping the issue one way or the other. Everybody else also had a voice, and an important voice. There was nobody who didn't count at all. And some colleagues would be very persuasive in particular cases, less so in other cases. Ismail was phenomenal, unpredictable, brilliant, but sometimes you would feel he would argue a weak position with that same sense of authority and bravura and brilliance that he would apply to something really, really meaningful, and I think sometimes we would all smile a little bit, you know, there's Ismail in full flight. He just couldn't take small leaps, he couldn't do things in half measures, even if he was following the wrong path.

## WORKSHOPPING DECISIONS

And so the two crucial things that Arthur did as leader, one was delegating tasks and then we set up committees in relation to these different areas. And the second was to open up debate. He was used to that. Those of us who had been in the struggle, we were used to that. I sensed that people who'd been judges for much of their lives, weren't used to that. They all loved ideas and debate. But I don't think that the theme of debate had been made central to their work practice. There would be some consultation discussion between them, amongst

themselves before and after a hearing. Certainly they were used to debate at seminars, they all loved seminars, in fact that's how I got to know Johann Kriegler and Laurie Ackermann, primarily from seminars and workshops. And they were good at these. But I don't think they were used to the intense application of the seminar technique amongst the judges themselves after a hearing. And we would go around the table...not around the table...people would jump in, speak, talk, speak out quite forcefully and loudly, and then ultimately Arthur would go around the table, make sure everybody spoke, and he would be the last one to give his views. And sometimes we would do it a second time and a third time, at the same meeting. And often we would come back after drafts had been circulated, we'd have yet another workshop. And to me this is probably the most distinctive feature of the South African Constitutional Court, the manner in which it work-shopped its decisions and continues to do so to this day, as far as I know. In other courts you go around the table, everybody speaks, you speak once and it's over. You declare your position. Our process was completely different. This is debating, analysing, different aspects, themes, focusing on certain issues, going around the table, focusing on other issues, going around the table, and it's often harsh, it's very vigorous, very sparky, frequently brilliant. I would sit at the table amazed at the quality of the discussion, the debate. So very special and very, very rich.

## HEARING ORAL ARGUMENT

Now we're sitting up on the Bench, and Arthur might ask one or two questions to begin with, Ismail would leap in, John Didcott boom away very forcefully, Kriegler quietly and then would suddenly pounce, Laurie would indicate he's going to speak and sort of sit back, you would see him thinking, he would choose his words so carefully, and he would arrive at his question...some of us are blah blahblah, talking, talking...never that with Laurie. He would lean back in the middle of his chair, he would pause, and always come out with very well focused questions slowly enunciated, very central to the issues. And at the beginning, we never heard Kate and Yvonne. We never heard their voices. The guys on the Bench were just rushing in. Tholie Madala, a naturally reticent person, he would wait right at the end, maybe speak. So it would be Kate and Yvonne and Tholie, the least aggressive. Pius would wait his turn, also a quiet person, be one of the last, but he would force his way in. And I'm determined to be heard, but not as one of the first. It was interesting the way we achieved substantive equality. It was through acquiring microphones. Microphones literally gave equal voice to Yvonne and Kate. I don't remember how early it was that we got microphones. It was partly people weren't hearing. Some of us up on the Bench, we are aging, we're not hearing questions from our colleagues all that well. Sometimes counsel would complain they couldn't hear. Sometimes people sitting at the back, even in a small room, complained they couldn't hear. So we got microphones and then you would press the button and you'd see who else had the buttons pressed, but it meant when Kate and Yvonne and Tholie and Pius and myself, when we wanted to speak, we would be in line to speak.

We took a decision, or Arthur announced fairly early on, that he would allocate cases to different colleagues to do preliminary special work, and that if their position happened to command a majority when we discussed it, that person would write the judgment. And we took a decision never to discuss cases before the hearing. I think that's also unusual. I think it was a very wise decision. In court matters where a lot depends on the evidence and you're making findings of fact and so on, sometimes you can save a lot of time by having preliminary discussions, and then you listen to the argument. Here where you're creating a completely new jurisprudence, you're laying down foundations of issues of lasting importance, not just for the litigants but for the whole of society, and where you come from such different backgrounds in terms of life experience and professional experience, it was important to go in with as open a mind as possible. You can't help but be influenced if you know in advance where Arthur stands, Ismail, you know where he stands. To think, gosh, am I going to disagree with them? Maybe...it was really important not to know that. And we kept to that quite rigorously. As far as I know it's still the practice in the court today.

We allowed counsel to address us for as long as they felt they needed. Our rules of court had indicated they had to send us heads of argument in advance. We said they should be succinct. They never were. But we would have a lot of documentation in advance of the case, for the applicants and for the persons resisting the application. Occasionally there would be a bit of a reply. And then we would do research ahead of the case. And the research we would do on our own, solo.

And that's where the law clerks played a very important role.

## LAW CLERKS AND FOREIGN LEGAL DECISIONS

And maybe I should say something about the law clerks. We were allocated one law clerk each. It was unusual in South Africa. The judges would have a registrar who might do some research. But the idea of a full-time law clerk, was, I think, new, it came with our court. And again, just as every judge ended up having a different looking office, every judge had a different system of preferences when it came to choosing clerks. And some simply went for the clerks who had the best exam results and the best testimonials. I was keen to involve people in the Constitutional Court project who otherwise wouldn't have automatic access, especially people from what we called, disadvantaged backgrounds. You might have a list of my law clerks, so that I can work out the profiles as they turned out in the end. But my first law clerk was Malebo, whose parents had been active in the PAC, they'd gone into exile in Nigeria and she'd done her schooling in Nigeria, got quite good academic results, now returned to South Africa. It appealed to me to have somebody who otherwise mightn't feel connected with the project, because of her background, to have her involved. And I saw the

experience as being a training one for the clerk concerned. But not only training in legal technique, but training in how to look at the problems of the country, how to measure them up, how institutions conduct themselves, how to deal with issues of race and gender, and living and lifestyle, and hierarchy, and courtesies of speech and collegiality and ambition and expression of self. And I enjoyed the relationship and the broad interaction very much. So Malebo wasn't your obvious law clerk straight out of university, a brilliant, bright, eager candidate. And Fatima Maal, also not your obvious pert, efficient, well-organised applicant. But both had a lot of soul, a lot of deep personality. I think in our second year already, we got funds, I think it was from Ford Foundation or Atlantic Philanthropy, to have a second law clerk. And that allowed for more balancing out and diversity. And I would say, most of my colleagues then would go for one high flyer, and then a second person, maybe not with the same level of exam results but somebody who'd shown brilliance and great promise. I tended to look to the universities usually left out, the University of Zululand, the University of the Western Cape, quite a few happened to come from there. My very last appointment was somebody from the University of Transkei. And Pretoria, the University of the North West. Afrikaans speakers who otherwise mightn't feel really invited to be connected with the court. And I can say a little bit more about the law clerks later. Well, let me say a bit now.

When I took them on, when I interviewed them, I'd say it's a very important function my law clerks would have. It's to find my glasses, to organise my papers, and to make sure when we're sitting in court that there's a little cup with lime juice in it, and some sparkling water. Each judge had little peculiarities, idiosyncrasies like that, and a good law clerk would understand that. A big job was sorting out my papers, and as I keep telling you, I'm not naturally tidy. I think it goes with...not think...I like to console myself it goes with a certain creative thing, and I remember documents and papers in different ways. But when you're dealing with a number of cases at the same time, and it extends over a period of vacation, your memory fails, and you need somebody who can find the right documents. So sorting out my papers became very, very important. And it's freeing me to get on with the job of thinking and writing, and debating and arguing. Then to follow up in terms of research – and that was before the internet was being used extensively, that came in a little bit later – going into the library, and we would use textbooks quite a lot to get the initial references. And if it was international research, the two books we used...I used the most, were constitutional treatises by Laurence Tribe of the USA, and Hogg from Canada. Tribe for his philosophy and bravura of language, very carefully footnoted, and we'd follow up the footnotes. And then Hogg, a much calmer style. But the Canadian Charter of Rights was really, in a sense, our model from a technical point of view. And the intellectual leadership given in the 1980s by Chief Justice Dickson and later with the support of Bertha Wilson, provided a judicial vision and methodology and philosophy that we found exceptionally helpful. And so the law clerks would chase that up.

I would personally do a huge amount of trawling of publications, South African and North American in particular, on certain topics. So, when dealing with the question of sodomy, I must have had twenty, thirty, forty articles from United

States, and maybe ten from Canada on the same-sex marriages afterwards. We had a case on privacy where I had to do the judgment. I would have had copies of twenty, thirty cases from the US. And then also textbooks from England and what material I could get from South Africa. A little bit maybe from Australia, not very much. A little bit from New Zealand. India, decisions of the Indian Supreme Court, the Indian textbook...I forget the name now, quite a thick book—Servaai, and following up with the footnotes from India as well. So that was another task of the law clerks, to get the materials. And then I would just get everything that had a title that looked interesting on these topics, photocopy, which was much easier to get done in the United States, than here. And I would read through and I would underline and mark and star pages, not knowing how they fitted into the case, but there's something that lifted off the page, suddenly it was alive and telling in its own way, and then I would group the materials, and when it came finally to writing the judgment I would have the materials available, and then my clerks would help me locate the particular materials. I remember one American article on gay rights, dealing with discrimination, not be targeting people, but making them invisible. It told of a young man coming to his parents and saying, Mom, Dad, there's something I've got to tell you: I'm black. I used it in a judgment.

The other important function the clerks had was to argue with me, and I would say when we first got the case, how do you feel? They would say a few things. And then after we came out of court I would say, how do you read the judges? Not, what do you think, but how do you read the judges? And to me sometimes it would be so obvious the way the judges were going from our questions. The clerks wouldn't 'get it'. And that was so important for their training to 'get it', to understand, that sometimes the judge would be leaning towards A, but would ask testing questions because of certain doubts. The clerks wouldn't understand that, or get that. And then I would say, what do you think? And then debate and discuss with them. So that was a very important function, the sounding-board function. And some of them would be really terrific. Just an idea, a thought, a phrase, a way of looking at things. But certainly we didn't have the experience that Supreme Court judges in the United States have where the clerks virtually write the judgements, and then the judges would say, do this, that and the other, and then correct the draft. Not at all. I think at one stage, one of our judges functioned in that way for a certain time, looking at the style of the language used. It wasn't her natural style. [I've given away the gender there.] But I'd say, by and large, we all wrote every word. In my case I know that it took me from '95 till about to the sodomy case...I don't know when that was...several years,..before I even allowed a footnote, not just a citation, an actual footnote, written by my law clerk to go in. It was on critical race studies in the United States, and my African-American law clerk, Sharon McPherson, she actually got a whole little paragraph in as a footnote. For the rest, every word would be mine. Towards the end I would encourage the law clerks to write up at least the factual narrative. And then something of the legal argument, and maybe I would retain a little bit more of their text. Maybe I was becoming better at explaining how to instruct or to guide, but I would say, by and large, every word of every judgment in my name was mine. Then the law clerks would often have to fill in gaps, find references; I'd say, we need a bit more research on this point, or is that point

correct? And again, they saved me an enormous amount of time- you can spend literally hours searching for just one citation. These were hours that I'd be spending on working on the text and debating and discussing things.

The relationship of judge and law clerk is very special. The relationship of judge and secretary is very special, but in a different way. Judge and secretary, usually 'she', she is in command of the workplace home, of the things that go on there. She knows, she organises, you respect that. But the secretary is very deferential in terms of intellectual aspects. It's not basically her role and function, and she's not trained and prepared for the legal argument and debate. In the case of the law clerk, it was much more interactive intellectually and at a very personal level. I think we varied very much. I insisted on my clerks calling me Albie. One of them got through a whole year without calling me Albie, Maryanne Angumuthoo. She just called me 'er'. That was my background, we didn't say Comrade Albie or Comrade Maryanne. But one was working at a level of equality. I wanted them to work harder because they were inspired and not because they wanted to please the boss; because they would get into the theme of the idea, and be lifted by it. Some of my colleagues, I think Zac, were on first name terms with their clerks, I think Kate, I'm not sure...I think Yvonne, I'm not sure about others. Others would be much more correct. Well, that was horses for courses, judges for law clerks. The relationship was strong. We got a lot of help and assistance from the clerks, that was the benefit to us. But they were getting a kind of grooming and a training at a very special time in their lives, usually just after university, before doing articles or going to the Bar, before travelling. And they were becoming adults, in a nice sense, in terms of lifestyle, living differently, not having to do exams and focusing on exams and prowess in the different ways that students have. Instead they focused on their relationship with the judge and their work in the court.

And to me the theme of values came through strongly. It's very different from a professor and student relationship, though it can come through to some extent there as well. This is daily working together, and often into the night, and often long hours, and often over weekends, and it's very, very close. Sometimes you're the only people in a big building, and I would arrange to get food and taxis to come and collect them at half past one in the morning, so they could get home safely. At the time we are feeling the most important thing they're getting from the work is the importance of values. Those would be my values, but not my values just as me, as Albie, but my values as a collegial member of the Court. What's important, what's not important? And not just purely legal values. It's values about what it means to be a South African, to be a lawyer, to be defending the Constitution. And terrific friendships evolved, with warmth and strong connections. Were there any failures? There was one clerk who had a lovely personality, very nice and gracious, but she just never 'got it'. It would be very frustrating. She just couldn't get around to thinking as a legal person, and focusing on the right issue. And that was a source of disappointment to me, and she never really improved.

I don't remember having any quarrels or tensions. One clerk who'd had trouble with his judge, and could have ended up rather unpleasantly storming out of the Court, and maybe publicly raising labour issues, I took him into my Chambers (office). A bright person, I like to think that he got onto his feet. But his behaviour had been bad in many different ways, irresponsible, not turning up for work. When he later applied for some legal position afterwards, I felt I had to be very blunt, it's important for the employer to know of his deficiencies. But he came and spoke to me, and I found a way of not giving him praise that he wasn't entitled to, and hinting that there were problems, but without the negativity. There were signs of contrition and the beginnings of maturity. I think he's come right, from what I heard and saw afterwards, when meeting him. Generally, we had a big choice from very bright people. They were self-selected, wanting to come to the Court, even if it meant delaying their articles for a year. And reasonably well paid, but not magnificently well paid, there was always an element of idealism.

At first we chose our own clerks, from names given to us, people recommended. And then we decided the process was too erratic, too subjective. So we developed a system of everybody applying, going through the same door. At first they would apply to be Pius Langa's law clerk or Yvonne Mokgoro's law clerk. We allowed them to express a preference. But the understanding would be that any judge could take them. We would spend a lot of time on planning the interviews, held at a fixed time every year, and selecting who should be interviewed. And I'd say the quality got better as the years passed. Especially the diversity of high flyers got greater as years passed. From fairly early on, there were women high flyers from all different backgrounds, but as time passes one could choose more men and women from disadvantaged backgrounds who were getting really good marks at all the different universities. So the pool of real choices for combining expert help that you wanted, plus giving people the opportunity they mightn't have had otherwise, got greater and greater. The most idiosyncratic choice I made was in the year of the Gauteng Education Bill case, fairly early on, I'd virtually appointed somebody from Wits, she was very good, and I said, I'll be in touch with you tomorrow, there are still three more people I have to interview. They happened to be three women, whom I sat together on the couch, saying I was not going to repeat the story three times, and I made the joke about their job being to find my glasses and as I'm talking, one of them jumps up, points to my tie, and says: 'Starry Night'. It was the Van Gogh Starry Night. She got the job not only because she showed an interest outside of law, but because of her spontaneity, Anel Boshoff, she had been a lecturer at Rand Afrikaans University. She was married to Willem Boshoff, an absolutely marvellous artist, who's become a good friend. The person from Wits was very disappointed. But Anel turned out to be a brilliant, a marvellous law clerk, and again, she was taking back to RAU what she'd learnt about the Court, becoming an agent of constitutionalism in a very direct way.

Int Albie, I wondered whether I could ask you about the foreign law clerks; at what point that started?

AS Fairly early on, we got applications from foreign persons to intern as law clerks. And we agreed that they could come, I think usually for a six month period, provided they financed themselves. That was critical. They had to have a law degree. And it became a very rich part of the life of the Court. I'd say the biggest grouping came from the United States. It's partly people there are used to the system of clerking, and partly they'd get access to funding. And the idea of going abroad was quite common. I took on Deepak, I think he was a Harvard graduate. Sharon McPherson, African-American. At one stage I think...gosh, I'm forgetting her name now, a Chinese American...

Int Was it Ting Cheng?

AS Yes, at a very late stage it was Ting Ting. Sorry, why am I not thinking of her name? Much earlier on, one of the early...I think it's somebody whose judge left or went on leave, was with me for a while. But Ting Ting yes, Ting Ting was terrific, in my last year at the Court at the end. I also had somebody from the prosecution service in Hong Kong. Felix Olckers from Germany, with a Social Democratic Party background, we became very good friends. Alok Gupta from Mumbai, whole told me he got great prestige in gay bars because he clerked in my Chambers. And Edwin Foley came from Ghana. I was particularly keen to have clerks from Africa, for the enormous benefit they would get from working at the Court, to be able to take the experience back to their home countries. But also because they could infuse something of African experience, which we always spoke about, saying we must cite African judgments and so on, something we very rarely did. I was in fact able to arrange some money from the Flemish Government for a special programme to finance people from Africa coming as law clerks. That was due to come into effect after I left the Court. I think it was for two years, and hopefully would be extended. And many of these potential clerks would have gone to the Centre for Human Rights at the University of Pretoria, and maybe done a course there. I might remember a few more names.

The clerks constituted a distinctive community at the Court. Generally, their relationships were good, but it wasn't always easy. Frequently one would find the white law clerks were progressive, liberal, decent, strong on non-racism, but not always understanding that their confidence and dominating of discussions and debates was shutting out others. Everybody could speak, have their turn, lawyers speak out, and if you can't speak out and hold your own you're not going to be a good lawyer. True. But it takes time to build the confidence. It wasn't only that. Many of them would have motorcars, they would be staying with family or have a decent apartment, while others would come, some by minibus, to work. They couldn't discuss the latest play or movie that was on, or tell stories about a trip to Europe they'd just come back from. And I suspect that some of the white law clerks didn't have sufficient understanding of that. They'd never been in that situation, you know, themselves, so they couldn't intuitively, imaginatively place themselves in the shoes of others. I think some of the black law clerks felt a certain measure of being excluded, of their voices not being fully heard, so I would encourage my law clerks...I wouldn't make a big issue of it, it's their world,

they're doing their own thing, to show sensitivity one way or the other in this respect. And it was often lovely to see how sometimes very timid clerks from UWC, University of Zululand, very quiet, when they arrived, towards the end of the year being much more outgoing and affirmative. I would insist that they speak to me, speak out loud, to get used to vocalizing, to expressing their thoughts, and to stand up to discussion. I know one year when...what's his name, was from Zimbabwe, was clerking with Kate O'Regan, he's a white guy, he had that understanding because of political background. And he established a soccer team. And this was fantastic for the African men who were clerking, because they were damn good at it and they could talk about it, and they had fun. And it was a mode of doing things as a team. Jason...

Int Was it Brickhill?

AS Yes, Jason Brickhill. He had that understanding, from a struggle family, his dad had also been bombed, and it was obviously a natural sort of thing to do. And in that sense the clerks were at the embryo of a new people coming into the legal profession. I think it's accurate to say that people of Indian origin were something of a bridge between those different groupings. Often from relatively comfortable backgrounds, they'd known discrimination, direct and indirect, and could understand the issues of race. Because of various accidental dropping out of other law clerks, I happened to end up having as clerks a whole series of women of Indian origin. And I found they were often very sensitive to these issues, and could chat to me a little bit about them and were influential in the clerks' community of establishing a genuine collegiality and getting everybody to speak out. I was very thrilled when it came to the farewell speeches, and I'm not sure how Farzana Bardat came to be chosen to say goodbye to me- I'm not modest about myself, and I'm not going to be modest about my law clerks- she made the best farewell speech. And it was the best because she wasn't reading from notes, and she wasn't making witty little comments referring to cases, she just spoke about her judge as a person talking about a person, and it was so fluent and I felt...oh, I felt proud, you know, that sense of self-confidence, expressing who you are and what you want to say and what you feel, and it just came out very beautifully in her case. And I've seen you looking up at the clock from time to time.

Int We can stop now, Albie, if you'd like a break.

AS I think it's a natural break in the sense of dealing with the institutional trappings. And I'd like to deal with hearings and cases, and how the court is now developing its personality as a court functioning in public.

Int Okay...

AS I must also say something about the media, there's a whole section on that. Something about the building, there's a whole section on that. And I think I'll do completely separate presentations on those two.

Int Okay, we'll stop at this point.

(Interview is stopped briefly and resumes the same day)

SOME EARLY CASES: ***Capital punishment, Certification of the Constitution, Gay Rights, Housing Rights the Rastafari matter, sex work and others.***

Int Albie, we spoke about various things but you wanted to move onto the hearings and the cases, and I remember in a consultation with you, you mentioned the *Mhlungu* case, and that as a starting point where there was great dissent and division, and I wondered whether that might be a good starting point? Or if you'd like to go earlier?

AS I'll begin at the beginning.

Int Okay.

AS And in the beginning was *Makwanyane*. It was the first case. We decided, fairly early on in our discussions, to set down the *Makwanyane* case as the one for our first hearing. It dealt with the constitutionality of capital punishment. The issue was very dramatic. I think there were four hundred people on death row. During negotiations the ANC and the South African government couldn't agree. The ANC was totally opposed to capital punishment; the South African government couldn't imagine a society that didn't execute its citizens. And it was agreed that the country's first democratic elections shouldn't be postponed until some kind of mutually acceptable arrangement was made on the issue. And you can't have a little bit of capital punishment. You either have it, or you don't. So the agreement was not to seek agreement, but to leave it to the new Constitutional Court to decide on its constitutionality. The Bill of Rights didn't expressly authorise capital punishment by saying no-one shall be deprived of life except according to due process of law, which would seem to authorise capital punishment if due process was followed. Nor was it expressly abolished, as in Namibia and Mozambique, which expressly, through their Constitutions, banned capital punishment. The feeling was that the Court should open with a case that had moment, significance. I suspect Arthur afterwards regretted that choice, and felt that maybe we should have started off with a case that didn't have wider public ramifications, so that the public could see the court functioning without the overlay and the heaviness of the capital punishment issue. But my own view is that it was very well-chosen. In fact the separate concurring judgment of Ismail Mahomed, expressly refers to our Constitution as marking a rupture between a past that was authoritarian and uncaring and disrespectful of human beings, and a future that would be caring and based on respect for fundamental rights.

We had got the small court room into a functioning, moderately elegant state. So proceedings could begin. The inauguration of the court, the swearing- in of the

judges took place on February the 14<sup>th</sup>, 1995, and the first case was *Makwanyane* on February the 15<sup>th</sup>, 1995. We had to agree on the time of starting, we would start at ten, go on till eleven fifteen, a break till eleven thirty. Then from eleven thirty till one. A break from one to two, and then from two to four. We had to take decisions on all these tiny details. We also had to decide how we were to be seated, and it turned out one of my functions, as the person responsible for décor, was to arrange the seating! Not that I think we had to use aesthetic principles to organise who would sit next to whom, but somebody had to decide who would sit where.

And it was agreed that Arthur as the President, then the Chief Justice, who would preside, would sit in the middle, and Ismail was next to him because of his natural authority. The seating distribution had nothing to do with questions of seniority, or background experience, but tried to make us look a little more non-racial and little less male preponderant than we really were. And I was willing to put myself on the extreme...I think I was facing the court on the extreme left, and then dotted in all the other people. I think we had Sydney Kentridge, who was the acting judge, on the extreme right, facing the court. And Arthur and Ismail in the centre, and then it meant slotting in the others. One of the important decisions we took was that there would be no hierarchical arrangement of seating. And every term we rearranged the seating, with only the Chief, and then the Deputy Chief Justice, remaining in the centre, and each one of us moving. It was important for the first hearing, in particular, to indicate that the fact that you had been a judge in the old Supreme Court of South Africa for twenty years, didn't mean that somehow you were senior to somebody who'd been a law professor or Pius Langa, who'd simply been at the Bar. The fact that you'd been to jail didn't mean you had to sit next to the Chief Justice because somehow you'd been in the liberation struggle. We had to indicate the idea of random seating and constant movement. This was just one of those elements that underlined the sense of equality amongst the judges. It might sound pretty ordinary but many courts are extremely hierarchical, and the hierarchical nature can be very inhibiting of truly free debate and argumentation. Even the symbolical representation of the court is somehow undermined by visual indication that some judges are worth more than others. I don't think we had any debate even about that question. This was a new court for a new age in the life of the nation. But its members all came from the old era. Its strength came from the hybridity of its composition coupled with the uniformity of its vision. Just to underline, it was particularly important to indicate that the fact that you'd been a judge before, or a law professor, or at the Bar, was completely irrelevant in terms of your status. We were all equal on the court.

The case was brought on behalf of Mr Makwanyane, I think by the Legal Resources Centre (LRC). It's worth emphasising the importance in constitutional justice of having well-organised **civil society organisations and NGOs** like the LRC. You, Roxsana, have done extensive interviewing on the LRC and amusingly in my long interview I never reached the stage of actually dealing with cases handled by the LRC. But it was exceptionally valuable that that first case was well prepared; well-presented with supporting material and thoroughness of argument. We were very concerned that we should hear at least two sides to the

question, so we arranged for the Attorney General of the Gauteng Province to speak on behalf of the State in defence of retaining capital punishment. On the other hand, the Government of National Unity under Mandela sent counsel, George Bizos, to argue in favour of striking down capital punishment. [I heard off the record that Mandela had in fact been robust to the point of rudeness in overruling Deputy President De Klerk's resistance to the government sending counsel at all.] This was unusual, the government usually defends a law, or says it abides by the court's decision. And we had I think two different *amici curiae*. And again, in our rules of court, we decided to allow for an **amicus curia**, the friend of the court, to make application to send in written memoranda that might be helpful to us, and if they wished, to apply to be able to make oral argument. And as it turned out, the oral argument by one of the amici was helpful for the judgment that I was to write in that matter.

Well we file in. For the first time now we're not just being called judges, we're going to be functioning as judges, and for most of us, it was the first time that we would actually be sitting as judges. And we take up our appointed seats. I think we had the names of the judges...no, they weren't printed at that stage, placed up in front. It was when counsel had difficulty remembering all our names, and questions were being fired, that we later decided to put the names in a little plate in front of each judge. 'All rise for the court', I think we had to agree on some kind of statement to be made. The Chief Justice's law clerk made that announcement, everybody stood, and he called the case of the *State versus Makwanyane* for hearing, and the proceedings began. For everybody on the court it was momentous. For the experienced judges, it's not the first time they're sitting on the Bench, but it's the first time serving under a law and Constitution in which they believed, with new colleagues, a new Chief Justice; in some ways it might have been harder for them than for those of us who'd never been serving as judges before. And counsel stands up, - we have arranged for the attack on capital punishment to be delivered first. Wim Trengove opens his mouth, and the new era of constitutional justice has begun. We were all very fortunate that Wim was the person chosen for that task. Exceptionally able, he thinks well on his feet, is very courteous, listens to questions put to him. We were off to a good start. Counsel probably only make a difference in, I would guess, ten percent of cases. In a case in the Constitutional Court where you've got eleven judges, you've got written argument presented in advance, the issues are not just between two litigants. They're issues of national importance, have an objective quality and so on. And my very rough estimate is maybe in ten percent of cases the actual persuasiveness or the implausibility of the presentation of argument, actually affects the outcome. In ninety percent of cases, however, the quality of advocacy influences the quality and erudition of the debate, and to some extent the calibre of the final judgment as written.

I'm not sure when the first interruptions began. My memory is only of the interruptions, not the argument: Ismail pouncing very quickly. John Didcott, with powerful booming voice, I've mentioned this before. Laurie Ackermann, very, very thoughtful. Remember we haven't discussed it amongst ourselves, we don't know what our colleagues are thinking. Arthur at some stage, in a sort of social setting, had once indicated to me that capital punishment case was a difficult

one, and seen that I had looked more than a little puzzled. For me, capital punishment was totally inconsistent with our new constitutional order. And in that sense it wasn't difficult. But exactly how and why it was inconsistent, and how one should tell the story, the rationale, turned out to be far more difficult than I had thought. Arthur had clearly looked at the text of the Constitution and decided the key issue was, applying the principles of proportionality, was the limitation on the right to life and dignity justifiable in an open democratic society? I'm sure he anticipated the argument that the deterrent value of capital punishment in protecting lives in future by discouraging in a very powerful direct way people from killing others, made it justifiable. And you're sitting up there, we'd set aside three days for the case, and I think Wim took the whole of the first day. Meanwhile I'd been doing my own preparation, so we had...I think we'd already decided in December that this would be our first case...so sometime in December and then January from when the court started, and the first part of February. I'm very sure that was the case that I prepared when I was staying at the Don...what's it called? The Don...

Int Suites Hotel.

AS It's not a hotel, it's a...is it Don Hotel?

Int The Don Suites...

AS It's the suites that they have, in Rosebank. Not the big Courtyard one, but one that was near the Rosebank Hotel. And somebody said that was the place for husbands who'd separated, looking for an in-between place between the home they were in before, and the home they're going to go to later. Well, in my case it was the place to be in between arriving in Johannesburg and getting somewhere permanent to stay before ultimately going back to Cape Town. And I'd bought a record player, or cassette player. And I remember working late into the night and putting on music. I had different music for different periods. I was now going back to Beethoven, the Eroica Symphony and Sibelius, grand symphonic music. I'd be sitting alone and it's dead quiet, and I'm thinking through and making notes and I'm reading all sorts of articles and underlining till late into the night. And when I come back from court the next evening...we'd go into court every day to discuss and do things and more research there, working with the law clerks...I see there's a note under my door, 'dear neighbour, we like your choice in music very much, but hearing it at two or three in the morning, is a bit difficult!' That was the grand music I played when I was working on capital punishment. I know I had a Chopin period afterwards, Shostakovich, Schubert, Abdullah Ibrahim. I don't think there's any connection between the quality of judgments and the music.

That was also the time when I made the discovery about thoughts coming to me while lying inert and non-thinking in the bath. After a whole day of reading and pushing and debating and thinking, I'd just write down random notes. Then I would have a long bath, and suddenly an idea would surface, I'm not even

thinking, about the case, about law, anything, and the idea would just surface unbidden on its own. And then I would get out, and jot down these sentences, sometimes quite beautiful formulations. People going through my old papers will find little splashes of water on them. And often these were the ideas that were the most formed and the ones that travelled the best when they ultimately appeared in my judgments.

And, so I'm beginning to discover something about myself and my **style of work**. Total undirected immersion. I suspect each one of us had a different style of work. And in my own case it would be to open myself up completely to the issue, to do an enormous amount of reading around the subject, not even asking specific questions, and to extract thoughts, ideas, themes, a phrase, an argument, from the literature, from judgments, from textbooks, from all over the world, including South Africa. Complete immersion. Thoughts would come to me, and I'd write them down. I had pages and pages of random notes on capital punishment. Just a thought, a theme, an idea. And that actually became something of a pattern for me, for almost all the cases. And it's something I'd used a bit when writing books, just jotting down random thoughts and ideas and then structuring them, and reordering them as I discover inner connections. In some ways this was particularly random because it was drawing on materials from all over the world, all sorts of different sources.

And then I'm thinking, why is it that the idea of capital punishment for me violates the whole character, nature of the Bill of Rights and respect for human beings, challenges my judicial conscience as shaped by the Constitution into which we had invested so much of our lives? And I'm searching for that all the time.

Having read the arguments presented to us, I'm a little bit worried that they seem to have been focused too much on North American material. I'm concerned for two reasons. The one is that the US Supreme Court had swung from a movement towards repudiation of capital punishment, to a majority favouring retention. But secondly, I didn't want an issue so central to the nature of life in South Africa to be determined by the values, the thinking, the state of the debate in North America, to make ours a derivative jurisprudence. It's good to draw on international experience to illuminate your own Constitution. But even if we relied heavily on the dissenting judgments in the later capital punishment cases, we're still allowing the US Constitution, the history, the set of values there, to determine the sorts of issues that should be fundamental. So I was quite keen to root the argument in South African history and culture, to our own consciences and sense of justice. And to me, the point went beyond simply capital punishment. It went to why we had a Bill of Rights, and my awareness that above all it was people like Oliver Tambo, and going back a little bit, Albert Luthuli, who had been fighting for this idea of a Bill of Rights. In the case of Oliver Tambo expressly calling for one as in the late struggle phase before we were able to go back home. And it linked up with the spirit of the Freedom Charter. It linked up with the dynamic that I had found came most powerfully from the African community. And so that was very strong in my mind and

something I felt ought to be brought out in the presentation, in the telling of the story.

The other was a very specific thing, linked with what I've just said. When I worked on my PhD in London, doing a lot of research on nineteenth century values, attitudes towards the law, I was struck by the number of prominent African leaders who had been opposed to capital punishment: Moshweshwe, Hintsa, Montshiwa. And then later on Z.K. Matthews writing against it. I think Tiya Soga also wrote against it. These prominent African figures were articulating something deep in African society which today is referred to as **uBuntu**. There's something going on there- I didn't use the term uBuntu. It wasn't a term that I was familiar with. But looking back now, I can see it's a kind of a cultural value of uBuntu. Although African society could impose extremely rough discipline in warfare, and treat alleged witchcraft with frenzied violence, when it came to the actual court proceedings, capital punishment wasn't used. Instead there would have to be apology and forms of compensation between families to repair the damage that had been done. So I was eager to see this dimension introduced. I did so with a certain measure of discomfort. I felt lonely because this was not the standard stuff of legal discourse. Further, I was aware that I was not of African descent, hadn't grown up in an African family, and couldn't speak African languages. Yet my evaluation was based not just on secondary sources, but on first-hand experience. In the struggle, it had been first-hand moments of difficulty, seeing people like Oliver Tambo standing up for humane, dignified principled treatment of people, even your enemies who'd been captured. I would participate directly in that experience. So that theme was strong. I didn't know how it would come through, and how it could be part of the final decision. What made it easier to introduce the theme was an argument presented by an African woman which was relevant to her argument on behalf of... I'm not sure what the organisation was called. It wasn't the Black Lawyers Association, but it was an association of lawyers where the theme of being black was relevant. And she asked the court to postpone the hearing of the matter because African opinion hadn't been consulted.

Int Was that NADEL?

AS It wasn't NADEL. It wasn't one of the prominent organisations. And the implication was that African opinion would be in favour of retaining capital punishment. Our concern wasn't public opinion as such. We knew if a public opinion poll was done, then as in many other countries in the world, the majority would favour retaining capital punishment. I think the figures showed whites were far more strongly in favour of capital punishment than black people, but there would be a majority in all communities. So that wasn't the issue. But she was raising the question of the importance of the values of the African community. And that enabled me, in terms of not simply importing my own views completely from outside on matters not argued before us, but in responding to her, to raise the questions I'd felt had underlying importance.

The other issue I wanted to raise, maybe I did a little bit in argument, was the progressive amelioration of punishment in South Africa, from the extremely cruel punishments of the period of the Dutch settlement. During my research I'd come across accounts of people being impaled while they were dying. They weren't even carrion, the birds would feed on them while still alive. Their legs would be broken. And there's a certain logic, if you want to deter people then you use the most extreme form of painful violence that you can. And this was done in public. And the one article I read, really an article intended to show how much more humane the British were than the Dutch...one could read between the lines, it was part of the Boer/Brit debate... ended up by saying that when the hangman, who used to be paid on a piece-rate basis for the number of legs he broke and eyes that he gouged, on discovering that with the abolition of these cruel punishments he'd be without employment, the hangman hanged himself. So I wanted to show there'd been a progressive amelioration from extremely cruel forms of punishment to hanging, which represented a less brutal form of extinguishing life. And now we're taking it a step further, and this was the South African progression. I want to emphasise that Namibia and Mozambique had expressly abolished capital punishment. Now none of this came out in the American-dominated debate, except possibly through my own questions.

We gathered for our workshop after the third day's hearing, and we went immediately around the table: constitutional? Unconstitutional? I'm not sure how we divided up the discussion at that stage, but it was clear straight away that there was nobody defending the constitutionality of capital punishment.

## DIVERSITY OF THE JUDGES

One of the questions I'd been asked during my interview, which I thought was a very fair question, was, should the court be representative of all the different currents of thinking, ideological positions in the country, and I had said, I find that difficult to answer. I really thought about it. Part of me says, yes. You wanted to reflect the different currents in the nation and then to get some kind of blend. And other parts said no. And I ended up with this, I said, well, at least the first court should be based on people who are in total sympathy with the values of the Constitution. And looking back now, I believe that that was the better approach, it was adopted by the President in his choice of people for the court.

We were in fact extremely varied in background. When it came to taking the oath, a couple of members of the court affirmed. Others swore, and said: so help me God. Five different languages were used. I had it stuck in my mind that Laurie Ackermann used to collect wine labels; I couldn't think of a more exquisitely refined hobby. Pius Langa, when driving in Durban one day, passed a building and said, oh Albie, that used to be the Native Pass Office. And he told me that when he was sixteen he had to go there, to get his pass, and he said you strip naked and you hose down, and a doctor feels your testicles, and he said it's not pleasant. But what had really got to him was to see old men, old enough to be his father, being subjected to that. That he couldn't take. So here's

Pius with a totally different life to Laurie. And yet, when it came to expressing basic values, they would meet on common ground. Laurie with his deep Christian philosophical beliefs, very important, significant to him. I with my deep secular upbringing, my parents having fought their parents on questions on religion, so that if when I'm dying and I revert to my original faith, I'll be reverting to a totally secular view of the world. And yet, Laurie and I could meet with common values about what human beings are entitled to, what constitutes your dignity, derived from different historical, ethical, cultural traditions, but meeting at that level. I found it actually quite moving at the time, and looking back it's still very moving to me. And it's a theme that I haven't seen well developed in the literature of...particularly top courts.

So, to return to capital punishment, now it's coming out in the debates, the discussions, we're going around the table, we all agree, and Arthur's going to write the judgment. I think the judgment that Arthur wrote in *Makwanyane*, is one of the great pieces of legal writing of all time. It was the first judgment he'd ever written. He wrote many fine judgments, but I don't think he did another that ever surpassed this one. And it's partly the nature of the subject matter. It's quite long, over a hundred pages. But there's no surplussage at all. Arthur doesn't have wings of fancy, but there's a resonance and a poetry of thought, if not actual poetry of language, that's very strong. I remember John Didcott, who'd been a judge for twenty years, signing on to this 'magisterial judgment'. And it did a comparative law survey of many countries generally regarded as having open and democratic societies. Overwhelmingly, they stood against capital punishment, with two major exceptions: the United States and India. But in India it's hardly practised, and in the United States it is the source of a lot of contestation. So overwhelmingly, the current, the trend, is in the direction of abolition. The crux of the case was whether the death sentence could be constitutionally justified in the kind of open, democratic society envisaged by the Constitution. In dealing with the justification, Arthur introduced, for the first time in South African legal reasoning on constitutional matters, the concept of proportionality, which later became central to most of the work of the Constitutional Court. Where the Bill of Rights says everybody has certain rights, it also states that the rights may be limited by a law of general application that would be acceptable in an open and democratic society. Then, in deciding what's acceptable or not, you apply the test of proportionality. You look at the extent of the invasion of the right, the reasons, the rationale given in favour of justifying it, specifically its public purpose, and the extent to which other less drastic methods could have been found to achieve the same objective. These critical areas have to be balanced against each other. It's a new kind of reasoning. It's not reasoning by classification. It's reasoning that looks very much at context, and the weight and the intensity of the different factors. In the end, you have to weigh all the relevant elements and evaluate the ultimate balance in terms of the value system that you feel the Constitution is defending. I should say that we found Canadian jurisprudence very helpful to doing proportionality type reasoning.

So Arthur sets that all out, not going beyond the necessary length. He deals with the question of whether it's right for a court to decide a matter like this: where public views are so different, and honest people can disagree, isn't it eminently a matter for the legislature? And ordinarily one might say, yes, it is, the balancing has to be done at a political level. But he looks at the history of the negotiations, where the negotiators couldn't agree and expressly left the matter to the Constitutional Court. So we are fulfilling the mandate given to us in the negotiation process. We're not usurping the ordinary role of Parliament in a case like that.

It was a magnificent piece of writing. We all came in with this sentence and that sentence, and what about, and something else, and something else. I know Laurie Ackermann liked a quotation from Immanuel Kant that nothing straight ever grew out of the crooked timber of humanity. Something like that. I think it went into the judgment. It was truly magisterial. But I was unhappy.

I agreed with every word. The basic issue turned on whether capital punishment could be justified. And the argument strongly advanced by the counsel for the State, was that it's a matter of common sense, it's obvious that the thought that you could be hanged is going to deter you much more than the thought that you could be locked up for a long time. Therefore it's justifiable, because executions take the life of a guilty person to save lives of innocent persons. The United States, is an open democratic society that has it. And I still remember how, at one stage, the State counsel's looking around from the podium, waiting for something to come, like you see in the movies, you're waiting for that last-minute bit of information to come, and it comes, and he smiles, and he says, "and the State Legislature of New York has just reintroduced capital punishment."Triumphantly. So the judgment pivoted on that issue. And Arthur said, the evidence we'd received, from a number of sources, indicated that deterrence is indeed an important public interest factor to be served. But the evidence also indicated that execution was not significantly more effective as a deterrent than the thought of being caught and being sent to jail for a long time. That was the real deterrent. Add to that the irreversible problems of error, and the discriminatory way in which capital punishment is almost automatically applied to the most vulnerable in society, the exceptionally severe effects of capital punishment outweigh the negligible, if at all, extra deterrent value it has. Accordingly its negative features outweigh any slender special deterrent value it might have. It is a disproportionality argument and it can't be justified. And I wasn't satisfied with that.

I agreed with it, but that wasn't why I was opposing capital punishment. I'm thinking, even if it's shown that there is a deterrent effect, I mean, crucifying people in the main street of Cape Town, with the birds coming to eat the body, that has a deterrent effect. It works. You don't do it. You don't do it. Applying electric shock treatment to captives produces results. People say torture doesn't produce results, or it's unstable, unreliable results. Maybe that's true up to a point. But it does produce results, by and large. You don't do it. You don't do it because your society doesn't tolerate that kind of behaviour. That behaviour is

barbaric, the country we're defending doesn't do that kind of thing. And to me, my objection to capital punishment was its violation of human dignity in a profound way, and the manner in which it made the agencies of the State become killers. Sydney Kentridge had quoted from an article in the London Times, saying that when you execute somebody in terms of capital punishment, you don't punish the crime, you repeat the crime. And that was a very neat way of summing up the point. But for me, it's more than just repeating the crime, you are tainting the whole society, making everybody a party to the cold-blooded extinction of a human life. It's different from self-defence, hostage-taking, or war situations, where there you are protecting life under direct threat. This is killing somebody, really out of vengeance, out of anger. Some others said, it's unacceptable in Kantian terms to use the life of *A* in order to protect the life of *B* or *C*. I didn't see it in those philosophical terms in quite the same way. But we're all pointing in the same direction. And I said, Arthur, I agree with your judgment, but I want to add something of my own. And there was a little bit of a stir, particularly since Arthur's judgment was so great. But I wrote a separate concurring judgment. And boom, everybody came in. Everybody had something to say. There's something about the theme of capital punishment that reaches deep inside you. That affects whichever side you're on in the great argument. And I think it's no accident that all the people who were chosen, I don't think one of us was asked by the J.S.C. to give our views on capital punishment, but all the people who were chosen for the court, were able to voice very powerful and strong and well-reasoned arguments against it.

And certainly those of us who'd practised at the Bar, we'd see how arbitrary it was, how it was distorting the whole legal system, and how whether you got the death sentence or not, didn't depend on the barbarity of the crime. It depended on the race of the perpetrator and the victim, and even more on who the judge was. And so this event, with these terrible consequences, was based on factors that shouldn't have anything to do with the law. So I think because of the extreme way in which capital punishment had been used under apartheid, even being understood as part and parcel of social control, we had a very deep-seated philosophical objection to it. And I couldn't contain my arguments.

You know, it reached me so powerfully that that beautiful judgment of Arthur's wasn't enough, and didn't capture my real reason for opposing it. Much that I agreed with everything that he said. And then, once I'd done that, as I mentioned, the others came in. I believe that Arthur asked everybody to add their own separate judgments. And looking at it as a whole, *Makwanyane* is a wonderful judgment, I'm speaking about the whole case, because we had this one magisterial judgment, that's quite long, going through the issues step by step, and then ten intensely personal responses, all in legal language, within the legal framework, by ten individual judges, highlighting different themes. And that decision, I think, has been quoted all over the world in different ways. It was also the case in which the theme of uBuntu surfaced as an important ingredient of legal thinking. And I think five or six of us referred to it. Yvonne Mokgoro quite strongly, and others in passing. And to me that was part and parcel of the whole...the nature of the project. *Makwanyane* is well-known. We were

launched. As Ismail said in his powerful concurrence, our Constitution marked a radical rupture with the past. And so did our judgment.

I'm not sure what the very first case was where we actually delivered judgment. I think it was the case dealing with the reverse onus of proof, in respect of whether confessions made in certain circumstances should be received in evidence. Sydney Kentridge wrote the judgment. And we all agreed with him. And just a few words about Sydney. It was truly wonderful having him on the court. In the obvious sense it gave the Court prestige. He's so stylish and so well considered. He was thoughtful, he phrased his questions beautifully from the Bench. He was very elegant in argument around the table. And I was thrilled to bits when I heard him commenting afterwards that he had found it an amazing court. He was struck by the intelligence, the intensity, the quality of the openness of the debate. And possibly the case that brought that home strongest to him was the case of *Mhlungu*. It dealt with a transitional provision in the Constitution, in a whole series of transitional provisions, from the pre to the post democratic era. And the one dealing with the judiciary, said, all cases pending at the time this Constitution comes into operation, shall be concluded as though the Constitution hadn't come into operation. I'm not quoting exactly. And the question was, would that apply to a case where capital punishment was competent under the old regime? It had not been struck down by ourselves. And I remember we were sitting...it wasn't a round table then, we had a sort of oval table, and Arthur would be at the head, and he started with Sydney, and Sydney said, the words mean what they say, and it means the old law applies. Arthur went to the next person, I agree with Sydney. I agree. Arthur said, he agrees. So that's five already. And he comes to me, and I say, ggggbghhh, what? Ggghbgh, I said, I don't agree. Why don't you agree? Gbhgg, I couldn't explain why. I was tongue-tied, I'm not often tongue-tied. I was tongue-tied. And I said, no, it just can't be. And then Kate said, well, I need time to think about it. Yvonne, I need time to think. Pius, I need time to think. And Ismail needed time to think. So that's quite a stir. I'm the only one who said, no. But I couldn't explain why. And the others just said, they needed time to think. So Sydney writes a judgment in which he said the words are very clear and it's important as a court, we give words in the Constitution the meaning they ordinarily bear, and although he accepts that words don't have an objective meaning, it always depends on context, that's different from saying we can divine what the meaning of the framers of the Constitution intended. And Ismail comes out with a judgment basically to the effect that all the Constitution is saying is that proceedings that started before, carry on; you don't have to lead the evidence again. That's all that it means. And Sydney is saying, but look it says, the case shall be decided as if, it doesn't say only proceedings. Any event, we're going around the table and there's a lot of support for Ismail's position. I was struck by a little phrase that John Didcott used: what worried him was that such a puny little provision at the end should have such big effect, but he still went along with that position. And I wrote a separate judgment, saying, the words of the Constitutional provision are clear: the case goes on as if there isn't a new Constitution, and must be decided under the old law. On the other hand, the Bill of Rights is also clear. Everyone has fundamental rights. So there's a clash of two provisions. And then I'm arguing for a proportionate balancing out of the clash. Ismail is

saying, with the support of majority of the others, no, in fact there's no clash, you can read the words to mean something else. And Johann Kriegler comes up with his own position – not Ismail's, not Sydney's position – in the very elegant language that he uses explaining his own position. For me that case, hardly commented on at all in the literature, was a very early watershed. It meant that constitutional adjudication would not be business as usual, interpreting what the legislature said in a literal way. It would be looking at a purposeful interpretation. Why do we have a Constitution? What's it all about? How do all the parts all interrelate? What role do the values, the preamble, and other aspects of the Constitution, play in qualifying the way that words are used, if they're capable of different meanings? And the debate was very vigorous, even I would say, tense. Sydney was never tense but some of the other arguments were put in quite a tense way. And Arthur is absolutely gentlemanly in style, but he's also an advocate who can fight for his position. So strong views were expressed. I don't mean in abusive sense.

Int Sure...

AS Strong intellectual views were expressed and the majority came down in favour of Ismail's position. It was important for the Court that there was no automatic grouping that somehow commanded a kind of automatic respect. But more important was, it established a purposive approach to jurisprudence, to our jurisprudence. And from then onwards we never had a battle over that. You know, the issue was over, and none of those who'd supported Sydney wrote afterwards to expressly backtrack on that, but they all adopted the purposive approach. And Laurie Ackermann probably did the most to spell it out in very effective language.

It's the only case I know where there was a deep division on a fairly fundamental issue of court methodology and interpretation. We had other quite sharp divisions on outcomes and how to apply the law in particular cases, on the weight to be given to different factors. But never on basic methodology. And to my mind, *Mhlungu* opened the way for us...if we hadn't had it, I think the jurisprudence would have been much more technical all the way on. It also established the equality of voice on the court. And it was important in that respect that each one of us would take a position, we weren't following Ismail. Ismail captured and spelt out powerfully what most of us were feeling. I had my own particular views and so on. Johann Kriegler, was a very, very thoughtful judge, who gave me a lot of support, which I appreciated in different ways. He argued with me, he got angry with me, he walked out on me a couple of times, he was offended by me, but it never lasted long. And in practical terms gave me a lot of support. And the judgment in *Mhlungu* was an example of his capacity to think things through and come to his own position.

Int In one of your articles, Albie, you mention your dilemmas with respect to the *Port Elizabeth occupiers* case, and I wondered whether you could talk a little bit about that?

AS Let me go through a few more cases, more to illustrate the manner in which the court worked, than to even attempt at this stage to deal with particular dilemmas and outcomes. The pride of place has to go to the *Certification* case. That was enormous by any standards. It deals with the special role given to the Court, to certify that the text elaborated and adopted by the Constitutional Assembly (that meant Parliament sitting as a whole) for a final Constitution for South Africa, complied with thirty-four principles agreed to in advance. And the text was brought up to us, handed over ceremonially for us to look at, and we set down, I think ten days for hearing. The idea was to invite the public, everybody who wanted to comment and object, to be able to do so. And I was put in charge of controlling the documents. And it was quite wonderful to see them flowing in, and then to collate them and to organise timetables. And for the first time we allocated a short snappy period of time to people so that we could get through...there were seventy different interventions...to enable us to get through the whole lot. We introduced a colour-coded signalling device: with a green light you're speaking; amber light you've got, I think, five minutes to go or three minutes to go; and red it's over. I still remember saying to my law clerks, do you want to make your mark in the constitutional history of South Africa? Yes, yes, yes, Justice Sachs, yes, Albie. Well, I replied, you're going to be in charge of that button, and you're going to be able to say, green, amber, and red. And that will be your contribution to the constitutional future of the country! And we had to go through every single objection. Laypeople presented, advocates for different sides, government defending all along the way, and we would collect the different piece of evidence. And then Arthur distributed areas for different judges working in small teams to respond. And Johann Kriegler was given the task of being the general editor; he did a really superb job. It's so easy for this thing to get out of hand, because there's so many different issues. There was a very powerful introduction; we all contributed. And then different themes initially developed by different people. But always a general meeting of the whole group, we would pass section by section, and then all would be knitted together by Johann in the final.

And I remember coming into court on the day of delivery of the judgment and seeing...I think Valli Moosa was sitting there, I'm not sure who else...people who'd been in negotiations with me. And we say that overwhelmingly the constitutional text complies with the principles agreed to in advance, but in nine respects it doesn't. And his jaw got longer and longer and longer, as we went through the nine deficiencies.

The most difficult area for us, and this is manifest in the judgment, was whether or not provincial powers had been substantially reduced compared to the interim Constitution. The principles stated they couldn't be substantially reduced. And we had two baskets, the basket of increased provincial powers, and the basket of reduced provincial powers. And it's not deadweight versus deadweight. It's comparing, you can do a bit more of this, but a lot less of something else that's different. And we had to balance it all out.

And why that stands out in my memory, is that on the morning we were due to make that decision, and that was the critical one, we hear that Arthur and Lorraine Chaskalson's home was burgled the night before, the robbers forced them down onto their knees, stole a whole lot of stuff at gunpoint. So we all come into chambers, and Arthur is there, and he's telling the story. And it was a very remarkable story and I believe deserves to be somehow placed in the annals of the Constitutional Court, because it illustrates so much. He said he drove into their home, he's not in particularly secure premises, he's parking the car in the garage, and suddenly he's aware of a pistol to his head. And he said, he got such a surprise, he actually dropped the keys. He is taken into the house, and he and Lorraine are forced to kneel on the ground, and they start helping themselves, the robbers, to a whole range of things. I think Lorraine is speaking to them quite calmly, and Arthur says what's going on through his mind all the time, is whether or not these measures in the constitutional text substantially reduce provincial powers or not? And he'd had a document in his car that had some notes that he had drafted, and he's worried they're going to drive off with that, but because he dropped the keys, they drove off in another car. So his main concern isn't losing his car, or anything, it's losing those notes. And only Arthur can tell that story in a way that's totally credible, and he said, as I'm down on my knees there, I suddenly get the solution to the whole thing. But, he added, if I rushed afterwards to my computer and typed it up, Lorraine would kill me: thinking about a case when our house is being ravaged in this way? But, he said, Lorraine got to the computer before he did to make her notes about a poem she had been composing. And then he proceeded to tell us what he thought the solution was. And in fact, that we developed and incorporated into the final judgment. So that case stands out.

Another case that for me was very significant was the **Sodomy** case. I'd done a huge amount of reading, mainly from North America, on the arguments, the debates, the issues there. Laurie Ackermann had been appointed as the person to write for the court, if his view had majority support. And he also wrote a magisterial judgment, going through all the themes and issues in a really masterly way. But for all its wide range and persuasiveness it left something out for me. It left out a lot of the real reasons why I felt the penalisation of sodomy was unconstitutional. It wasn't just that there was arbitrariness in the fact that male penetration of the female anus was not punishable, while penetration of the male anus was, a point used quite a lot in argument. It wasn't only the invasion of privacy in the ordinary way. To me the criminalisation of sodomy was an attack on homosexuals for being homosexual. On a section of a community that was defying a mainstream morality. And it had a human dignity aspect that went beyond just the act of sodomy itself. It was as much an attack on lesbian women as on gay men, because they were gay, because they were seen as deviant. And I wanted to bring that out. And so I wrote a separate judgment. Why didn't I just come to Laurie with my comments for him to incorporate them in his judgment for the Court?! But I was saying different things, in a voice and a style that was different from his mode of argument.

In addition, I guess I was feeling a certain measure of inhibition, almost frustration in relation to opportunities to express my legal ideas on the Court, that

I'd been given very little chance to write the lead judgment. And I'm going to speak a little later about the one case where I was given that opportunity and how I disappointed Arthur. But it was almost as though there was an informal ranking in the court, with some key people being asked to take the lead. And Arthur's...it was almost a strength that Arthur had, that there were some things, a certain lack of emotional, situational sensitivity, that perhaps became an overall institutional strength. He's very objective. He'd think: who can give us the best judgment on this case? Okay, we want an experienced judge...and so on, and so forth. And sometimes he would miss out on the emotional impact in fact on those not chosen.

Often I felt he looked right through me. We couldn't have been closer friends. When I came back from exile, I stayed at their house, I became very friendly with Lorraine, with Rosy who cleaned up and looked after the house. With Arthur himself who did much of the shopping and cooking, I had huge admiration for him. But on the Court, as a judge, he would look right through me. It was very odd, I would often find, if I raised an argument, nobody would pick it up, so I would hide behind someone else, and I'd say, "as Laurie said, I support Laurie's argument," and develop it a bit.

I should add that when years later I mentioned this experience to a new generation of judges on the Court, in a very open discussion we were having, in maybe my second last year on the Court, they couldn't believe that Albie had felt in the shadows and marginalised. They just couldn't believe it. And the only reason I mention it now is just to say, eleven well-motivated, honest, people with deep, deep values, and all imbued with the spirit of the law and experienced in the craft of the law, sitting around a table, working together, it's not all peace and light and easy and harmonious, and may the best argument win! We had to establish forms of emotional collegiality and trust and sharing that went well beyond simply agreeing or disagreeing on texts. And I suspect all of us were lonely in a certain way, used to spending much of our lives moving against the stream. Other members of the court felt it as well. Some would say so, some not. I know Tholie Madala felt it quite a lot at different stages in his years on the court. And I was just bursting because I'm signing on, I'm signing on, I'm getting a phrase in here, a phrase there, and one of my early inputs was to introduce strong opening paragraphs that set the scene and establish a tonality, even if the last thing you write it's important to draw the reader in. Sometimes I'd push for a strong final paragraph or I would insist on an editorial summing up in the judgment so that the reader can extract a clear conclusion from the mass of material. But I was only having marginal indirect impact.

And in this case, the sodomy case, I felt there were things not being said that needed to be put out there. When I spoke to Laurie afterwards, I said, Laurie, maybe it was inappropriate for me, but I just want to say I felt like that story of the little bird that climbed onto the eagle and the eagle soared up into the air, and the little bird flew a little bit higher, and I felt you were the eagle. And I think he...and I mentioned that. And I didn't say it in an ingratiating way. It was true. The fact that he dealt with all the basic structural elements of the argument gave

me the platform for bringing in the...that's where the theme of the multiple forms of oppression that can be experienced by one person came in. That's where I quoted from Du Bois, the experience of being black in America, you're there and you're not there at the same time. You're participating, you're not participating. And from critical race feminist arguments, where it's the overlapping or intersecting forms of oppression. And in this case it wasn't just a question of either dignity, or of equality, or of privacy, they all overlapped, and they overlapped to demean a class of people, because of who they were, not because of what they did. There was nothing intrinsically damaging or harmful in anal penetration as such. There was nothing physiological or medical that was involved, or biological in any way. It was penalising the men for acting out being gay. And I wanted to bring that out. And what was interesting for me looking back now, was, I got the support of I think all the judges in spirit. They didn't want to be tied down to a number of my detailed arguments. And I think the gay and lesbian community appreciated the fact that in addition to the powerful, technically well-argued and thoroughly-motivated decision by Laurie, the wider issues about human emancipation came through. And when it came to writing the *Fourie* case, I was able to use many passages from the sodomy case directly now with the support of the whole court, not just in spirit. And those have travelled around the world. So it was almost like incubating, waiting for their moment to come in the evolution of our jurisprudence. I would feel excited and uncomfortable writing in an expressive way, and then your colleagues come back and request I cut out a few things, which you usually do. And it's not normal mainstream legal writing, but that's the way I see it. It's not just that's the way I want to write it. This is what is impelling me, what's motivating me, that's the why, much more than the powerful technical arguments. I want to speak about the right to be different, about achieving equality not through suppressing difference but through acknowledging it and even celebrating the vitality it can bring to society.

The first case I remember being given to me to write the lead judgment dealt with. I don't know if it's Section 85, 65 of the Magistrates' Court Act, imprisonment for civil debt. And I'd heard about it. The Magistrate's Court filled with cases, the prisons filled with people; poor people who couldn't pay their debts, and they're sent to jail to compel their relatives to get them out by paying up the debt. The LRC challenges it. And it was Mohammed Navsa in fact who argued, the young Mohammed Navsa arguing. And I'm trying to think: why is it wrong to do this? What kind of deep rationale renders it unconstitutional? I look to international experience, and everybody knows you can't lock up people for civil debt. And I go through the different instruments. But I see the prohibition is often qualified. And in South Africa it was called contempt of court. There is a court order, you must pay, and you don't pay. So you're not being imprisoned for civil debt, you're being imprisoned for contempt of court. But it's not a real contempt of court. In any event, I do my research, write a long draft feeling my way, about the question of freedom and a violation of freedom, but I say we don't have to get to the freedom aspect, and I'm trying to define freedom. It's a very long judgment. And we were driving up to Polokwane for a conference, Arthur's driving, takes his time, "Albie, there's a matter that I thought I might discuss with you." I'm quite curious. "It's the draft judgment that you've presented, and it's got

lots of very good qualities. But I think you might reconsider whether you're not raising many, many more questions than need to be dealt with, and whether you couldn't narrow it down very specifically to a particular issue." One particular issue was that people were being sent to jail without being given an opportunity to make their case out to the magistrate. But that wasn't my reason for regarding the process as unconstitutional. That might be a good enough reason, no fair hearing, but my reason was deeper, even if there was a hearing, it's unacceptable, it's wrong to use the mechanism of jail to collect debts from poor people. In the case of the rich, if you go bankrupt for millions, you don't go to jail. There are insolvency proceedings, bankruptcy proceedings. And you're declared insolvent. Only if you violate the law, if you secrete away stuff and you prefer some creditors, then you can go to jail. But you don't go to jail because you haven't paid. So I'm not satisfied with the limited procedural aspect. The attorneys could persuade Parliament to amend the law by allowing a hearing, and the system continues. And I spoke to Johann Kriegler and Johann said, no, Albie, this is your view, stick to it. But then he wrote a judgment on the very narrow position (*laughs*). I think Arthur was disappointed in me that I hadn't listened to him. But I did take counsel, and the counsel I got from a colleague was to go ahead. Johann liked my expressive language, he liked the way I was searching out for deeper understanding. Sydney was quite critical of the judgment. He didn't like the way it was written, having too many short paragraphs. And in the end the longest judgment, mine, turned out to be a minority judgment, not in terms of outcome. We all agreed on unconstitutionality. But I think John Didcott said, he's not sure that it is unconstitutional to send someone to jail for not paying the debt if they contumaciously refuse. And Johann wrote what became the judgment of the court, on purely procedural grounds, leaving it open to Parliament to decide whether or not to rectify the procedure. In the end Parliament never restored imprisonment for civil debt.

So I think that confirmed Arthur's concern that Albie's a bit of a loose cannon when it comes to judgment writing. Looking back now I can see it was an important experience for me. At a later stage in my period on the Court I would probably have settled for the procedural defect as being enough to render the process unconstitutional, and put in a lot of material suggesting doubts as to whether imprisonment for non-payment of debt could ever be constitutional, without finally deciding the matter.

Another big case at the time was the *South African Rugby Football Union case (President of the Republic of South Africa and Others v South African Rugby Football Union and Others)*. It's the case of the two Presidents. The President of the Republic of South Africa and the president of the Rugby Football Union. The president of the Rugby Football Union I think thought he was more important than the President of the country. And in a way it was two titans in their own spheres clashing. And I won't go through the whole story but, the High Court held that the appointment by President Mandela of a Commission of Inquiry into the management of rugby football, was unconstitutional. The judge held that Madiba had simply rubber-stamped the Minister of Sport, not applied his own mind, and been responsible for various other procedural defects. And Nelson Mandela went into the witness box, probably thinking he could charm

anybody, and he had a very gracious hearing, but in effect he was disbelieved. So a very ungracious outcome. It's taken on appeal to us, and five or six of us are asked to recuse ourselves, because we can't be objective, we're all close friends of Mandela. But if we get off the case, there's no court left. It's a way of sabotaging the case. And we write a judgment, which I'm surprised isn't better known internationally. It's the most comprehensive judgment on recusal ever written, I believe. And we refused to withdraw from the case. There was a tense moment when I asked counsel for Louis Luyt of SARFU, could he justify the statement that my wife and I had frequently had lunch with President Mandela. I said, I'd been divorced for twenty years, and I'd never had lunch with him. And I should have just left it at that, but he wriggled and I followed him a little bit, and I got quite irritated. And I remember being rebuked by Richard Goldstone, Albie shouldn't have got involved in that argument with counsel, and he was quite right. The ultimate decision we gave, again we were given different sections to work on. I'm not sure if it was the decision of the court. And it was another very comprehensive judgment on the powers of the President, how we should look at judicial review. And so that was an important decision.

So let me get to the case of *Grootboom*. We knew *Grootboom* was a big case.

The issue really is, how do we give sense to the right of access to adequate housing, guaranteed in our Constitution, in a country where millions of people are homeless? Mrs Grootboom and a thousand others are sleeping out in an open field, having been evicted from land where they put up their shacks, land that had been reserved for formal housing, for people in the queue way ahead of them. And I've written about this, I won't repeat that, but just stress two points. The one is an actual existential moment for a judge, that's me. And an imagined existential moment for Mrs Grootboom. And I'm imagining her lying out on the field there with the children, and the winter rains are approaching, and she's saying why? Why must we live like this? Why? I want to give my best for the children. I'm not a bad person, and we're sleeping out in the open, and there's so many other people in our country and they're sleeping in beautiful houses, why? And now it's the judges' existential moment meeting her existential moment. How? We fought for social and economic rights to be in the Constitution, the text is there. But we're not government. We don't take over the housing programmes. How can we find a meaningful way of securing rights for people like her sleeping out in the open like that?

The other point I want to make is that, it was clear early on that there were two competing currents of thought. Sometimes in the same head. The one, government is building hundreds of thousands of homes, which are being given free to people living in shacks. It's not for us to say they could spend the money in a better way. The political process takes account of that. The Parliamentary procedures take account of that. The freedom of the press takes account of that. And we don't design housing programmes or determine priorities. The other current was to say, the right to adequate housing is in the Constitution, it's got to have some meaning, otherwise it's just a piece of paper. And the end result was to combine those two...find a way of combining those two approaches in a single judgment. And that was where the collegial way of working played itself out quite wonderfully. Around the table, then sometimes going into each other's offices

and chambers. We're using email by then, and just building up bit by bit, slowly, a sense of how we can interpret the constitutionally protected provisions in a way that doesn't exaggerate the role of the courts, and get them to do the things that belong to the administration, the executive carrying out laws passed by Parliament. But at the same time, to acknowledge that there are certain circumstances where the need is so dire, the human dignity is being undermined in such an intolerable fashion that the court must intervene. And we ended up focusing on the duty of the State to take reasonable legislative and other measures progressively to realise the right within its available resources. The word 'reasonable' was what I call the lever...Archimedes said, give me a lever and I can lift the world. And in a court case you need a lever, you need a hook, you need an angle, or pivot, on which you balance your basic argument. And we found the concept of 'reasonable measures' gave a large discretion to government to decide the best way to spend money on these purposes. But if government behaved in a way that went outside of what's reasonable, that is, in exercising its legitimate discretion, it went outside of the limits of reasonableness, then the court could intervene. And what we held was unreasonable in Mrs.Grootboom's case was the fact that a very excellent, apparently excellent Housing Act and housing programme, made no provision for people in circumstances of dire distress, with no emergency programme at all for victims of fire and flood and eviction. And so the programme was unreasonable because of its under-inclusiveness. The basis of the judgment was not the state's conduct towards her, but the failure of the state to develop a programme to deal with people in her situation. And that became the foundation for our jurisprudence on social and economic rights. Zac Yacoob wrote a very powerful judgment. We all fed in themes and ideas, and that's another advantage of the collegial way of working. You don't need ten different judgments, when everybody can feed in. It's only if you've got something that can't be incorporated, because it belongs to a different realm of thought, or relies on a distinctly different argument because you actually disagree with the reasoning, even though you agree with the outcome, then you write a separate concurrence.

The *Treatment Action Campaign* case evoked huge international and local interest. Lots of journalists there. I've written about this. I won't repeat what I said, just mention that the court was packed with people wearing t-shirts saying HIV Positive, men, women, black, brown, white, young, old, everybody there. Arthur announced that Nevirapine could not reasonably be withheld from women in all State hospitals, if there was informed consent. The drug was safe, it was being provided free, the doctors could only prescribe it if there was informed consent. And after we filed out of the Court, cheering broke out and I felt very emotional, and I've described this, the judge who cried. I cried not just because of the weight of HIV in our country, but to think that I belonged to a court that could defend basic rights in this way. It was just overwhelming, a very subjective, powerful, personal emotion.

A couple of years passed, we've now moved to the new building, which I'll describe in a separate portion of this interview, and Arthur asks me to take care of the *Port Elizabeth Municipality versus Various Occupiers* case. And I read the

judgment of the Supreme Court of Appeal, which had overturned an eviction order granted in the High Court, and I'm worried, I'm seriously worried. Something like fifteen African families are living in shacks on vacant land, owned by white people, close to a very salubrious suburb in which the white people were living. The owners of the land go to the council and say, please get them out, people can't just come and put up their shacks on our land. And the court agrees, orders an eviction. The Supreme Court of Appeal overturns the decision but on what appeared to me rather unconvincing factual grounds. The families are told they can move to Walmer. It's not established that Walmer is, what we used to call a location, no evidence is given about it, and so on. And I'm really worried. If we can't uphold the Supreme Court of Appeal decision, then we have to restore the eviction order. And it provoked a sense of crisis in me. I've taken an oath, without fear, favour or prejudice to uphold the law in the Constitution, and the law says, you can't put your shack, or your tent, or whatever it is, your Jacuzzi, on somebody else's land. It's an arbitrary deprivation of their right to property. But I, Albie, I can't put my pen to an order commanding that they leave. It's I, Albie, with my whole life history, with what got me onto the court, with a Constitution that I was one of hundreds of people who helped to draft, I can't do it. And I must seriously consider resigning. And I was thinking of speaking to Arthur about it. And then I started working on it, and I found I was able to convert what was a purely personal dilemma into a legal dilemma. Because the Constitution that prevented people from arbitrarily erecting their shacks on someone else's land, the same Constitution protected the right of everybody not to be evicted from their homes, except by a court that took account of all circumstances, bearing in mind that everyone has the right of access to adequate housing. And that enabled me to reconfigure the whole presentation of the issue, not as a limitation on the rights of ownership, but as a clash between two competing rights, each with historical origins and geneses with social dimensions. And I remember Arthur and Lorraine went to New York for Arthur's sabbatical. I think he was teaching at Columbia then. And I sent him the draft that I'd prepared. And maybe the draft was particularly powerful because I'd had that dilemma, and I had to confront the issues in quite a deep way. It reminded me of the Mozambican artist, Malangatana, who said the best mural he did was on a very rough wall where the brush had to fight against the roughness of the wall, and it forced him not to use glib, easy strokes; he had to force the brush onto the wall in every stroke. And so I had to locate the whole issue of how the court should decide what was just and equitable, in terms of the history of our country, and why some people had nowhere to put up their homes, the meaning of a home, while other people had spare land that they didn't need immediately, otherwise they would have built on it or farmed on it. And I found myself saying that when we live in a country where so many people, like the occupiers, are living without secure shelter anywhere, it's an assault not just on their dignity but on our dignity, but on the dignity of everybody, because we're all part of one country, one community. And that's where the theme of uBuntu comes in, the interdependence of all human beings in the same broad polity. And so it's a judgment that was picked up by Drucilla Cornell, whose passion is uBuntu, and so she makes quite sure that that portion of the judgment is well promoted. But it was a very interesting experience for me in writing it, because there I was able to fuse the technical, the historical, the emotional in what seemed to me a fairly seamless way. And when I sent a draft to Arthur, I got the most wonderful

response from him and he said, you know, he showed it to Lorraine who used to teach English literature, as a beautiful example of expression. So it was a very generous response from him. And I got a lot of support from him in terms of my style of writing, once we'd got through that earlier period, and maybe I'd found my feet a little bit more.

I think those first couple of years on the court, for any newcomer, are complicated. I do Pilates now and then one of the things is standing on a little, it's like a disc that rotates, and you do both legs at the same time. It's a bit like that, you've got to keep your balance while you're rotating your ankles. And when I met Sonia Sotomayor shortly after she'd been appointed to the US Supreme Court, I just kind of counselled her, you know, to take it easy, not to be in a rush to make her mark. I forgot about that, and when I saw her two or three years later, she said, Albie, thank you so much for that fantastic advice. I didn't even remember I'd given her that advice. But I suppose it was really looking back on my own experience. But it pays to work yourself in. If you're too quiet and demure, then you don't learn what your voice is because you're never using it. But one doesn't have to be in a hurry. And even though you see this case going by that's got so much in it that you want to talk about, there'll be other cases.

Int Albie, I would hardly call you demure, but I wondered what it must be like, because you've made this comment to me once about somehow always being the dissenting voice, or the lone voice, and I wondered whether that had been your experience in those first few years maybe, in particular?

AS No, I was more often an alone voice rather than a dissenting one. Alone often in the sense of concurring but for different reasons. To start with capital punishment where I broke ranks. It came out in the sodomy case. And even in the *Mhlungu* case I had a totally different rationale from the others. So it happened fairly often. Then, in cases that came in almost in a cluster, I wasn't completely alone, but a dissenting voice that got quite a lot of support. The one was *Bel Porto*, where Yvonne Mokgoro and I, went against a decision of Arthur's, dealing with an aspect of administrative law in education. And in respect of both the outcome and the approach, we felt Arthur's approach was too cautious. And it just involved different ways of viewing administrative law. I think the court, including Arthur, came around to our point of view afterwards, without expressly saying so. And all these cases are a bit fact-sensitive and contextualised.

But not long afterwards we had the case of *Enver Prince*, the Rastafari, and I think that produced the most emotion of any case that we've had in the court. And the ultimate decision, I think, went five-four, for upholding the refusal of the State to grant any form of religious exemption to Rastafari people for smoking marijuana. It's the one case where I felt maybe if certain judges hadn't been on leave, the outcome might have been different. The only time I've actually felt that, but that's not really relevant. And I'm not sure why it evoked such strong feeling. Freud speaks about the narcissism of minor differences, that people who

are very close to each other, when they disagree, it can come out in very exaggerated forms. And he fought like hell with Jung and with his own disciples, far more viciously than he would fight with people who denied psychoanalysis altogether. And so the sharpness might have come about because we were all so close. Probably all the members of the court would have been comfortable with the State itself carving out an exemption. So it wasn't as though there was an intrinsic hostility to the idea of the Rastafari smoking marijuana. The real issue was, is it basically a political decision for the legislature, pure and simple, or is there a violation of a fundamental right that can't be justified? And the narrow majority said, it can be justified, there's no way in which you can meaningfully police even a minor intrusion on the anti-drug laws; in any event, it wouldn't be satisfactory to the Rastafari to give them a limited exemption, they wanted freedom to smoke dagga as part of their religion generally. And I wrote separately, Sandile wrote a powerful judgment separately, and I'm not sure, two other judges came on board with us. I think Yvonne signed on to mine and Tholie Madala on to Sandile's. We even fought over the press summary... we had to change the rules for our press summaries afterwards. Some of the majority group were extremely annoyed when the Star published much of my judgment in a full page, and gave almost no mention to their arguments, thinking that the editor obviously had his own personal motives for doing that. It was actually a bit unpleasant, and we had to take steps afterwards to ensure that somehow the intensity of our disagreements on legal questions shouldn't give rise to any acrimony and certainly should not be reflected in the way we drafted press summaries. So that was another case of disagreement. The smoke of disagreement cleared very quickly afterwards, by the way.

Then we had the *Jordan* case...well certainly these are the cases of the marginal in society, and of how to approach prostitution/sex work, we couldn't even agree on the language. The Sexual Offences Act had been struck down by a High Court judge on the basis that it violated rights to privacy. What you do with your body, and if you get money for it, is your business, and the State can't intervene. The judge asked: what if you don't get money, you get a box of chocolates, or you're taken out to the opera? The class thing came through quite strongly there. His approach was rejected by the court. It was one of the areas where I found that the values of an open democratic society went against my own intuitions. I don't think that prostitution is something good at all. I think it's bad, it's nasty, it's unfortunate, it's unpleasant, it has a huge anti-feminist bias in terms of its operation, its history. At the same time, I think it's important to hear the voices of women who become prostitutes/sex workers. And one has to think of what are the best ways of intervening. There are lots of things in our society that are not good. But you don't use the criminal law to deal with them.

And we got very strong arguments from different feminist groups that were completely opposed to each other. A feminist group in the United States, that I think tracks issues like this around the world, and then intervenes with affidavits, strongly fought for upholding the laws that criminalised prostitution. The South African feminists, and particularly SWEAT, (*Sex Worker Education and Advocacy Taskforce*), strongly denounced the use of the criminal law to deal with sex work. And they got the support of the Human Rights Commission. So

here were two feminist views in total collision. In the end I teamed up with Kate O'Regan, and we wrote a judgment dealing with the equality dimension, basically bringing out the double standards, in the sense that the women were being punished because men were hiring women for sex. The majority on the Court countered by saying the statute is gender neutral but, then we said, in practice it's only women who are prosecuted. Well that's that fault of the prosecution, they answered, not of the law, and then we said, when people speak of prostitutes they always mean women, and if it's a man, they say, a male prostitute. The adjective is added to identify something different from the norm. And then the majority responded by saying, well, the men can be found guilty of being co-conspirators, and our technical answer was, that then the men would not be regarded as the principal persons breaking the law. And the hidden undercurrent and powerful subtext of the law is that it's the women who are responsible, who lead these poor red-blooded men in to temptation. And I've never understood supply side and demand side economics, but here it's the supply that's seen to be at fault, not the demand. The unfairness of imposing the primary culpability on the women tracked general inequalities based on gender in our society.

The women law clerks were furious when their judges didn't agree with Kate and myself. It's the only time I've heard of clerks actually going against their judges...generally they might disagree, but not be angry. In this case they were angry. So we had a cluster of cases all involving that kind of marginal area of society. And what I suspect is that the majority in both those cases felt, you know, Albie and Kate, they might be right in their approach, but they're not clearly right. This is better left to Parliament. We're picking up enough cases that are very sensitive in the public domain and we're taking a strong stand, capital punishment, sexual orientation; we don't need to come out as being soft on prostitution and soft on drugs as well. And I would suspect that would be part of the background, you know, the sort of judgment about judgment in closely-balanced cases.

So those were difficult cases. The sense of feeling alone was not just on outcome, it was on envisaging the whole role of the judge and the manner in which you tell the story. It's not easy to describe the alone-ness, the solitary-ness, you feel as a judge. The setting is collegial; colleagues are convivial; you have an entourage of secretaries and clerks. Yet your conscience is your own, and yours alone, and your words come from your mouth and your pen alone. You pronounce, and the words are there forever. Yours. For the world, affecting the lives of people, the values of your society. And it wasn't as though I was choosing deliberately a certain style of argument just to tell the story in a certain way, to make a special point. That was the way the story came to me. Colleagues began to refer to an Albie-style judgment. I worked very hard at accessibility. I always imagined a whole range of readers, and I would sometimes read pieces by other judges, you had to plough through so much before you got to anything interesting in them, and you give up before you get there. I would deliberately go for forceful, scene-setting openings, and strong finalizing statements. This methodology seeped increasingly into all our judgments. These were style and formatting choices, consciously followed

through. But more important was to find a way of giving the actual reasons for my decision. Sometimes I'd be asked, Albie, will you do an opener, will you do a conclusion? I was very happy to do that, it brought me closer to my colleagues.

What concerned me more deeply was something else related to the judicial role. It was just the feeling that the way I envisaged these issues was broader, more contextualised, more... For example, I used the term permeability of rights. And it was actually ridiculed by Jeremy Gauntlett, one phrase I used, a sentence I used, as an example of unnecessarily obscure writing. And it might be that having been a law teacher for a long time, practised at the Bar, travelled around, written books, become interested in psychology, sociology, architecture, and all the rest, quite naturally different ingredients infused themselves into my thinking as a judge. It might just be. And the price of it was a certain sense of isolation. But it was coupled with an intense feeling of collegiality and warmth. I mean, just this morning I was with Chief Justice Mogoeng, just to say hello, and it was wonderful, you know, the embrace. We had never sat together. But the warmth was very, very real.

Int Albie, I'm aware that you have another interview.

AS Oh. Yes.

Int So we could stop at this point and then pick up tomorrow. Thank you so much.

**Interview Two : 16<sup>th</sup> November 2011**

Int Albie, we meet again. Yesterday we spoke about..., we left off at the point where we were talking about you being, perhaps not a dissenting but a lone voice. And I started the interview by asking you the question about difference and belonging, and key points at which you have felt a notion of difference and belonging....And I wondered whether you could talk about being the lone voice and the reason that marginal issues have gripped you so much?

AS I don't quite recognise the description of marginalised and lone voice. It's a different feeling, it's a feeling of being alone on the court, and I think every single judge feels that. When I think of my colleagues, there are moments in their behaviour where you can see that they actually feel isolated from their colleagues, who are sitting right next to them, all engaging in debate and discussion, and I think it's something to do with the judicial conscience. In the end, although you're part of a team, and you're trying to achieve a consensus, in the end you're answerable to your conscience, to your sense of right and wrong in a particular situation. It's a lonely decision-making process, and sometimes you stand up and you think, gosh, it's just me, and there are ten of them, people I respect and love and admire, who are clever and progressive, and have just everything you want in a judge, they all think this, but I just think differently. And you feel very alone at that moment. It's not as though one's dealing with a court that's made up of conservative, reactionary, rigid, dogmatic people, and you are holding the torch of freedom all on your own. This could happen in other countries. It's nothing to do with that.

It's a kind of existential experience that I think all judges have, and I've seen manifestations at certain moments...I remember our meetings—at least four of us cried at meetings, with different forms of emotion. At least one of us stormed out of meetings a couple of times. Another stormed out also a couple of times. Remember, we are very controlled people. We all believe in the power of debate, of reasoned argument. So it's shocking, distressing to feel a colleague explode; or implode. So it's sometimes, it's very intense work, and it's quite emotional in its own way. It's emotional about ideas. And sometimes you feel very solitary, maybe solitary is the right word. Solitary in a very embracing context and a very supportive context because we were exceptionally helpful to each other, yes, even when we were commenting at the end of reading through...we call it a read-through, of all the judgments before they're delivered publicly, to check on correctness of citations, on language, on grammar, sometimes even on how well a thought has been expressed, we would read through the judgments of colleagues who disagreed with us, and we would tell them how we think they can strengthen their judgments that criticised ours. So and so, I think your judgment would be stronger against mine if you put it this way or that way. A sense of collegiality that went beyond the emotions that there might be, that might arise out of difference of opinion. Because what truly matters is the quality of the product that comes from the institution of the court. So in that sense, the collegiality was very strong, the sense of embrace, of

honest discussion, of dialogue that's intended to be helpful always, was always there.

But there are moments when "it's me, it's me, oh lord," you're on your own. And you've got to make up your mind yourself, and you can feel very, very alone. And I just have recollections of...I won't mention any names, but moments when I just saw colleagues of mine also feeling very isolated, sometimes showing distress in different ways.

In my case, what intensified a little bit that sense of being alone, not marginalised...marginalised means people are pushing you aside ...rather, standing aside a little bit, myself within the collective, at times with a different vision, a different way of locating the issue. At times a different mode of expression. Not the standard language of the law but a language that came out, just expressed itself, that is the language that expresses what I'm thinking about this case, and should I hold back from expressing in that way, should I tell it in my own way? And I suppose as the years go by, I get a little more adept at kind of almost sneaking in those special phrases that I want to be there, because they capture exactly what it is I want to say. But also my colleagues, they get more used to seeing a variety of modes of expression including mine. And some even adopt styles a little bit similar to mine. So it is a process, getting from a position where one can see your mode of expression is very different from that of your colleagues, where you don't have to sign your judgment, everybody can say, that's an Albie judgment, to reach perhaps a more mature way of expressing things, including everything I want to say but making, not concessions to, but adopting a kind of formatting and style that is more familiar, and with which colleagues might be more comfortable, maybe one can, going through the judgments, one can see that process having taken place.

I'd like to mention a case that, looking back, I find very interesting in retrospect, where I was alone, and I called in the aid of colleagues to help me deal with that, and that was the case that laid down the foundations of our constitutional approach to equality, *Prinsloo v. VanderLinde*. We in fact had two equality cases that came to the Court at much the same time. And my purpose in telling this is not to explain the reasoning but to explain how we come to a certain kind of a reasoning, show the process of discovery and explanation of what we thought the right thing was. And they both dealt with equality.

Equality is the first of the substantive clauses in our Bill of Rights. And it has to be. This is the post-apartheid Constitution. Other Constitutions start with the right to life, or the right to dignity. We start with the right to equality. Given the way in which people were separated, divided, kept apart, and oppressed in South Africa before, clearly the equality clause is going to be central.

What's meant by equality? If you look at the history of judicial functioning, there are centuries of decisions on freedom, on liberty. Equality jurisprudence is relatively new, and it starts effectively with the American Civil War and the

Amendments in the late middle part of the nineteenth century. And it's a rather disastrous jurisprudence because it adheres to the notion of separate but equal, segregation's OK. And then the American law follows its own trajectory, with *Brown and Board of Education*, being one of the great landmark decisions of any court in anywhere in the world, striking down segregation as being inherently a denial of equal protection because it's stigmatising a group and keeping them apart. But then American law on equality goes all over the place, with some judges supporting affirmative action, and others striking it down. The majority position today in the U.S. Supreme Court is to strike down corrective action undertaken to overcome systemic structures of inequality, as being race-based and therefore violatory of equal protection.

Where do we go in South Africa, what does equality mean for us? I'm given a case that it couldn't have been less emotionally-charged than if you had tried. It's about the distinction between the duties of landowners in fire-control zones, compared to those in non-fire-control zones. And the duties are different, with certain different consequences, is that a denial of equality and of equal protection? At the same time, we have another case, heard a couple of months apart, of a Mr. Hugo, who's sitting in prison, the President has made a clemency announcement, the new President, new hope for people, it's quite frequently done, you let people out of prison: all disabled people in prison, people under a certain age, and mothers of children under twelve, are entitled to be released, provided they're not guilty of crimes of violence. And Mr. Hugo says: I'm a father of a child under twelve, and it's unfair discrimination against me because I'm not a mother, on grounds of my gender. That is a case that is dealing with the kind of equality issues, that we're familiar with.

I'm given the fire-control zone one. The Hugo case is in the background. And I do a huge amount of research on equal protection, and look primarily to decisions of the United States of America, the original home of equal protection. The judges are going all over the place. I look to Canadian decisions, going in a different direction. I look to Indian jurisprudence. And each one has its own vocabulary and points of reference and formulations. And I'm trying to find what's common...what can I extract from the fruit salad of cases? I come to the conclusion that there are two basic approaches to equality. Nobody is spelling this out in the decisions themselves, or in the legal literature.

The conclusion I draw is twofold: under one approach equality means you treat all people in like situations in the same way, unless there's a very good, indeed compelling reason for not doing so. And that's the instrumental, practical approach to equality applied very strongly in different contexts in different countries. The other is the human rights approach to equality. This is totally different. It's not looking to people being treated alike in like situations. It's looking to history, it's looking to how people live, it's looking to what it means to belong to a certain group. Who are the groups that historically have been disadvantaged, because they are...and it might be black, or because they are female, or because they are gay, or because they are disabled, or because they can't speak a certain language, or because of their birth or whatever. And

depending on your starting-off point, your base, you develop a whole different methodology of responding to the question. The objective is not to treat everybody the same way, in spite of their differences, using the norms and standards of the dominant groups as the basis for sameness of treatment. It is to treat everyone with the same concern and respect, which means removing the barriers that prevent people from the disadvantaged groups from expressing their full humanity. I haven't reasoned it all out yet in my mind at that stage, but I'm aware there's a difference between the purely practical approach based on rationality, and the human rights approach based on humanity.

So I've clarified that roughly in my mind, but I'm still not quite sure. Why do I think that the human rights approach, has to be the South African one? I ask myself: Why is equality placed first in our Bill of Rights? Primarily because of apartheid. And we all know it and we all respond to it. But also, because of patriarchy and sexual oppression, male domination; very powerful, everybody knows that. And one knows the other forms of marginalising people because of their language, we are very sensitive in South Africa to those issues. That's why we have an equality clause. It's not in the Constitution to deal with fire-control zones and non-fire-control zones, where you need other principles to decide whether the differentiation is permissible or not. But then, okay, if that's our starting off point, where do you go from there? Remember, we are dealing with newly formulated text, with no local precedent to guide us.

Then I was serendipitously invited to a conference in Canada of the Canadian Judicial Institute. One of their big judges' conferences, and this would have been towards the end of the twentieth century, looking forward to justice in the twenty-first century. I prepare to give my presentation, with a whole lot of themes taken from South Africa and the world. And then I listen to the other presentations, and they have a session on equality, and a Professor Lynn Smith is looking at Canadian jurisprudence on equality, and she says, there are four different approaches: the one supported by four judges of their Supreme Court, another approach supported by two, another by two, and there's one lonely dissenter right at the end. Lynn Smith summarises those different approaches. And the first three are fairly technical and precise but different in their formulations. All are based broadly on the human rights approach, but spelt out differently. The last one is by Justice Claire L'Heureux-Dubé, who says equality is concerned with people not being treated in a disadvantageous way, in a manner in which their dignity as human beings is being reduced because they belong to a particular group. And she puts a strong emphasis on human dignity being assailed because you happen to belong to a particular group. I think, gosh, you know, that fits in so well with the South African situation. These other more precise and rule-based approaches just somehow seem to be too artificial, too formulaic, to capture the essence, the core values, of the post-apartheid society envisaged by our Constitution.

I come back to South Africa and I'm starting to write up the case and I can do the introduction quite easily... "Much of South Africa is tinder dry," that's an Albie opening, and then deal with the threat of fires coming and causing enormous

damage, and this context that the Act was passed, and the question is, do the challenged provisions violate the Equal Protection Clause, the equality principle? And I start writing it up and I know this is going to be of momentous significance, our first full-frontal confrontation with what is meant by equality. I'm feeling a bit uncomfortable, I can't just sit and try to jot down all that stuff going through my particular mind to lay the foundation for our country's equality jurisprudence. It's got to be something that's coming from the whole Court. At least the Court's got to have something carefully worked through. So I'm not sure what the actual process was, but I ended up asking Laurie Ackermann and Kate O'Regan to come on board. Kate, because she'd worked on gender equality, and Laurie because he was such a clear thinker and so architectural in his vision. And I had a draft, and presented it to Laurie and Kate for their comments.

Basically I was saying that all legislation is about classifications that differentiate between people. Legislation always draws the line, they don't treat everybody the same. So, you can't drive if you have more than a certain amount of alcohol in your blood. Or you can't vote if below the age limits. People owning property of a certain value will pay rates at a certain level. Line-drawing, distinguishing between people, is of the very nature of ordinary legislation. The court will only interfere on the equal protection basis if the distinction is so arbitrary as not to have any rational foundation at all. For the rest, differential treatment is a discretionary matter for the legislature. Equal protection is not about the fairness of treating land-owners in fire-controlled zones differently from those in non fire-controlled zones.

On the other hand, when the differentiation assails your human dignity because you happen to belong to a particular group, then it's presumptively unfair unless you can show that there is a justification for it. So I'm making a broad distinction between the two approaches. Laurie afterwards said, not kindly at all, but maybe accurately, that when reading my notes he felt like the professor in *Pygmalion*, so I would have been the illiterate Cockney, and he would have been Professor Higgins. Whatever the reality, I can see that the ultimate line of reasoning was consistent with what I had been saying, but he gave the presentation, and quite a lot of the language, an architectural strength and solidity that it didn't have before. Most important, as I recall, what all of us agreed on, the three of us at that stage, and then the whole Court, was that Claire L'Heureux-Dubé's lonely voice captured best the animating principle underlying our constitutional provisions. It avoided a formula, a principle or rule of the kind that lawyers like because they think it gives you predictability. But the deeper principle, embracing values and context, has more guiding, explanatory force than any formulaic rule. The foundation of the equality enquiry is the journey to discover whether your human dignity is being invaded because of your actual or perceived connection with a particular group. All the invidious stereotyping comes from that. We quoted directly from her. And that became foundational to our equality jurisprudence.

I mention this partly to illustrate the processes involved in which one arrives at a certain jurisprudential conclusion. It doesn't explain the actual content of the

decision at all. The words are there and have their meaning for people to read and interpret.

But I also tell this story to emphasise the importance of international exchange of ideas. Maybe our Court, more than any other court in the world, drew on international legal experience. And there was one very...two very good reasons for it. The one reason, strong for me, is that democratic South Africa was a product of international, universalist principles of human rights, challenging notions of racial exclusion and South African exceptionalism. The role of the United Nations was very powerful, the Organisation of African Unity played a very big part, so the international dimension was right at the very heart of the constitutional project. The other is, when you are starting off a brand new court that can't rely on the jurisprudence of the judges in the apartheid era, you can't take a bit from here and a bit from there where it's useful, you need a point of reference, a counter-point, a sounding board, outside of just your own thinking and outside of the actual text. And you're saying, what are thoughtful, forward-looking, value-sensitive judges in other parts of the world, what are they saying about these issues? We are required by our Constitution to apply international law. And that would come through many international instruments, and we do that directly. And we are also expressly permitted to have recourse to foreign law and foreign judgments. Further, when applying the Bill of Rights we are required to uphold the spirit and purport of the values of an open democratic society based on human dignity, equality, freedom. So it's written into our Constitution that we refer to open and democratic societies. That doesn't mean copying the United States or Germany or Sweden, or India; you're not using a particular country as a model. You're extracting values that are somehow common to all of them, to international instruments, to forward-looking thinking, to value-driven judges. Many of us have been attending conferences, maybe as part of the anti-apartheid struggle, now it's the post-apartheid democratic era, we're speaking, we're rehearsing what people are saying. We're not looking for people to point a finger and say, you must do this, that and the other. We try to extract those broad fundamental values, compatible with what our Constitution's requiring of us. In the early years of the Court, we drew very heavily on international jurisprudence, and enriched our thinking by taking part in debates at international conferences.

I should mention that I did a huge amount of travelling while I was on the Court. During recess, I would frequently go and teach in the United States at different law schools, imparting South African experience, and getting access to the libraries, coming back with masses and masses of photocopied documents. But I would also bring back ideas from debates, I would attend seminars, I would meet different people. At a later stage I met judges of the U.S. Supreme Court. Judges in other courts as well. I also went to Canada very, very often, and I found a particular sense of...not symmetry, rather affinity, a Charter of Rights from the early 1980s, a modern document and a very thoughtful court, not divided on heavily ideological lines as was the United States Supreme Court. Tackling and dealing with issues often very similar to our issues, in an erudite but also readable and accessible way. But it wasn't simply reading the judgments, you wouldn't have to leave South Africa to do that. It's meeting judges, and speaking

to people. Claire L'Heureux-Dubé, as it turned out, became a great friend, and she twice involved me in missions of hers put on by the Canadian Justice Institute ...the one was in Sri Lanka, and it was to sensitise male judges on the importance of issues of gender. And a year or two years later the same in Nepal. I've since been back to Sri Lanka, I tried to share South African experience of achieving peace when it seemed impossible. I got a very good hearing. Many others went from South Africa as well. Sadly, in the end, it was war that decided the issue, and their problems still seem to remain. I went to Nepal fairly recently, doing the same thing. I went to Northern Ireland many times. And there was great receptivity. The Sinn Féin people contacted South Africans and were particularly eager to hear about how it's possible to transform an armed struggle into political struggle. And that created a very favourable setting to speak about South African experience, particularly in having a Bill of Rights in a divided society, the role the Bill of Rights, can play. And there I think sharing South African experience was very positive. And the knowledge that you have a court able to make the ultimate determinations, not the political branches of government, I think was quite useful there, even though they never adopted a Bill of Rights.

I went to Guyana. Again, a very divided society, sharing experiences, I don't think my being there altered things one way or the other at all, but it was certainly very interesting for me to be there. A moving and difficult visit to Angola, speaking in Parliament to all political groupings. And then recently, twice this year, I've been to Cairo, in the period of the Arab Spring. And the people are just soaking up our experience, how we dealt with the conflicts. The role of Constitution making and the Constitution, and the implementation of a Constitution through a Constitutional Court. I frequently mention the story of Nelson Mandela accepting the decision of the court. Here is this person of enormous prestige, and the court says, in effect Mr President, you acted in a way that violates the Constitution, and we so declare. And the President accepting, it's my duty, as President, to accept your rulings. And emerging with almost elevated prestige because he's part of that whole project, the constitutional project in the society. And I'll be going, a week from today, to Tunis, and hopefully...and these are people from the whole region, mainly from Libya and Tunisia and Egypt, discussing how to transform their societies through constitutional and legal methods.

I know that many of my colleagues have travelled abroad to speak, to teach, to bring back ideas and materials. And that sense of being part and parcel of worldwide jurisprudence, no longer being a universal recipient of legal ideas, which used to be the condition before, when some of the more broad-minded judges on the South African Bench would import what they thought were learned and progressive rulings from the House of Lords in England, maybe from the United States, maybe from Australia. Now we receive from everywhere and we give to everywhere. And many decisions of our court and passages from decisions are quoted in many, many jurisdictions.

Int Albie...I wondered how you feel being a judge, having this enormous sense of power, and in a way not really concerned about government and their power? And how does that sense of power sit with you?

AS When I take people on a tour of the Court, and we sit in the foyer and they look up and they see the beautiful columns and the mosaics and the light streaming in, and cheerful colours on the chairs and so on, I say, do you feel you're in a court? And they say, no. And I say, why? They say, it's too bright, it's too beautiful, it's too friendly. And then I say, why shouldn't a court be bright, beautiful and friendly, particularly a court that doesn't express power but a court that restrains power.

Some people argue that there's no difference between the two, expressing and restraining power. There is a difference. You are not intervening in ways that end up compelling the State to lock people up, to execute people maybe, to take property away. You are working on the validity of laws and of State conduct. It's a different mindset. I was a prosecutor for one week only in my life. I didn't enjoy it at all. I've never been a judge sitting in an ordinary court. I'm not sure how I would have been if I was required to send people to jail, or say who should get custody of a child. I was used to being the lawyer for the defence. But when you're on a Constitutional Court, you don't have those dilemmas. So that's part of the psychological side. The other is the feeling that you are working in terms of this Constitution, our lives were invested in that Constitution. It represents our values. And you owe a loyalty and a duty to your life and to those who died and to everybody who contributed to achieving that particular document. That's also part of it. At the same time, we are very sensitive to the fact that every time we make a declaration against government, it will cause distress. Just as every time we refuse to make a declaration against government, it causes distress to others. They feel they're being wrongly treated and the challenged law shouldn't have been upheld.

Yes, the powers given to the court are not either/or. It's true that if a case is brought to us and the invalidity is shown, inconsistency with the Constitution, we don't have a discretion. We can't say, well, you know, the consequences will be too bad, and it's only a teeny weeny little violation, we're going to disregard it. We can't do that. We are obliged to declare unconstitutionality. But then we are given the power to suspend the operation of the declaration of invalidity for a period sufficient to enable the defect to be corrected. And so we will say to government, how much time do you need? What are the problems? And we'll discuss it, we'll get evidence, and we spent a lot of our time on orders. Maybe a third of our judgments and maybe twenty percent of our time, is pent on what's the best order in the circumstances.

We are also given the power to make an order that is just and equitable. And we always balance out the needs of government, of Parliament, the pressure on the legislature, on the one hand, as against the urgency of the new constitutional measure coming into force, as against upholding certain basic rights on the other.

So it's not a brutal conflict and it would be false to see the separation of powers as involving three hermetic spheres, the executive, the legislature, and the judiciary, each fighting for total control of its own domain. It's very much conversational, very much dialogic.

One example of this, a little example, would be, when it came to the Nevirapine case. The Court declared that it was unconstitutional for the Department of Health to restrict the provision of Nevirapine in the state sector to two sites in each of the nine provinces. Instead it was obliged to make it available generally, given that it was safe and had been provided free and the doctors supervised the whole thing. We said that the limited distribution to two sites was unconstitutional. And we stopped at that, although we were being urged by the applicants to order government to report back within six months on what they were doing to roll out the ARVs. And we said, no. We simply declared unconstitutionality, and we left it to government to take the appropriate action. If they didn't, people of course could always come back to court. We gave our reasons. In fact, the drug was made available, and South Africa now has the most comprehensive ARV programme in the world. So it's not a stance of opposition. When it comes to enforcing social and economic rights, generally the test we use is the reasonableness of measures, and in deciding on whether a measure is reasonable, we give very great discretion to the superior knowledge and understanding and the importance of policy decision-making by government. A wide discretion, provided that that discretion is exercised within the limits of reasonableness. If not we will step in. There are many other areas where acknowledgment is given to the superior aptitude of government to suss out the situation, to decide on resources, coupled with their broad accountability to Parliament, or to the electorate: it means that we don't intervene. That's built into the nature of jurisprudence. But...but if there's a clear stepping beyond the limits of constitutionality, then we do intervene, even if it does involve questions of policy, and even if it does cause distress to government.

Int Albie, much has been made about the *Grootboom* case in particular, the fact that the Court handed down this fantastic ruling in favour of Mrs Grootboom, but in fact those socio-economic needs weren't actualised, certainly not in her lifetime. And I wondered whether you could give your position on that?

AS Yes. Mrs Grootboom died about ten years after the judgment, just before she was able to move into her new brick house. But she had been given temporary accommodation, in terms of the court order. And it must be remembered that the Court didn't order that Mrs Grootboom get a house. That wasn't the order. The Court said there had to be general programmes in place for people in crisis emergency situations. As far as I know, the government has in fact taken measures like that, and if they haven't, you can challenge it on case-by-case basis. So there was compliance. It wasn't a failure of compliance. The State said, in fact, she was going to get a house, she was actually right in line to get a house the very next month. It's a doubly sad case because I believe her death was connected with HIV, which is such a serious affliction, especially for the

poor in this country. Do we still have a huge housing problem? Yes, an enormous one. But something like two million brick homes have been given free to people. That could be ten million people moving from shacks to brick homes. It's not only brick homes, they get water, electricity, sewage. The places don't burn down like shack-land burns down every year. So it's been tremendous by international standards. But what her case did was to say, you have to look at each individual situation in its context. It placed the needs of people like Mrs. Grootboom at the centre of the constitutional enquiry. It required the state to act with candour rather than secrecy, and to act reasonably. It became the foundation for our decisions on evictions generally, and laid the basis for the *Port Elizabeth Municipality* case, which I've dealt with earlier on in my interview. And then—a phrase that I used in passing in that case that day was picked up by Justice Zac Yacoob in the Olivia flats case, and given central operational importance, namely meaningful engagement. And meaningful engagement has now become central to the jurisprudence on evictions. And it gives a very strong and proactive role to the homeless poor, they are not just the objects of litigation, they now participate actively in finding solutions. It also requires local authorities to engage with individuals, with real people, and not with just an anonymous mass of 'unlawful occupiers'. And it's helped to humanise...this is what the commentators are saying, and certainly what I believe...in quite a profound way, the manner in which evictions are dealt with.

Int I also wondered, Albie, in terms of your having had a history which was very closely aligned with the ANC's mandate, I wondered what it's been like for you; your experience on the Bench, where you sometimes had to go directly against government and their decision?

AS It wasn't difficult at all. I took an oath to uphold the law and the Constitution without fear, favour or prejudice. But it wasn't just 'the' Constitution, 'the' law, it was 'our' Constitution. And I'd spent my life in the ANC fighting for a constitution like that. This represented the culmination of our endeavours. So it wasn't as though I was once a freedom fighter and now I'm in power, and I'm up there and I turn my back on everything we were fighting for. On the contrary, it's a continuation of our project in the context of the new society and the collegial way that we worked on the court. So that's number one.

Number two, I would say to myself, well, you know, the ANC were probably the main movers in establishing these standards, maybe they're kicking themselves, but they established these standards and they should be proud that they're being held to the very standards that they helped to set.

And then, I suppose number three, it's in the very nature of living in a constitutional state, certainly Nelson Mandela helped the whole country and the world when he accepted our ruling against him. The government and the ANC and the central authorities were directly involved, so was the Premier of the Western Cape, who brought the case. He was...I'm trying to think of a softer word than vitriolic. I can't. He was vitriolic about the ANC, about the President, and about the Court. He said very rude things about us, that you can't expect

justice from an ANC court. And in fact, though not on the arguments that he had advanced specifically, the Court came down in his favour. But I didn't feel any discomfort in that at all. The Court ruling was complied with. The supremacy of the Constitution was established by the Court and accepted with grace by President Mandela.

There were many other cases where we held for government. Sometimes the ANC as a party was involved, on floor-crossing and elsewhere, and sometimes we held for them, sometimes against them. So it didn't require me even to say, well, that was the good ANC of the old days, and the ANC ain't what it used to be. It had nothing to do with that at all. It was the new role and function that I had voluntarily accepted, enthusiastically accepted, under the Constitution we had fought for, and in pursuit of the humane values that had inspired us. There wasn't a moment when I didn't feel proud to be on the Court and part of its collective endeavour.

Int Albie, Drucilla Cornell has described you as a 'revolutionary judge' about how does a revolutionary become a judge and it's a beautiful article. I wondered whether you could talk about being an activist and being an activist judge?

AS I think many people are political activists and they end up...some end up as fantastic activists in business, and that same energy they had is now applied in a totally different way, maybe for better, maybe for worse. So I don't think being an activist in the struggle is in itself a predictor of where you will be in the post-struggle period. It's not a predictor of how one will be at all.

The things that come through, I would say the two biggest things that I brought with me or to the Court, the one was closeness to and awareness of the importance of the way people can be oppressed, the cruelties people can impose on others, connected with racism, authoritarian power, it's in our bones. And the horror at executions, the horror at any form of detention without trial, arbitrariness, comes from that, that carries through.

And the other is the tradition of collegial working. The Bar, it's a very strange institution, because it has quite a strong ethos, and they would use the word brethren in the days when it was boys only. Yet it's extremely competitive and individualistic. And you're on your own, and you want to outsmart the others, and you put people down with witticism and you prepare traps for them, within certain limits. Well I had that experience, and I wouldn't say it left me without a trace. But I had the experience of working in the underground, in exile, on the national executive and very much with Oliver Tambo and his style of work, and saw the benefits of dialogue and debate and discussion. How enriching it was, how often I could be absolutely certain about something and then listen to somebody else and say, well, maybe I wasn't completely wrong but certainly I missed out on certain things, or I didn't see it from that point of view. And I think I brought quite a lot of that with me onto the Bench.

The writing part, I think that was something in me since high school, and then writing a book about jail, and about my second detention, and then about being blown up. So the uses of language and the experience of using language in an expressive way to communicate thought and feelings, maybe I'd become, I would say, habituated to that. But I couldn't easily shed all elements of creativity, of style, of if you like, judicial passion, for the sake of an apparently completely depersonalised, objective presentation. I couldn't do that. I wrote...I might have said this before...I wrote one judgment...did I say this? I wrote one that was totally technical and boring. Partly to prove to my colleagues that I could, if I really tried hard, I could write a good, boring mainstream-type judgment that no-one could say, Albie wrote it. It happened to involve Kader Asmal, an ANC comrade of mine from old days, who'd become Minister of Education, a close personal friend, and writing for the Court, I struck down a measure that he had introduced, because we objected to the way in which he did it. And he wasn't happy at all, and his face was very, very long after that. And I gave a purely, purely, purely technical judgment, but that required serious effort on my part.

Int Albie, in light of what you've just said, I wondered what it felt like in 2008 being referred to as a counter-revolutionary? Judges were referred to as counter-revolutionary...

AS I was very saddened by that statement. I knew where it came from, and I understood the political background. For a long portion of my life we had had a simplistic view of the State, the instruments of the State were there to maintain the status quo, prevent any major change; in particular, the judiciary was drawn from the sons of the privileged, so even if they came from poorer families they would be socialised into the values of the propertied classes; they'd be defending property, and their most important clients would have been wealthy people, or government; they'd be on the side of power in one way or another. And he was simply articulating that kind of view, in the context of fighting on behalf of a political leader whom he happened to support. So I understood the background. And fortunately the statement wasn't part and parcel of a concerted attack by those in authority to destroy the judiciary. It was very contextual, very related to that situation, and moment.

Nevertheless, I found it distressing, because it was so unrefined and disrespectful. But even more so, because I felt that far from being 'counter-revolutionary' the Constitutional Court was really one of the major instruments on the side of transformation and change in South Africa. Any familiarity with our actual role and functioning and the decisions we had made, picked up all over the world in a way that inspired progressive lawyers in Africa and all continents, showed us to be a court that can be serious about its constitutional mandate, and respectful of constitutional text, and within that framework be imbued with the values of overcoming the disadvantages that the poor, the marginalised, the homeless, all the people who because of their gender or race had been disrespected. Frequently in our judgements we said we were a court for transformation. So it was just plain wrong as an allegation.

But you know, political statements come and go, political personalities come and go, often things are said in the heat of the moment responding to particular situations. So it wasn't deeply distressing in that sense. But I couldn't help in my book, the *Strange Alchemy of Life and Law*, making a little comment on it, because earlier on I'd observed that in 1974 I was quietly teaching law at Southampton University when I discovered I was a terrorist. So I couldn't resist the opportunity to echo in 2009 that I was quietly writing this book when I discovered I was a counter-revolutionary (*laughter*). So maybe it's the prankster in me that remembered something I would otherwise have let pass by altogether.

## ON LEAVING THE COURT

Int Albie, I do want to ask you questions around some of the problems and contradictions inherent in transformation in this country, but I think that's a larger discussion. What I'd like to probably end with is I received a wonderful email the other day from MeleneRossouw, and she spoke very movingly about her time in your chambers, and apparently it was in 2009, and she said it was a very sad and emotional period for all of you. And I wondered whether you could reflect on that and what it meant for you to actually have to leave the court? Because fifteen years for you have flown by, as you said...

AS Yes. I thought it would be on midnight the 12<sup>th</sup> of October, 2009, that we would expire as judges. And I got it wrong by one day. It was midnight on October 11—lawyers count the first day, they don't count the last day. And round about then, I think it was on the last Friday, we had a farewell at the court, it was very well attended, quite a few former law clerks were there. We had something like nine farewells, so we had to say a farewell to the farewells. And this was the one now in the court, the last day we're there, and afterwards the TV cameras came and said: well, Justice Sachs how do you feel about your last day on court, now you're leaving? I said: I don't want to go. No, but how do you feel? I said, I don't want to go. How do you feel? I said, I don't want to go. That's all I could say, like a little child. But that was how I felt. I didn't want to say something philosophical. My legacy, leave it to the others, good people following, dah dahdahdah, that wasn't how I felt. And I thought I would get over it fairly quickly.

Somebody asked me earlier on, how I would adjust to leaving the court, and I said, no, I'm sure just as Archbishop Tutu reinvented himself, I'm sure I'll reinvent myself. Yet in fact I was miserable. The year that followed was at one level a terrific year. I got three honorary degrees, I got a medal in front of President Obama and a visit to the White House, my book was published and did very well and got great reviews. I got other honours and distinctions. But I just felt hollow inside. I think it was a combination of two things. The main one of my whole life since I was seventeen and had sat on a Bench marked non-whites only, had been directly connected with the central issues of the life of the South African nation, and now suddenly I'm not a judge, I'm right out of politics, I've been out since '94. I'm not anywhere. I'm just another person. And I'm not used

to being just another person. I'm used to feeling engaged in a very visceral, central, way with the life of the nation.

Secondly, the feeling of deflation, emptiness, in spite of the honours, must have been related to the sheer intensity of the work that we had been doing. I often equate it to extreme sports. You know, these people climb a mountain and they jump off with a parachute and then slide down the snow... And I felt being on the court in some ways was like an extreme sport. You used your intelligence to the maximum. You pushed and fought hard in your own head and listened to arguments and read, reread and revised, and stated and re-stated positions, and we worked very hard and often after midnight. And I would give maybe false solace to my law clerks, you know, when getting a taxi for them to go home at one in the morning, we're working and working, reworking on something, and tell them about the joy that you get out of doing fantastic work even though you're not required to do it. So it had a physical/existential dimension.

But it also had a soul dimension, a heart dimension. What does it mean to be a human being in this world, the things that you can do, the difference that you can make, the way in which meaning can be given to the craft that you have? It's that inner space that every human being has, relating to the intelligence and the dialogue and all the rest. And it's gone. We had the last judgments to get out and so on, farewells, and then suddenly the adrenaline, the intensity is gone. So taking these two things together affected me, it even affected my driving. I'd be distracted, there was something going on, and I was moaning to everybody about my sad existential state.

Then miraculously after about fifteen months, I noticed a spring getting back in my steps, I don't know what prompted the new energy. Maybe the mourning period was over. I'd been particularly saddened by the Ministry of Justice failing to respond to an offer I had made to develop, with the Ministry, a programme of public education on constitutional rights. And I thought that's a way of continuing with the life I had led. I can't be a judge anymore, but I particularly wanted to reach out to workers, trade unionists, to faith organisations, to community groups. Not just to groups that I often spoke to, business groups and press people, and so on, but to other sections. I didn't expect payment. But it turned out there was nothing doing from the Ministry. I was disappointed.

And what's helped me is precisely what I'm doing now, that's oral history, it's recording our past, it's connecting with the past in a way that's appropriate to the moment, the moment now is to remember, it's to step back a bit, and to ensure that people who want to know what happened can find out how I saw it, how Arthur saw it, how Sandile saw it, how Kate saw it, all the rest, together with all the other people. And we're also working, another group completely, on an oral history of the making of the Constitution. And again that links up with the past. But again it's something appropriate to my situation today. So maybe it was just that a grieving period was needed, and I would have bounced back anyhow.

And the last point is that something I'd kept in the back of my mind for all my fifteen years on the Court, now came to the front, and that was writing a film script. And that funny kind of energy involved in doing something you don't have to do, in the sense, you don't need it for a living, or for a job, or for a career, or for anything like that, but you really, really, really, really want to do it. And it's a tremendous challenge because it involves a formatting that's completely different and you can invent characters and throw them out and establish your own factual situation. And I'm absolutely loving it, I've just, as I'm speaking now, received comments on the second draft, and I'm totally embarrassed by the first draft, and I'll work on those comments and the third draft will go to my agent.

So,if you happen to be one of life's mischief-makers who can't just leave the world alone, there are plenty of pies into which you can put your fingers. And somehow, one way or another, I found enough meaningful living experience to reinvigorate my inner being. It's lovely meeting my old colleagues, I was with Kate O'Regan the other day, and there's such poise there, and she's doing so many good things all over the place, and she never had that feeling of distress that assailed me.

And when I went down yesterday to meet colleagues sitting around the table about to work on a judgment, they gave me a most marvellous welcome. At the same time I sensed they wanted me to get out of the way quickly because their time was precious. So I told them we had a rule that if you came late for a meeting, you paid a hundred rand fine. And added that if I stayed any longer now I'd have to pay the hundred rand. And I left.

Int     Albie, thank you so much. To be continued.

AS     Okay.

### Interview Three: 10<sup>th</sup> January 2012

Int This is an interview with Justice Albie Sachs and it's the 10<sup>th</sup> of January, 2012. This is our third interview, Albie, thank you so much for participating in the Constitutional Court Oral History Project, we really appreciate it.

AS Your problem will be to stop me talking (*laughter*), and I feel a certain sense of sadness, it just hit me now, it's almost like saying goodbye to the Court through memorialising the whole experience. We didn't start with a programme, with a model, with a concept, with an idea. We started with a need, with a constitutional text, a moment in history, and eleven fired-up people, fired-up by the challenge, the excitement, the uncertainty, the vanity, the sense of the importance of what we were doing, a huge deep feeling of vocation. This wasn't just another job, it was an extraordinary thing that we were doing, for the country, for the world, for ourselves, for our profession. And I would say a programme emerged, it emerged out of the practice. The practice came from experience, each one of us deeply experienced South Africans, having experienced the country in all sorts of different ways, growing up in it, and being educated in it, and suffering under it, and having anguish in it, and having dreams and hopes in it, and also honing a craft, a technical craft, and a series of skills in it.

I've described some of the personalities and the backgrounds. The theme of diversity was exceptionally important. Life experiences, community backgrounds, and professional experience, blending them all, but not to create some kind of bland blend, but a rich, interactive, vibrant, effervescent blend out of all that. And just reflecting – and this could possibly be a model for any institution being established – I see a sort of a dialectical interactive relationship between three factors: there's leadership, and there's delegation of responsibilities, and there's collegiality. And all were important.

We had remarkable leadership, I won't repeat what I said about Arthur Chaskalson's formidable brain, tremendous experience, solidity, decency, openness, love of debate and argument, and respect for people. With that he had a willingness to lead, to guide, to offer his own views, and an exceptionally brilliant legal mind. Then there was his great experience in setting up the Legal Resources Centre, of administration, of working with people, of organising things, of keeping minutes, of having follow-ups.

But part of his leadership came from his capacity to delegate. Delegation meant he didn't have to do everything. But also it meant all core members of the court were fulfilling basic responsibilities. They weren't like experts from outside whom you had to control, or who had their own agendas or perspectives. We were deeply immersed in the functioning of the court, each one of us. It meant each one of us felt involved in the project, and it meant a lot of discretion and responsibility, organising your time, doing things in certain ways, to different people.

Thirdly, there was collegiality, about which I've spoken at some length.

I think our Court was remarkable in all three respects. Exceptionally good leadership from Arthur. Powerful intellectual leadership from Ismail Mahomed, though not the organisational, administrative leadership of the kind that Arthur was giving, but a tremendous brain that was sparky and an energy that ensured that we would never be intellectually deficient. And then different tasks for different people. I'm not sure if I mentioned the tasks that we were given?

Int In terms of the first meeting?

AS Yes?

Int Yes, you did mention...

AS So I won't go through that again, but it was the library, Laurie Ackermann, the rules of court, Ismail Mahomed, the gown, Tholie Madala, and so on. And ultimately a system of committees emerging, the committees reporting back to the full court. The collegiality was really a crucial element. In a sense we were *prima donnas*. Partly because of the office, partly the kind of people who sparkled in different ways over the years. And we were elevated—that was the term that was used—to the highest court in the land, with extraordinary responsibilities and tasks. Some of us very sparky, alive, powerful in expression, others much more demure, modest, but each one of us proud, I would say, as a person. And it was how we interacted with each other that became vital to the functioning of the Court, to our decision-making. Whether it was on intellectual questions like capital punishment, or on questions of where our new building should be, the management of the Court, whether people should pay fees to come to court, the practical arrangements—we developed a style of discussing and debating everything, and taking a decision, and going for consensus. I can't recall ever actually voting on something, that is, a decision ending up with a vote on question of court management. We voted on decisions on case outcomes, and there would be a majority decision. But in terms of the court functioning, we would get a consensus as to where the majority position was, and the others would go along with that. And I would expect any new institution being established could benefit from providing balanced and integrated attention to all those three elements.

In terms of the collegiality, the full richness of our achievement came to me in a very surprising way last year. In the middle of the year, I attended a conference at McGill University to honour the late Charles Gonthier, whom I'd known as a Supreme Court Justice in Canada. He'd actually visited our Court, he came with his wife, and we struck up a good, quiet friendship. Charles died recently. And the conference was on a favourite theme of his, *fraternité*, fraternity. I found myself deeply moved by the session. Here was Charles Gonthier, Catholic background, religion was central to everything he did, very family oriented, French speaking, civil law background. He spoke about fraternity, a theme he

wanted placed on the agenda of law: liberty, yes, everybody knows about it; equality, yes, it's moving along. But what about fraternity? It's human solidarity. I was the last speaker, at lunch right at the end of the procedures, and I spoke almost with tears in my eyes, about how meaningful it was to me to be taking part, coming from a totally secular background. My parents fought their parents on religion, so my faith, if you like, was the faith of believing in a material world, with spirituality, important values, important ethics, but not derived from some supernatural order or Being. I came from an international socialist kind of background, of Jewish immigrant families, fleeing persecution in Lithuania. My background couldn't have been more distant from his. And yet through the theme of fraternity in his case, and uBuntu in our case, we had achieved an extraordinary meeting of minds. To me this indicated a richness and a texture that is part and parcel of judicial collegiality. It's a value-driven collegiality, the values of humanity, of human dignity, of what the project is all about. It includes social solidarity, and caring; and caring meaning you cared for individuality, you cared for expression, you cared for distinctiveness, for difference. Caring doesn't mean you imposing a uniformity of views. But it does mean you live in a world of connected people. I think the audience was also moved by the close inner connection of two judicial minds that to outward appearances would be totally apart.

I then found myself transferring my Montreal epiphany to a reflection on diversity and inter-connectedness in Braamfontein, Johannesburg. Some of the connections were obvious. With Yvonne, I don't know why exactly, but we were so in tune with each other in relation to so many things, not just ideas, but style and voice and response and feeling. Maybe the feminism in me and the masculinism in her, you know, found a meeting place. And then with someone like Pius, both with backgrounds in the underground, the resistance, the political struggle. He, child of an itinerant pastor, quite poor, very independent, very thoughtful, very mature in his outlook on different things. I could see why we would connect because so many people I'd been with in the political struggle were just like Pius in their different ways. But Laurie Ackermann came from a completely different politico-social background, deeply religious, his Christianity was central to his beliefs about fundamental rights, he didn't use Christianity as a doctrine to dictate outcomes and how the law should work. But it was the source of the deep underlying values that underlay his view of the values in the Constitution. And we would just agree on so many different things. He had a muscular, powerful style of writing. I possibly displayed a more rhythmic fluid, looser style of writing. And in many ways we were different personalities. He collected wine labels, an exquisite, esoteric (to my mind,) interest that he had, but very meaningful because he loved detail and correctness and precision within the overall framework.

And then the other personalities coming in, each with their different philosophies and experiences, they didn't suppress their philosophies, they expressed their philosophies, rather than suppress them. But not in doctrinal terms, not in theistic terms, if they were theists, but as a source of dignity-oriented values, and also historically-grounded values, that animated the whole Constitutional project. So on the one hand we all hated apartheid, we loathed it because of what it did

to us as individuals, as human beings, whether suffering under it, or economically advantaged by it or not. We all repudiated the cruelty that followed from it, and the inevitable denial of core values of the law. But it wasn't enough to be simply all denouncing the negative. We needed that positive approach, with a bit of a glow, a kind of a vision, a humanising vision, a caring vision, that would animate our decisions, the style of writing, the way we dealt with the personalities we were describing, the stories we were telling. And that was part and parcel of our collegiality, very, very deep respect for each other's integrity. It was not simply a case of my saying, oh Laurie, I don't care if you're religious, that's your business. I do care that he's religious. It's not just his business. It's part of him, it's part of what makes him. It's part of his intellectual and moral strength. And it comes through in the clarity, the integrity, the honesty, of all his work on the Court. *(pause)*

It comes through in the clarity and integrity of his every endeavour, and I respect him more because he is deeply philosophically grounded in the way that he is.

I could go through, from person to person, all the members of our Court. We had no shirkers, no free-loaders. We argued, debated, accommodated each other, but never acted as brokers with each other. We were all believers, believers in the Constitution and its values. Despite vast differences in temperament and in life and professional experiences, we trusted and respected each other, and found creative and productive ways to work together. And I think in a top court that is so concerned with providing guiding notions and principles, lodestars, for the society, that sense of collegiality, not simply in not being rude to each other, the absence of negative qualities, but having respect for each other, I think is very vital.

Int I'm curious, Albie, in terms of collegiality, in terms of the idea of conflict and how one then overcomes that conflict to achieve that collegiality, I wondered whether you could talk about instances of that?

AS The collegiality expresses itself through conflict, through challenge, otherwise it's bland. At the one level it's simply disputation, argument, to get to the right answer. Often you would argue for a position around the table quite sharply, quite forcefully, but to test it, and you would listen to the others. At times the interchange could be harsh. I can remember at least four occasions when people left the meeting-room crying. Each one was different.

I cried at one moment, where I found myself speaking about something or another: 'this is what we were fighting for,' and I was just like overwhelmed and I choked up. But others cried out of pain, out of pique, feeling offended. But I would say, within twenty-four hours, it would be over. Some people were more brittle than others. And even the brittleness, you respected, that was part of the person. Ismail, I've spoken about this, he could find lyrical heights, a clarity of exposition...he's quoted today all over the world, in this country. His words are lasting, enduring. His voice sings through the ages because it has a sense of

truth, a beautiful articulation of an idea that he captures. And yet he could be wounded by the most trivial thing, that nobody else would even notice. It was like he had the thinnest, thinnest skin with no protection. And it put you always a little bit on edge with him. But that was Ismail, that was part of who he was, and part of the energy mix on the Court. There were times when we...but very, very rarely, where we asked colleagues to tone down an expression in a particular judgment. Too combative, too wounding, too... in that sense, too subjective, too personalised. And I can't recall a single case where the person concerned didn't calm down the language and find an alternative way of expressing the thought. And then things move on and people even like forget about it. But that was fairly rare.

So we were not immune to, I don't know if you would call it, the frailties, the realities, of human personality. On the contrary, there were lots of strong, proud, personalities. And we had the sensibilities of our society where sometimes a word thrown out just touches on a little nerve, based on a kind of implication of a stereotype, wow, you know, it will be an electric shock and the person might react. So we weren't in a cocoon divorced from the realities, but we were very aware of what we were doing, and the importance of constant debate, discussion, and if there were problems to discuss the problems.

I don't know if I mentioned before, at one stage when the question of racism at the Bar was very pronounced in Cape Town, did I mention it?

#### THE ISSUE OF RACISM

Int No, you haven't talked about that, and I want to talk about that...

AS Okay, it's relevant now. And the Chief Justice, Pius Langa, after discussing with all the Heads of Court, decided that all the senior courts should have sessions under the guidance of trained persons, to deal with issues of race, gender, disability and homophobia. And we felt, well, we don't really need it, you know, not on the Constitutional Court. We're the good people. We're there already. And if we weren't when we started, we now certainly are. But then the thought was, well, we can't expect all the other courts to do it, if we don't do it as well. And we did it.

We went away for a weekend, and we had two outsiders who were experienced in dealing with these things. The basic format was a form of roleplaying. You had to imagine if you're a man, that you're a woman; if you're a black person, you were white; if you were straight, you were gay, able-bodied, disabled. It was powerful. It was powerful. We choked up. We choked up. We discovered deep suppressed emotions, ambivalences, we were quite surprised. It brought home to us, if ever it was needed, that no-one is immune to the tensions, the unconscious feelings, the presuppositions, the emotions of everybody in society. What's important is that you're conscious of them and you deal with them in that open, collegial kind of way.

Int Albie, I'm interested in terms of the perception of racism, not necessarily racism, but the perception of racism and how that may have manifested amongst you and your colleagues?

AS There were differences of style, based on differences of professional experience. That to some extent got caught up, but only to some extent, with race. So we had people like Johann Kriegler, Laurie Ackermann, John Didcott, powerful, anti-racist, not just in conviction but in their professional life conduct, what they believed in. And also culturally aware and sensitive and open and taking pride and joy in belonging to a very diverse society, with many languages and different ways of expressing. But the three I've mentioned had that style of the Bar, strong, confident white men, who were forceful and spoke out. Laurie a little more diffidently, but gosh, you listened to him when he spoke. And John, booming voice. Johann, quiet, waiting for his moment, but then it came out very, very powerfully. Arthur a bit like that, but so ultra courteous and correct, softer voiced. So that represented a certain grouping.

And it would be easy to say, well, that's the old traditional white style. It was the traditional Bar, which was a male Bar and a white Bar, and it came through. But I think what mattered significantly was the interrogating always of themes, values, ideas. I think every single person on the court was very...at the minimum very correct, in terms of workplace relations and ordinary courtesies and showing none of the kind almost inherited disrespect that people of privileged backgrounds might show to others, even unaware of doing so. Does that mean that Ismail didn't feel that somehow there was a kind of hegemony of the old guard of progressive whites? I don't know. I doubt that he would ever consciously express that, but I'd be surprised if he didn't feel that in many ways. It was part of his sensitivity and subjectivity, that was so intense. Of all of us, I think Pius was the one who was the most comfortable in any ambience, any society. He could even adapt a little bit his speech and the jokes, and a little bit of Afrikaans and isiZulu, and a biblical reference here and there. Possibly he was the most connected of all. And Yvonne with that beautiful glorious nature that she had, also had that capacity. But Yvonne also at times could feel...once we were discussing education, an education case, and, I think she won't mind me mentioning that she started crying. She remembered her problems of getting an education, and just suddenly she choked. It was very moving. And it was in answer to something that I'd said. We were like brother and sister, you know, and it shocked me that something I'd said had provoked tears of painful memory for her, and when she explained her tears, I said, but that's what we have to overcome as a society, you know, Yvonne, we have to find a way of transcending that sense of being blocked, trapped by stinging emotion.

One might have had to ask Tholie...in some ways he was a bit alone in our group, not having been at the Bar in Cape Town, or Pretoria, or Johannesburg, or Durban. He'd practiced in had provoked tears of painful memory for her the Transkei. Very dignified, very stately. And we were often pressuring him to complete a judgment, sometimes maybe producing a negative effect, that the

pressure you put on him to hurry up, and he could see through the indirect pressures. I don't know what he would say. If you interview SandileNgcobo, I don't know what he would say on this. And I find him someone with a very remarkable intellect, extremely sensitive, very inward in many, many ways. And I had the feeling when he arrived at the court that he felt a little bit that there was like an overwhelming...what's the word...sense of mutual interaction and consensus amongst a core of the stronger-voiced members of the court, who all happened to be white. And he might speak about that. If he did have that feeling then, well, the sheer brilliance of his legal thinking and writing established very quickly that he could more than hold his own at any level, intellectually, conceptually, linguistically, with any of the colleagues. So maybe it came through as a bit of a challenge to him.

I don't know if Zac has spoken about this at all. And Zac was very sussed and very sensitive, also laid back, he'll notice things, deal with them in his own way, his own time. He won't make it central, he won't let it deviate him from his work.

So I can't really answer your question. In terms of the public perception of the Court, I might have mentioned when it came to the seating at our very first session, and I being, with Yvonne, responsible for décor tried to make the Court look more diverse racially and in gender terms than it really was. By the time I left the Court, the lack of gender balance was very noticeable. But in racial terms, the Court was beginning to look roughly like South Africa. And you felt this in terms of all of its decision-making, whether on organisational or jurisprudential questions.

To me the key issue is not the black/white, or even the male/female representation on the Court, important though they were. It's the extent to which the philosophy of progressive constitutionalism, both international and indigenous, was applied. And ideally, if values are universal, they should reach deeply into the soil everywhere. And ideally, each soil feeds into the universal values everywhere else. And I think our Court did exceptionally well in that regard. I think I did mention how important international law was when we started. Because it wasn't just this group or that, ANC or PAC, or this party or that party, or religious or non-religious. Our points of reference were out there, on-going, developed by people who were not even thinking of us, but creating objective, external markers; developed by people who believed in the values that our Constitution required us to uphold. At the same time, I pushed, to a certain extent, to try and introduce more weighting for indigenous values of social solidarity and interdependence, starting off with the capital punishment case. And I think I mentioned in my previous interview that since we've left the court, the references to uBuntu have become stronger, entering directly into doctrine.

This brings me to another aspect of what I regard as being very African. To be very African doesn't mean beating drums and waving spears, although those may be very African activities. The idea of collegiality tunes in strongly with African culture and tradition, the idea of respect for many voices, of listening, and trying to get a consensus. But more than that, the dialogic character of the

Court was for me very African. I think our Court has been – and I like to feel still is – the most dialogic court in the world. The debate, discussion around the table. That's how we got a Constitution, through dialogue. And that dialogical participatory theme and style of work came through very strongly in our work. I think I mentioned it in my concurrence in the *Doctors for Life* case, and the need for public participation. But it was also very important in the manner in which we ourselves worked. The idea is that truth doesn't belong just to individuals. Truth circulates amongst individuals, gets enriched, and takes on its own dynamic, and then informs the individuals again. The dialogical relationship extended to other branches of government.

Maybe this is a good moment to bring in, a very particular relationship with **Nelson Mandela**. It wasn't just a nice thing, and a fortuitous happening, that Mandela was the President at the time the Court was launched. It was part of the same project, the realisation of a...for me, it would have been an ANC dream if you like, of a just society, and a fair society, and a society respectful of everybody and acknowledging everybody. Mandela had been involved as one of the negotiators of the Constitution, at the public helm of the process. He had not been particularly active in terms of the detail of negotiations, but had clearly supported the idea of a Constitutional Court. Then as head of the Government of National Unity, he had the very important task of appointing the judges, from lists sent up to him. He clearly chose people whom he felt were most in tune with the deep core values of the Constitution. And again, I'm not sure if I mentioned it before, that I was asked during my interview, should the court represent all the different currents of legal thought in the country? My answer was, yes, but maybe not the first court; the first court should be imbued with the values of the Constitution.

Now I think actually that that first phase is far from over. It's the phase of building up institutions in the country, of developing values and we want diversity of philosophy, background, believers, non-believers, isiZulu speakers, English speakers, Afrikaans speakers, people from rural backgrounds, urban backgrounds, sure. But I think all members of the Court must be really in synch with the core values of the Constitution. In that sense, to have somebody with an apartheid background, still believing the races should be separate, would be dysfunctional on the Court; and wouldn't contribute to the jurisprudence. In any event, Mandela, working with the Judicial Services Commission, appointed the eleven members of the Court. And he spoke beautifully and movingly at the opening of the Court, when the Court was inaugurated. It was great having him there. And having him there, not just his presence and feeling, but the pride that he took in the institution. One just felt it. And being a lawyer, I think the Court had special meaning for him. He later gave his blessings, as it were, to the establishment of the new court building by announcing the winner of the competition, and I'll deal with that when I deal with the building.

Mandela had known Arthur Chaskalson, who'd been one of his defence lawyers, he'd known Ismail Mahomed for a long time. He'd known me in the underground, in the struggle. He'd known Pius Langa through the Constitutional Committee of

the ANC. And he certainly would have met Laurie Ackermann and Johann Kriegler at conferences. Everybody knew John Didcott, that brilliant, brave judge in Durban. So he felt very comfortable and at home there. The project fitted in deeply with his philosophy and outlook. We had, I think, four cases in which Mandela was a litigant in his capacity as a decision-making-President, and not just as the nominal head of government and state. The way he responded I think helped to give a significance to separation of powers that was very, can I say, mature, meaningful and rich.

The one case, I don't know if it was the first one, dealt with an amnesty that he gave to three classes of prisoners who had not been guilty of crimes of violence; prisoners who were disabled, those who were very young, and mothers of children under twelve. A father of a child under twelve challenged the amnesty, claiming it discriminated unfairly against him. First of all we had to examine the clemency prerogative of the President, can it be challenged? In traditional English law and American law, it couldn't be. But we said, yes, the Bill of Rights applies to all Presidential conduct, the courts though, would not easily interfere at all with the exercise of his discretion. Did the amnesty represent unfair discrimination against men? By majority, we decided no, it did not. Though one could see a certain patriarchal tinge in his justification for making it mothers only, the Court, and I won't go into the details, by very clear majority said, that in the particular context it was not unfair discrimination to allow a few hundred mothers to be reunited with their children while not permitting tens of thousands of fathers to be released.

The most significant case, I believe, was the Western Cape Local Government Act matter, in which the ANC was challenged by the National Party, and the national government was challenged by the Western Cape provincial government, then under National Party control. The case dealt with two proclamations issued by Mandela dealing with the country's first democratic local government elections. The laws were absolutely necessary. Parliament had authorised and required him to issue those proclamations, and the country needed democratic local government elections. But the Court, by a large majority, struck down the two proclamations, on the basis that Parliament had had no authority to entrust law-making power of a primary character like that to the President. So even if it was adopted for an excellent purpose, and even if by a wonderful President we all loved and admired, and even if expressly authorized by Parliament, we struck down the proclamations. The result was extremely inconvenient. The whole of Parliament, then in recess, had to be reassembled, it was expensive, and they had to rush the legislation through. How would Mandela react? He went on to television straight away, and he said that when he had passed the proclamations, his legal advice had been that he was authorised to do so. He now accepted that his legal advice had been wrong. He added that he as President should be the first to show respect for the Constitution as interpreted by the Constitutional Court.

To me that was such a special moment for South Africa, fully equal to the marvellous day we all voted as equals for the first time. I don't even know the

date of it, it should be a public holiday. Because that was the day when we weren't just a democracy, we became a constitutional democracy. And once Mandela had accepted that, with all the authority and prestige that he had, then if it's the Postmaster General or the head of Telkom or the mayor of this city or that city, or the Minister of Justice, they're not going to feel it's personal. They would see the Court as doing its job. And I might say that Mandela emerged with added prestige, as if to say, you see what a marvellous country I'm the President of.

It wasn't fortuitous. We all came from the same idealistic background, believing in the possibilities of the new constitutional project, which we'd worked so hard to achieve. But it was wonderful. There was a confluence that helped to establish between government and the Court, not a nervous, ragged, edgy relationship, but a very warm one.

It's perhaps become a bit edgy at times since then. Maybe some of my colleagues have spoken about that. Thabo Mbeki was manifestly unhappy with some decisions of the Court. When he spoke at the inauguration of the new court building, he spent a lot of time quoting from the American law professor, Robert Bork...not a lot of time, but a long quote, about the importance of the court being in touch with broad public opinion, and not interfering with the discretion of the legislature and so on. We had a marvellous new building set up in the heart of the prison where Gandhi and Mandela had been locked up. Judges from all over the world were there. This was a moment for collaboration. Instead we got a dour speech centred on the values of an extremely conservative American professor who had challenged the right of the U.S. Supreme Court to declare segregation in schools unconstitutional. And that was after we had struck down a governmental requirement that prisoners would not have the right to vote unless they were awaiting trial prisoners, or prisoners unable to pay a fine. And I don't know if there was a connection between the two.

But I'll say this for Thabo, and for me he is Thabo, we have been friends since the exile days in London when we were both young, he never disrespected a decision of the Court. He always accepted, sometimes very graciously, sometimes laconically, but always accepted.

And all Presidents have followed that. Motlanthe in the short period when he was in office, seemed to be totally at home and comfortable with the idea of a Constitutional Court. And then President Zuma has quite openly criticised the Court in relation to...not the Court but the judiciary in certain respects, but coupled his critique by emphasising his respect for separation of powers and the role of the court. But whatever reservations he might have, I can't think of an example where he's actually gone against a decision of the court.

## THE MEDIA

I'd like to say a bit about the **press**. Richard Goldstone was the person in our ranks who was very keen on ensuring that there'd be good communications with the press. And he based it on his experience in setting up the prosecutions office for the former Yugoslavia War Crimes Tribunal at the Hague. I understand that when he started, the Tribunal was getting nowhere. They couldn't get funds, nobody understood what they were doing. So he had to constantly be finding stories that were real stories about what was going on, to engage public interest and attention. In our case some of the early reporting on the decisions was absolutely woeful. They even got outcomes wrong. Journalists were picking up a phrase here, a phrase there. It was disheartening when you'd worked on a judgment with important public interest, to find the issues being trivialised in the way that they were. There were a few serious journalists. But in general, the most the journalists would do would be to see who won, who lost, it would be like a football game. The values involved and the reasoning and the meaning of the judgment, just wouldn't come through at all.

It didn't have to be so. On the contrary, the very nature of cases that go to the highest court in the land depends on a tension between competing values, often not between good and bad, but between good and good. Constitutional values—the safety of the community, the rights of individuals—may collide at a certain moment in a certain context. There's an inherent drama. Even leaving aside the actual factual circumstances that are always interesting, the drama of the conceptual and moral issues at stake never came through in the reporting.

We actually set up a small group, Richard and I were two of the members – I think Pius was also on it – to discuss ways of improving the reporting of judgments. We didn't want praise-singers in the press. That wouldn't help us or anybody, and would make for boring reading. It would also be another way of trivialising what we were doing. We wanted to enable something of the intensity, the significance, the meaning for the country, of the issues involved, to come through. The reporting should not be simply about winners and losers. It should serve as a form of public education about the law and what it means to live under a Constitution. And we organised, I can think of at least two workshops with...we wanted to get the ear of the editors, and specialist journalists who were being seconded in the Court. The editors were key, because they had to understand what was involved and find the journalists. But mostly they would send junior reporters dealing with crime, and they'd pop into the court and pick up something and really not know what was going on. We got...what's her name now...Linda Greenhouse, who used to do wonderful reporting on the US Supreme Court for the New York Times. She came out. We had a few other people with experience like that. It helped a little bit, but not a huge amount.

And then we started to issue our own press summaries of decisions. They turned out to be absolutely vital. Looking back now, it's so obvious. You do a judgment, the capital punishment case I think was a hundred pages by Arthur Chaskalson, the main judgment, and then ten page judgments by each of us,

another hundred pages. And the journalists have got a deadline and they've got two hundred pages to read, it's all over the place, they can't make out what's going on. They actually quoted Arthur Chaskalson as saying something which I had said. That was because, Sachs, I was alphabetically challenged, the last in terms of the order of judgments, so they took the last words of the last judgment, and attributed to Arthur something he'd never said at all. It was distressing. To counter this, and facilitate the press and public understanding of our judgments, we issued one-page summaries in advance of cases to be heard, setting out very succinctly the constitutional issues and the principal arguments. The journalists would know, and say, well, I don't think there's much interest in that, or we really must be there. Then, when they're listening to the argument, they know what the basic issues are. Then, when the judgment actually comes out, we developed the practice of reading a fairly short summary (some of the judges go on for quite a lot longer) and we also circulated a press summary. And now, sitting in Cape Town or Nairobi or Boston I can pick up the press summaries on the internet, together with the full judgments. It's wonderful. I can just read the summary, and if I'm really interested, I can go into the main case. Then, when I look at the press reporting, I see they are usually structured around the summaries. And once that happens, then the judgments have to defend themselves as it were, as far as public opinion was concerned. But at least we were getting more intelligent and far more accurate reporting.

## HUMANISING THE COURT

Int You've also mentioned, in *Leadership* magazine, that the importance of the role of the media, was also making sure that judges became more human to the public, and I wondered whether you could talk a bit about that?

AS Yes. We found amongst the judges we differed in terms of availability for public activity. And some of the judges didn't like it. They felt we must focus on our work. At most you can give a lecture, which you read on legal occasions. And others felt, no, this is the new South Africa. And we have to trust each other, and we can go onto Morning Live TV, which Pius did, I did, Dikgang did, radio programmes, television programmes. Certainly we would speak at Law Society events, other public events like that. And then quite a few of us would speak on little private occasions to different interest groups. I know businesses were always keen to get judges to come and speak at a luncheon, and it would be completely off the record, and you would never discuss any cases. But it was a chance for some public education. I spoke at quite a few schools. I love speaking to children, who are eager and open and searching for a sense of what's right and just and fair in the world.

Certainly our style of work in the Court itself was not to be bullying, not to be abstruse, not to use Latin. If we had cases that were about the rights of very rural communities, on a fair number of occasions (and I think I did mention that previously) the presiding judicial officer would say something in an African

language, or get one of the clerks to speak in their language to the people who'd driven through the night to be there, just thanking them for listening so respectfully. We didn't want to make it difficult for people to come to court, and to feel they have to dress in some awkward or expensive way. I remember in Mozambique, you couldn't sit with your legs crossed—an official would go along, with the sole task of uncrossing the legs of people sitting in court, to show respect to the judicial officer. The general ambiance of the Court up on the Hill, and the ease of visitors quietly entering and departing, and tourists coming through and children's groups coming through and the building being used for all sorts of activities, were all designed to get rid of that idea of an hermetically sealed, strange place, where amazing whizz-kids get together and solve the problems of the country by sheer rationality and intellectual brilliance. We also wanted to destroy the notion of the Court representing a form of state intimidation of the populace. Rather, we wanted it to be a place where people could feel, whoever they were, they could claim their fundamental rights.

Int Albie, we have about an hour left and I wondered whether we could talk about your passionate interest in building up **the artwork** and what you've achieved in terms of actually making this building a reality, because you're really credited with doing so. I wondered whether you could talk about the genesis thereof?

AS One of the huge advantages of starting with a brand new court, is you can invent yourself. Normally if you occupy an old court building, even if you're that new people, with a new Constitution, the building speaks to you. If it has any images at all, they'll be pictures, you can be sure, of dead white male judges. Now one day I'm going to be a dead white male judge, so there's nothing wrong with that. But if that's the only image you see, and you think that's just a trivial part of our past, it's actually telling a sad story. Only whites mattered, only men mattered. And so having a completely blank slate gave us a huge opportunity to create a presence, a style, a personality, that was uniquely ours, South African, and at the same time taking its place as part of international respect for fundamental rights

We didn't have any clear ideas at the beginning. A little breakthrough was made in terms of not automatically adapting any stereotype. So, when it came to deciding what **cars** the judges should drive, we were given a choice of Mercedes or BMW, to choose one or the other. And I think all the judges who'd been judges before, automatically went along with this. But Arthur decided, no, he wants a Toyota. And he got a Toyota. That was their first shock. I decided I wanted a Honda—the car that blew me up in Mozambique was a red Honda, so I got a red Honda. John Didcott, a Ford Escort. Kate wanted a family car that the dogs could jump in and out, one for her children and husband to use. I understood that there were people who were quite shocked in the Department of Justice over that. Looking back now, I can see it was quite interesting in terms of how the new judges responded. Those of us who came from advantaged backgrounds, we rejected BMWs, Mercedes. And that was partly who we were. We didn't automatically want to enjoy those privileges that just went with the position. On the contrary, we wanted to show that we were actually uncomfortable with the trappings of authority. But colleagues who'd grown up in

a society where there was just no access to any of these decencies, to any dignified indications of status, went for the big cars. Some African colleagues even teased Yvonne when she bumped her car – it was a very tight exit from the underground garage – saying, well, Yvonne...you want to drive such a big car, what do you expect, little Yvonne driving that huge car.

We had more uniformity on the question of **toilets**. In our temporary accommodation I think it was relatively easy to accept, that we'd not be there for very long, and we would share toilets. And it meant the judges sharing, but also the law clerks and security, and everybody, would share the toilets. At times it can be quite embarrassing because they weren't very secluded toilets that gave you much privacy. And it's amazing how awkward you can feel when you're sitting on the toilet and you're fearful that a loud explosion is going to come from you, when you know one of your colleagues is next door having a pee. So you'd sit and wait and wait and wait, and keep it in, until he'd gone out and then bhhh, you know, you'd let it go. The question with the new building was, should we have one judge, one toilet? That was the practice in the High Courts. And I think one or two of my colleagues favoured that, but overwhelmingly the feeling was no. Partly that it uses up quite a lot of space that we would rather have for our chambers. And partly we like the idea that we're performing our bodily functions as equals, provided there are enough toilets to ensure privacy, and you're not listening to each other's bowel movements, or having to queue up. And in the end that was in fact achieved. However, the compromise was made that the plumbing would be laid on in each set of Chambers for an individual toilet, should in future any judges feel for health reasons or otherwise, they needed a toilet, it would be easy to install.

These are little signs, but to me, fairly indicative of a more democratic spirit, more emphasis on function rather than on status. But also of a willingness to be innovative. And that became very important when it came to the ambiance of the court.

Here I have to go back to the early meeting of the Court where Arthur dished out different tasks. In the end, everybody's got something to do, except Albie and Yvonne. And he says, oh, Yvonne, Albie, can you attend to décor for the court for its first sitting which will be on inauguration, February 14<sup>th</sup>, 1995? That would have been a couple of months ahead of that date. And, he tells us, we've set aside ten thousand rand to help you in that regard, at that stage the equivalent of two thousand US dollars.

Décor turned out to be far more significant than I think anybody would have imagined at the time. Relatively straightforward was working with open-minded Public Works people. We didn't want an austere court with panelled walls, the sound bouncing, the frozen, harsh atmosphere of standard courts. We sought a welcoming court with as much soft furnishing as possible, and some colour. When Yvonne and I spoke to them, Public Works were absolutely delighted. They feared that we would insist on us mimicking a grand court, copied from

England or the U.S. Supreme Court, which would be both more expensive and also far less hospitable and far less South African than the one we envisaged.

What should our first visual signs be? This question cropped up in two ways. The one was the logo. We couldn't bear the idea of sending out court documents using the old South African logo. It wasn't an ugly logo as logos go, heraldic in the European sense, it had a lion and maybe a unicorn or an antelope on the other side. But it was the seal that had been used for death sentences, Group Areas Act, forced removals, for all the terrible laws and state actions of the past. The idea that this new body, this new court, should be using that symbol, was too much. So Arthur asked Yvonne and myself to work on a new logo, to be ready for the inauguration of the court. And we went about it very scientifically: Kate O'Regan said she had a friend who knew somebody, who was a friend of a graphic designer in Cape Town (*laughs*). That was the scientific way we went. I went to see her, Carolyn Parton was her name, and I just knew straight away she was the right person. There was something in her style, the ambiance of the office, her openness and expressivity, this wouldn't be a studio-smart person, saying, let's do some research and come up with something slick. Carolyn had heart and feeling, loved the idea of South Africa's new democracy (I learned later her grandmother had been in the Dutch Resistance). We didn't want the blindfolded woman. We didn't want Roman columns. We had fought so hard, it was our Constitution, our freedom, our court, surely we should have our symbol. We wanted something organic, rooted in our struggles and hopes. And in the end we couldn't decide whether the emphasis should be on a tree, organic rooted, or on the human face, the Bill of Rights. Carolyn produced a number of sketches of trees and others of the human face. At the time Arthur was on holiday at Kalk Bay with his wife Lorraine, and they happened to have a friend visiting from London, a South African who'd been a graphic designer...I didn't know that at the time...who'd gone to London and become a psychiatrist, who was visiting, and he said, why don't you join the tree and the people? He went back to London, but he'd solved our dilemma. We worked on that, and that became the symbol of the court, the logo of the court. And then a copy was made in metal, and then a statement was attached that this court was inaugurated by President N Mandela, such and such a date, such and such a place, in all the eleven official languages. From that tiny acorn, the logo, everything else grew. The tree sheltered the people, and the people protected the tree.

With the ten thousand rand we bought one tapestry a very lovely tapestry based on a picture by Joseph Ndlovu showing humanity embracing. It just seemed to fit. Faces that are clearly African, South African, the colours, the faces. But that sense of uBuntu, connection, was there. We had no funding after that. And then it was just a question of improvising whatever way we could.

The very first piece we had installed came about through my bumping into Cecil Skotnes in a bank in Cape Town. I said, oh, Cecil, I've been meaning to speak to you...he'd done a lot of public art work for the Grahamstown Arts Festival. Big beautifully carved and painted wooden pieces. And I said, do you have any

ideas, any guidance you can give us? And he said, Albie, there's something you might look at, you might just be interested in. I went up to his home, he was working on something, his tribute to democracy, a very beautiful piece. And I said, Cecil, it will be wonderful—this is the first piece being given to the Court—if you could work with an African artist to make it a joint project. He'd thrown open his studio for decades to African artists, and symbolically it would be specially meaningful. He knew a young artist, Hamilton Budaza, who was working as a librarian at the University of the Western Cape, and trained him to go from lino cuts to gouging out and painting the wood. And so he sent up a large triptych-like printing on wood, and travelled up to have it installed near the entrance to our improvised court chamber: Semi-abstract, African-style figures in reds and browns, with side panels containing faces, upraised hands and doves. I was nervous. I was very nervous. It wasn't your judges sitting in their robes, it wasn't the Magna Carta, it wasn't any of the symbols associated with court buildings, such as we'd known in the past. How would it be taken? Cecil flew up, he didn't charge us at all. I think we paid for his flight. We had given him incorrect measurements, it almost didn't fit. He wouldn't even take off time for lunch, insisting on installing the whole thing in one go. Now we had our first piece up there: what would the response be? Arthur had a friend, I don't know who it was, who knew a bit about art. Arthur called the friend in, and the friend said, it's terrific. Phew! That little step, again, that together with the logo. It meant Arthur trusting Yvonne and myself to have the sensibility to draw on the best artists.

We had exhausted our tiny budget. So we had to take whatever we could get. Then we just had to take from wherever. I went to Linda Goodman, I'd spoken at some of her gallery events, I'd known her, I'd known artists who'd worked with her. I said, Linda, can you help us? Linda didn't take prisoners: she squeezed the necks of three of her prominent artists and we ended up with a beautiful William Kentridge piece, plus a gorgeous tapestry by Willie Bester, and a very lovely painting by the Englishman who died two years ago, very sardonic lyrical beautiful painter...his name might come back later. Oh yes, Robert Hodgins.

I'm in Amsterdam, I'm staying in Holland, I'm visiting Carl Niehaus in fact, who's the South African ambassador there. And he arranges for me to give a talk on South Africa's Truth Commission. I take the train down, we have a long supper, Carl's father is there, very proud of his son, the ambassador and the judge dining with his son, the ambassador. So we're a little bit late for the start of my talk, and somebody comes up to me with bubbly hair, blonde hair, and she says, it's your fault, (she's slightly tipsy), she said, I'm never on time for anything, but I came on time for this, and you came late, and all these lovely men are going around offering this lovely South Africa wine, and look what it's done to me. And somebody whispers to me, that's Marlene Dumas, and she's becoming very famous. And so I arranged to meet her in Amsterdam, and we go to a little warehouse and see huge cigar-like boxes tapestries, industrially-made, she tells me, an extra copy she did for a court in southern Netherlands, entitled the Benefit of the Doubt. We struggled to open the box. Marlene is fantastic with watercolour and paint, but she's not very handy. And even when I had two hands I was never really adept. But somehow we managed to open the lid of the huge cigar box, and I looked down, and I just knew straight away, this is fantastic. And

so we got three Marlene Dumas tapestries, which the Dutch government later flew out to us and the visiting Dutch Prime Minister inaugurated at the Court.

I opened an exhibition of Andrew Verster, dropped a big hint about how fantastic Linda Goodman had been, and eventually his agent caught on and told him, Albie was dropping a hint, and he said, well, you can have a particular picture. I was very pleased to get it, but it was rather gloomy. And when I went to another exhibition of his later on, I said, Andrew, you know that picture you gave us, it's very powerful, but it's very dark, and he said, do you want something else? I said, yes. I mean, talk about chutzpah, but he gave us a triptych, beautiful pictures.

Louis Schachat I'd known as an attorney, from way back when I'd practiced as an advocate in Cape Town. If anybody had told me he'd be interested in art, I would have fainted, and now he's running...I'm trying to remember the name (Die Kunsamer). He also donated some works. He helped with shipping up some works from the National Gallery as well.

The Blue Dress, I won't speak much about it, it's in my book, in the DVD, which I will leave with you to become part of my presentation, which I'd like to be incorporated somehow. It saves me repeating everything that's there. The Blue Dress was sewn and painted by Judith Mason, in honour of Phila Ndwande, whose naked body was found with some blue plastic covering. Judith painted this wonderful picture of the soaring blue dress, without any body inside it, with a predator in the background and the wire fence. It's become the most famous art image in the Court. It's used on many book covers in different parts of the world. I gave Judith a little bit of money from my pocket. I said, we don't have any funding, we didn't have funding then. And eventually she got some extra funding from Nancy Gordon, whose husband Gerald Gordon had been a Liberal Party member, a civil rights lawyer for many, many years. She wanted something to honour Gerald, and instead of putting up a bench somewhere, she gave some money for the installation of those pictures.

So each...they say every picture tells a thousand stories, but I can tell a thousand stories about every picture. I donated fifteen DumileFeni drawings I had brought back from London. And it was partly to ensure that the collection did not take on too much of an imbalance. Who are the artists who can afford to donate work? They come from the advantaged sections of the community, of the artist community. So the Dumiles would indicate that you don't just have brilliant white artists who do fine art, and then wonderful black crafters who are really good at craft. But you have brilliant white and black artists who are thoughtful and intelligent and dominate both art and crafts. Then we got a selection of paintings from Sekoto from his Paris period. I think they're going back to the National Gallery, but they promise to keep up supplying pictures in future.

The theme that I focused on was emphasis on humanity, on human dignity. So there's no angry art. Denunciatory art has a very important place in art. But no-

one should come to court and feel people like them are being denounced, that you can see from the art the Court doesn't like cops, or white people, or men, so if we have a case, we don't stand a chance. It wasn't a conscious policy, just a sort of intuition as to what belonged, and we gave more emphasis on the human body than to abstraction. Human dignity is at the core of our work, even more than pure rationality. Whenever I travelled anywhere in the world, I would bring back something from the country visited, Angola, from India, from Sri Lanka, from Canada, from Côte d'Ivoire. Often it would be roadside art that I just picked up, the varied imaginations of crafters throughout the world filling our corridors, from Ethiopia, some very interesting works. It has a totally serendipitous character, stuff that came to us, the collection that collected itself. This is not what you get when you have an artworks procurement committee with a fiscal budget. It will be either dominated by one person's taste, or else represent the choice of the lowest common denominator that no one really likes and everyone can live with, bland and insipid. I like to say that the works that came to the Court were given with love and received with love. Somehow that affection and the connection with people inspired by the project of the Constitutional Court, and artists feeling valued and invited to participate, became part and parcel of the character of the collection. Some great sculpture. A DumileFeni sculpture called History. A huge battle to get the funding in the United States, but it cost the Court nothing, and the support in South Africa of the DumileFeni Foundation made it possible to place it outside the Court And work by...gosh, names might come back to me, Orlando Almeida's Moving into Dance and John Baloyi's Godzilla.

## THE BUILDING

We had temporary accommodation, Arthur chose it when he was appointed, as then called, President of the Court. Up in BraamPark, a modern building, quite well situated, convenient, and that's where we would launch ourselves. Then where would the permanent building be? We couldn't delay dispensing justice because we didn't have our own building.

It had been agreed at the constitutional negotiations that Johannesburg would be the place of the court. People say it's because Arthur lived nearby. That really wasn't a reason at all. It was partly because half the lawyers in South Africa were based there; Soweto was close by; there were three law faculties up here. Partly, it was because it wasn't Bloemfontein, it wasn't Pretoria, it wasn't Cape Town, it was the major city left out of the constitutional negotiations in 1910. We were shown many sites: the old post office in downtown Johannesburg—too cramped. A very interesting site halfway to Soweto—inside a commercial development, there was something lonely about the site, and it would have been subordinated to the commercial development. Midrand, they were so keen, they offered to fly us in a helicopter; we thought if it crashed we'd lose the whole court. We said, thank you, but no thank you. They did an excellent tour on the ground, kind of hinting that Parliament is thinking of locating there, halfway between Pretoria and Johannesburg. Yet it would have been

completely wrong to locate the court in the heart of the corporate sector, and it was not easy to get to. Thank you, but no thank you. Arthur was quite keen on a spot in the... I think it's called the Pieter Roos Gardens, connecting Braamfontein and Hillbrow with Parktown. And it would have been quite a good situation, even though it meant occupying space in one of the few public gardens in the area. And then we were taken to the Old Fort Prison. Straight away, straight away Johann Kriegler and I knew, it just has to be here. The location was right, it would help stop urban blight. It links up Hillbrow, densely populated, problematic, dynamic, exciting, with the calm, beautiful Parktown to the north, and bureaucratic Braamfontein on the other side. It was a natural connector, a unifying factor just in itself. It's got space, on a hillside, close to the public transport. But above all it's got history. The site of pain, of suffering, of indignity, of oppression, gets transformed into a site of liberty, of liberation, of freedom, of justice. We didn't have to fight very hard to get all our colleagues on board. Sometimes when other people are happy to go along, you just need a few convinced champions to get a firm decision.

The idea of a **competition**. Now here is décor taking the lead, advancing from the logo, to the pictures that are going up, and everybody's now getting used to, and some praising, nobody complaining. I spoke to Jack Barnett, a prominent Cape Town architect and friend from struggle days, who'd been imprisoned under apartheid, and had actually completed some drawings while in prison. Jack had been responsible for turning UWC around to make it a real campus; for the Baxter Theatre in Cape Town; he basically did public buildings. And Jack said, you must have a competition—if you don't you'll get mediocre work. It wasn't for democratic purposes, but for elitist reasons. He told us that in the old days Public Works gave work to their friends, and it got mediocre work. Cosy. So to avoid the same thing from happening now, we should have a competition.

Should it be national, international? I said national; our Constitution was national, so should the competition for the building be. I was outvoted. People said, let South African architects enter, if they're the best, they will win. So we made it international. We had a two-stage competition, and the five shortlisted entries turned out to be from Southern Africa, one from Zimbabwe, and four from South Africa. I was on the jury, and I've told that story, and it's in the book, so I won't repeat it at length. But the international architects who entered proposed pretty buildings, but they just didn't connect up with the site, its history, and the hopes of the nation.

We discovered that two things were vital to ensure the right outcome for the completion. The first was to have a steering committee that was very inclusive, South African style. All the role-players, all interested parties must be involved. We had heritage representatives, people from Hillbrow, from the City, and from the Province, and the National Government, from Public Works, from the black architects association, a very small group, and the very large South African Institute of Architects, from SABBACO (*South African Black Technical and Allied Careers Organisation*), which represents the technical workers, all took part.

Secondly, the brief had to emphasise what kind of building we wanted, friendly, open, accepting, not monumental, not ornate, not powerful, but something inviting, something that would make people feel this is our building. And Thenji Mtintso, who was head of the Gender Commission, who was on the jury, asked the question, what would her mother want? Her mother took in washing from white families to send Thenji and her brother to school and university. My mother's coming to the building, she said, what face does the building have? Is it smiling or is it frowning? For most people, particularly poor people, particularly black people, buildings frowned. They either expressly said, go around to the back, or implicitly, you're not welcome here, this is not for you. Our new Constitutional Court had to be a building that says, this is for you, you are welcome through the front door. But at the same time a building that counsel who might be very well-educated, could come in and feel, gosh, this building is for me too. We wanted a building, the brief said, that linked into the South African landscape, both physical and cultural, without providing a smorgasbord of different cultures. And it was that definition, more than the accommodation, that turned out to be vital in terms of the frontrunners and the winning final entry for the building that we've got.

The jury was headed by Charles Correa from Mumbai and MIT, and Geoffrey Bawa from Sri Lanka. And Peter Davey, editor of the British Architectural Review. Plus Thenji Mtintso from the Gender Commission. Isaac Mogase, the Mayor of Johannesburg, who'd been locked up in Number Four Prison, and who said that if he had told the guards when he was locked up that one day he'd be the Mayor of Johannesburg awarding the competition for a new Constitutional Court building, they would have killed him; also Gerrit Damstra from Public Works, and (??) representing architects and draughts people, and Herbert Prius on behalf of the heritage. And Thenji, and Isaac Mogase and myself, representing the Court, we just loved the entry based on the idea of justice under a tree. We couldn't make it out very clearly, but we just knew this was the building we wanted. Peter Davey said after, it's the best jury he'd ever been on, because normally the experts fight and the lay people line up, and usually choose the least exciting building. In this case the lay people did most of the talking, and he was easily persuaded. His only doubt was, whether the architects could carry it through, but he loved the idea. And Charles Correa was totally thrilled with it. Geoffrey Bawa, in fact, became a personal friend; he had a stroke afterwards, I visited him in Sri Lanka several times. It was sent in by young architects from Durban and a town planner from Johannesburg. And we didn't know who they were, they were just numbers. But we unanimously voted for the Justice under a Tree entry.

Then the money ran out. Everybody's despondent, the architects are laying off staff, people think it's never going to happen, we'll carry on in temporary accommodation forever. But Gauteng Province was suddenly galvanised, it set up a body called Blue IQ, investing in five nodal points in and around Johannesburg. None of these were seen as pure investments but rather as places of growth that would revitalise the city and the region. Suddenly the basic funding was there and we were able to make the building bigger than it had been originally.

What about the artwork? We got a small tranche, one percent of the basic budget, this was a first. I travelled all over the United States raising funds. We got a big chunk from Ford Foundation to support the programme of involving some South African artists and crafters in the Court's integrated artworks. We were not looking for beautiful works of art place in a finished building by decorators. On the contrary, we wanted integrated artwork that would form part of the fabric of the building. The doors, the gates, all the things a court needs, but are done with the intelligence and the feel and the hand and the emotion, and the sharpness of the artists. Taken together, they would give the building a character that it wouldn't have had otherwise. The carpets...you can see this beautiful carpet down here...were specially designed for the court, and made by rural women's co-operatives. We had competitions for the carpets. The chandeliers, the same thing. They give the building a very African character. This African character doesn't come through heavy, stylistic impositions on a cold modern building, with spears and drums and things of that kind. It comes through the openness, the transparency, the feeling of being in a little village, having galleried walkways rather than sealed off floors, so that people on different levels can wave to each other. It comes from the use of wood, lots of wood in the ceilings, from the shapes of the chandeliers reminiscent of beer strainers and handmade fish traps.

So it's a building in the modern style, in terms of openness, extensive use of concrete for the basic building material, but it's imbued with a strong African quality in terms of the fabric of the building, the openness, the light and the sense of community.

The theme of justice under a tree is the dominant theme that actually helped the architects to win the competition, because that was their notion of the tree sheltering the people, in traditional African style, of disputes being resolved under a tree. You feel the sense of being in a clearing in a forest when you enter the foyer of the building, that intermediate space after the hurly-burly of life outside, before the calm rational space of the court chamber itself. And then the use of the bricks from the old awaiting-trial block, as part of the cladding in the court chamber. The very bricks that were used to keep people oppressed are now used in defence of the rights of the people. Then there's the transparency of that ribbon of glass, the low-level window running through the court chamber. In the back, the giant flag produced by hand, by women from the African Art Centre in Durban, using big porcelain beads. I don't like flags—country or death, blind obedience. But whenever I got up I would brush against that flag. I love that flag. So it's that sense of creativity, of drawing on what South Africans have to offer, overwhelmingly South African artists that gave our building its intense and charming personality, re-defining for the world what a court could look like.

I should mention that once the architects got involved, we developed a proper artworks committee. Janina Masojada, the architect, came to the meetings, and one or two other outsiders as well, including Carol Steinberg, an advocate who had once taught drama, and then worked for the Department of Arts and Culture.

Decisions were now properly taken and minuted; at first all had been done in a very ad hoc, improvised sort of a way. And now we have the collection and we have a court with a special radiance and ambiance itself. Even the question of the lighting, I was very keen on the court building being lit up, so you would see it from afar at night. And they said, no, we want the court to glow. Glow from inside. And you feel that when you're walking at night from the Women's Jail across, and you see this glowing presence. Finally they decided to retain the awaiting-trial block from—the only precious building that had to be demolished, though a lot of material was recycled—and one, two, three, four of the staircases of the original awaiting trial block are kept, and they have big towers of light built up on top of them. They provided the beacon, the light on the hill that you see from afar, giving the building its special presence.

Maybe I can end with this, subject to any questions you might have. A court is an institution created by society to resolve legal issues. A court is the body of judges who perform that function. And a court is the building in which the judges do their work. In our case, all three had to connect up in a meaningful way. The institution, with immense authority and great significance for the society, as envisaged by the Constitution, needed a powerful, embracing, radiant character, reaching out into all areas of society, with its own resonance and significance. The eleven judges, bringing in their life and professional experiences, interacting with each other, and establishing a collegial, dialogic way of working, had to give meaning to the Constitution. And, finally, the whole project had to function in a building with a particular character. I wouldn't say we worked better in this more beautiful building, than we had worked in the earlier building. But I would like to feel that the spirit that invests this building came from the same spirit that led to our Constitution, and the same spirit that motivated us when we were serving as judges.

Int Albie, I'm curious, in terms of the courtroom itself, I wonder what your vision was for that particular courtroom and what are some of the particular features that make it a very unique courtroom?

AS The architects came up with the overall design. We had more input in relation to the courtroom itself and to our chambers, than to anything else in terms of the building. We wanted the judges to be seated low down so that they weren't oracles up on high. But we wanted a court chamber with dignity and space, of a kind that our temporary accommodation, with its very low ceiling, somehow didn't provide. We wanted a welcoming gravitas in the volumes and lighting, and we got it. Then, there's a ribbon of glass that you can see through, to the knees and thighs and shins of people walking by, and I always joke, gosh, that's our non-racial, non-sexist society outside there—you can't tell if it's a he or a she, or black or white or brown. It's a striking visual reminder that there's a moving world out there. The bricks, taken from the awaiting trial block. The flag. The carpets. The details all contribute to a strong and attractive sense of place. Our building is not a copy of the Old Bailey, or of the American Supreme Court, which itself was an idealised imagined copy of not quite Greek, not quite Roman, building constructed in the 1930s, copying the Capitol buildings of the early nineteenth

century, fitting in with that Roman-Greco kind of imagined style. It wasn't a copy of a copy of a copy. It has its own special ambiance. You feel something when you go in. The passive cooling is an important feature. When I take people past the vents, if there's a blonde person with a dress, I always ask her to stand there, and they feel, oh, what sexist thing is coming up now? But it's just to illustrate the Marilyn Monroe effect. Cool night air, trapped in cold rocks in the basement, is pumped into the building during the day, and it gives a lovely ambiance and a nice feeling, and that's also part of the openness, the justice under the tree quality. And it does not rely on non-renewable energy. These are some of the main features.

Int I also wondered, Albie, when you talk about the building and the artwork, it all sounds very smooth and easy, and I wondered what were some of the challenges, for example, I know there was a lot of debate about pillars and how pillars should be positioned. I wondered whether you could talk about some of those challenges?

AS There was a lot of anxiety amongst some of my colleagues early on. They didn't trust me. They thought that I would go for a brutalist building in severe concrete style. They were very, very concerned. But as we worked together, and when they actually saw the plans and they met the architects, they fell in love with the architects, especially the ones who had been the most concerned. Laurie Ackermann was famous among other things for his attention to detail, each sentence in a judgment had to be just right, the reference had to be exact, and he would now take out a little slide-rule and suggest that counsel must be standing on this spot and the arc of the Bench must be exactly at this particular angle. The interaction was terrific. Instead of sticking with a plain concrete wall standing in front of the entrance, the architects proposed, and we accepted, placing the name of the Court in all eleven official languages, having a national competition for a special font and using the colours of the flag for the lettering. They also introduced tiled roofing and timber balconies into the otherwise monolithic concrete library wing. The only occasion I remember of my colleagues putting their feet down was over a proposal from the artworks committee that the Marlene Dumas tapestries be put in the court chamber itself. The result would have been fantastic. No. Albie, one of them said, you can have the foyer and the corridors, and even the library, but not the court chamber. The result is that although there is colour and texture in the walls, carpets, and sound-absorbing fins in the Court chamber, and a massive beaded flag, there's no formal artwork at all. And looking back, maybe my colleagues were right. There was always a slight concern from my colleagues that I had to be watched. But I would report back, and people got into the idea of adding to the artworks, and we would have joyful inaugurations.

This reminds me that I haven't mentioned the choir. It's the only court in the world, I think, with a **choir**. It emerged after we'd moved into the new building. One of the secretaries died and we had a memorial function. And I said, shouldn't we have a choir? In Mozambique we had had choirs everywhere, in every institution. So an ad hoc choir was set up. They sang so beautifully, we

suggested, why don't you carry on? And it became the Constitutional Court choir. They would sing when we had visitors, and they are the secretaries, and the security people and staff mainly, occasionally a law clerk. When Neil Kinnock, who nearly became Prime Minister of Britain, visited on behalf of the British Council, he joined the choir, he's a great singer, he's Welsh. And he sang well, he fitted in quite easily. Now I believe the choir has dissolved. Maybe it needed, you know, constant support, and they found it difficult to hold all their meetings. They are memorialised in the DVD of the Court tour. And they sang beautifully at the wedding in the building, officiated by Pius, of Vanessa and myself.

I understand that some of the chambers now have air conditioning. I believe some of the new judges were really keen to have their own toilets. So many some of these practical symbolical things could prove to be less prominent than they were before. I had a look at the cars parked in the basement garage, and still BMWs, Mercedes were well represented, but there was a Volvo and a Volkswagen in the judges' section, so the tradition of permitting non-conformity is being maintained.

I like to feel the court as an institution is pretty solid. It developed a style of work, it's got a rich, strong jurisprudence, and it is robust and resilient enough to contain a lot of the stresses that might come from outside or even from inside. But who knows? Who knows? It's certainly...I'm doing a lot of work now in Africa. I'm going to spend most of this year in Kenya now. I went four times last year to Kenya. The interest in the South African experience of the Constitutional Court is enormous, and it's tremendous to see the interest in how fundamental rights and democracy reinforce each other. We are resolving some of the hardest problems of the world in the conditions of Africa. We don't rely on African exceptionalism but nor do we use some kind of imposed universalist notions that don't correspond to our reality. When I visit the Court like I've done today, I'm thrilled to see how well it is working, and dismayed to discover how well it is doing without me! Our Court has, I believe, made a major contribution towards the development of a progressive, democratic people-centred African jurisprudence that takes from and enriches forward-looking jurisprudence in the world.

Int Albie, thank you so much for a wonderful interview. I have a feeling that we will continue the conversation, perhaps not video, but audio, and really engaging on a whole range of questions, including your philosophy...your jurisprudence and philosophy.

AS And then if, at a later stage, as one of those who pushed really hard for this oral history to be done, if I can say it's terrific to see it happening, and the records are being made, the material is there. Then at some stage we will have to have a review and to see what best use can be made of the material, what gaps remain to be filled in, and maybe also in particular how to get good educational material out of it.

Int Absolutely.

AS So if I can just thank you for being...handling it in such a gracious and professional manner.

Int Thank you, Albie, thank you.