

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

SS It's a pleasure.

Int I wondered if we could start at the beginning, if you could talk about early childhood memories, where you were born and some of your early formative experiences that may have led you down this particular career pathway?

SS I was born in Johannesburg, in South Africa. I've lived here my entire life. Very hard to say what drew me to the law. I think it was because I don't like blood (*laughs*), so I didn't want to be a doctor. And I'm numerically challenged so I didn't want to be an accountant. And I'm a firstborn child, whom I'm told are particularly risk averse so I had to do a profession. But something about the law, certainly from when I was older, resonated with me. I think like most young law students I started out thinking I would fight injustice and use the law as a vehicle to accomplish many great and grand things. As it's happened I've now specialised mainly in commercial law (*laughs*). But I think that's what drew me to the law in the first place. I'm not sure why. Whether there was...obviously there were particular things in South Africa that would make justice a more pressing need than in other countries at the time. But...

Int I'm very curious in terms of family, you say you were the firstborn, what were family discourses about growing up in South Africa at the time that you did, and where do you think your sense of social justice may have become conscientised as such?

SS Well, my mother is a foreigner. She was born in Poland and lived there until she was ten and then she went to Israel. And I think for her South Africa, and apartheid in particular, were very strange and quite offensive. So I suppose I got a lot of that sense from her. I remember actually, one of my memories in primary school, and fortunately I was sent...I was very fortunate in my education, I was sent to very good private schools and my primary school was a relatively progressive school. And I remember in something like standard one we had to do a project on a famous person that we admired, and under my mother's influence I did a report on Fidel Castro, and it was totally and unequivocally pro Castro (*laughs*). I remember the teacher calling me aside and saying, that's quite an interesting viewpoint. So I guess...I guess my sense of social justice was probably rooted in my mother's outlook as a foreigner and a very bizarre and twisted country and its politics.

Int How did she, do you think, given her history of having come from Poland, etc., how did she then adjust to South Africa and how did that impact on you when you were born and growing up?

SS I mean, she never fully...she never fully...she still has lived here now for thirty-nine, forty years. She's not a South African, she's never fully integrated into South African society. She's made a life for herself and she has friends and obviously her daughters...I've got one sister, I'm the only one still in South Africa. So I guess...it's a difficult question to answer, I suppose I was aware of her difference, but not necessarily in a negative way. There were points, you know, certainly in primary school, where you want to be the same as everybody. I think that's every child...well, generally, not all children, but many children's wish is to just be the same as everybody else, and I was very aware of it then. And I've always been aware of it, but obviously as I grew older I embraced that difference rather than saw it as something negative.

Int I'm also curious, in terms of your own process of development, early on, where you found a sort of a sense of social justice, how you formulated that for yourself? When did you witness racial disparity; when did you become aware of it growing up in South Africa?

SS All South Africans witnessed racial disparity, I mean, it was just part of how we grew up. When did I become aware that it was wrong?

Int Yes.

SS It's hard to say. I can't pinpoint a time. As I say, I went to quite a progressive primary school so I remember...I can't remember the exact age, it might have been ten, it might have been eleven or twelve, you know they'd had people coming in and talking about June the 16th. They would have people addressing us on those issues and there were sort of charity social outreach programmes that I did then, and then in my high school, which was a different high school, as well. So, I think I was always aware that this isn't how things should be. There wasn't a moment of great epiphany when I was seventeen or eighteen or nineteen: this is terrible. It was actually something that I think I pretty much grew up knowing.

Int Right. And when you went to university, at the point that you went...?

SS Yes, and then I took a year off so then I would have started university in '91.

Int Right, okay, so you finished in '89?

SS No, 1990 I matriculated...sorry, 1990 I matriculated. 1991 I took...

Int A year off...

SS A gap year, so then '92.

Int Right, okay. And at that point apartheid had started being dismantled...

SS Yes.

Int And I wondered what were some of the transitional issues, and also as a law student, in terms of constitutionalism, what were your legal studies about at that point?

SS At that point, it's hard to remember precisely, but as you say, at that point it was very clear that apartheid was...you know, the end had been written pretty much. And then I think certain of the subjects reflected that. There was human rights. I can't remember in relation to the Constitution when we started to study it and at what stage of its development. But certainly we would have looked at Bills of Rights in various countries and started out at least comparing rights that were going to be in the South African Constitution and debating and discussing those.

Int And which university did you go to?

SS At Wits, I went to Wits.

Int And in terms of the type of law, what did you envisage the type of law that you would like to pursue?

SS I thought I was definitely going to do human rights. Human rights law. Without a doubt. You know, constitutional.

Int So at what point did you then...

SS Although I did do some commercial (*laughs*) law subjects.

Int Right, at what point did you then decide that you wanted to apply to the Constitutional Court, had you done articles or did you decide...?

SS No, I never did articles. In fact, I was...I think it was my final year, my final year of my LLB, and I was considering three things, so the one was articles, which I did, I applied for articles and was granted articles. I also applied for a scholarship, a Fulbright to study. I wanted to go to America. And I applied to the Constitutional Court. All of which seemed like very good options at that time. And in fact I remember I sent out my CV to all of the judges in the Constitutional Court and the only two that were interested were Judge Mahomed and Judge O'Regan. And I think, you know, I met with Judge Mahomed and I was just...I was captivated by him from the beginning. He was a very powerful man, a very, very powerful man, an incredibly eloquent, passionate speaker. And I remember (*laughs*) my first...my interview with him, was actually quite traumatic. It was very, you know, he could...he had a very aggressive way of asking questions, almost like you were being cross-examined, which I was totally not prepared for. In fact, I think at some point I had an interview with Kate O'Regan as well, which was completely different because she was much gentler. But I found him very challenging and incredibly interesting.

Int The content of the interview, what sort of questions did he ask?

SS You know, there were...my memory, as I'm sure you've gathered by now, leaves a lot to be desired. I blame it on my children (*laughter*). But there are two themes that I remember. Both of which were, I think, quite important to him; the one on the personal level and then the other one on a more professional level. He asked me a lot about socio-economic rights. Like how did I see that the Constitution could actually give effect...sorry, the Constitution, the Court and the law could actually give effect to the constitutional promise in relation to socio-economic rights? How could it help sort of put bread on the table, ensuring an education for children, proper health care? How does the Court get involved in what government's role is and step in where government hasn't done what it should do or what the Constitution promises that it should do? So he asked me quite a lot of substantive questions about that, which I was quite taken aback by. But it was a very important area for him. The other thing that he was very passionate about, but I don't recall him asking me about that in the interview, was judicial independence. And I often think, you know, it was a great loss to South Africa and the judiciary that he passed away when he did, because he really had a strong and keen commitment to judicial independence that would have come into use.

Int I was curious, you could have gone and done articles, you could have done a Fulbright, but you chose to come and clerk at the Constitutional Court.

SS Yes.

Int At what point in your studies...the Constitutional Court had come into effect around '94/'95...I wondered at what point you'd become aware of the institution and the fact that this would be something that would be worth your while in pursuing?

SS It probably would have been the year...I mean, the first judgment that I remember really being of great interest was the death penalty case, *Makwanyane (S v Makwanyane and Another)*. Obviously I was aware of the whole certification process and I think probably in my second last year of law school I would have been aware...it was big news, the Constitution, particularly if you're a law student, it was very big news. And there was, there was a lot of talk about and a lot of pride about how we had probably one of the best Constitutions in the world, and there was a lot of optimism and a great sense of hope for this document and what it promised. And then the death penalty judgment really delivered on that. You know, all of the judgments I think of all of the judges were really wonderful pieces of legal writing and very inspirational. And I think that can be said of a lot of the first judgments of this Court. And there was, you know, you can even read it in those judgments, every single judge had this passion and this commitment and this desire to be the best that they could be at their job. And obviously, as a law student, one sensed that and one felt that, and one read it. And probably this was the most exciting place to be. And for me, and I'd always had a dream of going overseas to study and the Fulbright obviously was an incredible opportunity, but...you know, in South Africa at that time it felt like a real opportunity to be part of something very special.

Int Right. I'm curious, so when you got here it would have been '96...

SS About (*laughs*).

Int I'm very curious what your first few months were like at the Court and what your memories are of clerking for Judge Mahomed?

SS Yes. The Court was a very exciting place to be.

Int Right. It was in the other building, Braampark?

SS It was in Braampark, that's exactly.... despite the corporate surrounds, I mean the cases were really, really fascinating, and the level of research that was being done was really quite amazing. And the access to international research was brilliant. From a clerk's perspective it was also amazing because all of the judges had one or two clerks. In fact, I think Judge Mahomed was the only judge who only had one clerk.

Int Right. And that was you.

SS And that was me. And it was, you know, at a clerk's level, it was wonderful. You'd sit, you'd debate ideas, like mini judges I think, you know, clerks virtually thought...we all virtually thought that we were writing the judgments, which of course we weren't but to debate and discuss the cases and the issues, and I think there was a very similar dynamic – that was the sense I got – amongst the judges. There was a lot of debate, there was a lot of politicking, trying to convince colleagues to come over to the dark side depending on what one's view was. There were obviously special relationships between certain judges. Like I was aware that Judge Mahomed had a very special relationship with Judge Didcott, who(m) he admired incredibly.

Int Oh, really?

SS And Judge Didcott actually passed away in that year. And it was...it felt like you were sitting at the forefront of South African law at the time.

Int At the time that you were clerking for Judge Mahomed, what were some of the key judgments that came through?

SS You know, that's...I think the...it's very hard for me to look back and know which...there were key judgments and I can't remember if we were involved in them or not, if we just read about them afterwards, but I think the *State v Hugo (President of the Republic of South Africa and Another v Hugo)* was one of them. I mean, that's the one that sticks out the most in my mind.

Int Why is that? Did you work on it with Judge Mahomed?

SS Yes.

Int ...Could you talk about that process?

SS Well, the process...he was very empowering Judge Mahomed to work with, so what would happen is, effectively I would go off and do a draft of what I thought the judgment should look like, which was a really amazingly exciting exercise. Because it's the best part of law. You know, you're researching but it's not academia. There's a very clear practical impact about what you're researching. So I would go and I would do...I would write a draft judgment and then I would give it to him, and then we would go and he would, you know, tear it apart or (*laughs*) there would be many, many hours of, why didn't you look at this, and why do you say that, and it would really be a process of discussion, and he'd say to me, well, research this more or I like this idea,

develop this more. And then we'd debate it, we'd discuss every single aspect of it. So he really did involve his clerks very much in every part of the process of a judge, although obviously he would go and he would write his judgment. And, I mean, you can see that he has a very particular...when one reads his judgments, he's got a very...it's almost like a poetic style of writing.

Int I'm very curious, you were the only clerk and in terms of collegiality and camaraderie amongst law clerks, how did you then find yourself integrating with the other law clerks?

SS I think I probably didn't integrate as well as many of them did. Also, I think, we were located kind of in a corner (*laughs*), which partly contributed to that. The other factor is that quite soon after I started Judge Mahomed took up his appointment at the Supreme Court of Appeal. So there was also this knowledge that we were leaving, and we came back every recess, we would come back and we would be based at the Constitutional Court. But after, so I think, you know, that partly contributed to it. But I did, you know, I did interact with the other clerks. I still am...I wouldn't say close friends, but professionally friendly with some of the clerks who did clerk at the time that I was there. And, you know, we were all, at the end of the day, interested in very similar things, so there was that commonality.

Int Shanie, in terms of the decision to leave with Judge Mahomed, was that an automatic thing, or did you then decide to leave with him when he was appointed as Chief Justice at the Supreme Court of Appeal?

SS I knew, I think, before I took the job, before I started...when I first accepted I didn't know, but then in that intervening period he told me that he had been appointed as the Chief Justice and that he would be going to Bloemfontein, which wasn't as exciting an option as being at the Constitutional Court. And if I remember, I think it was in that period, that Kate O'Regan, I think, had also offered me a position, and then she said to me, that she knew that he liked me and that she didn't want to take away a clerk that he thought he wanted, particularly when he was being exiled off to (*laughs*) Bloemfontein. And so at that point I did have a decision to make but I think it was the force of his personality. I wanted to work with him.

Int Interesting...

SS And also, what did appeal to me as well is that the Constitutional Court was an amazing place with all of these great constitutional judgments and issues, but in terms of this whole other body of law...

Int Right. Like the common law?

SS Like the common law, which is the law that probably affects most people and most legal disputes turn on, that's what the Supreme Court of Appeal was doing. So it felt like it would be a great opportunity to be exposed to something more than constitutional law, which, you know, as it happens, it was.

Int So you made a major transition in that you had to leave Johannesburg and go to Bloemfontein...

SS Yes. Major transition.

Int And what was your adjustment like there?

SS Oh, it was difficult. Firstly there were no clerks. None of the other judges had clerks. And they viewed clerks with hostility. You know, at the Constitutional Court when I came we were the second tranche of clerks, and I think the first clerks really had done a great job, so the judges really respected their clerks, treated their clerks well, and there was a whole system in place for clerks. Whereas in Bloemfontein it was very odd because they thought, you know, like what do I need somebody out of law school to help me do what I've been doing (*laughs*) my whole life, which is the law? And writing judgments after obviously after they'd been appointed as judges. So there was a completely different atmosphere. It was also initially there was a lot of hostility towards Judge Mahomed. He wasn't the favoured appointee of the judges.

Int Why do you think that was?

SS Well, I think the reason was that after...you know there was...the law profession is generally speaking, a very hierarchical conservative profession. You do your time and things work in a certain way, in a certain order. And the successor to Judge Corbett, Chief Justice Corbett, was a judge called Van Heerden. And he was an excellent judge. He really was an excellent judge. And I think it was felt, you know, by the judges at that time, that he was being unfairly treated. Which, you know, if one looks at it without looking at where South Africa was at the time and the need to transform the judiciary, he was. He was the person who...you know, any country I guess untouched by issues of politics would have taken that role. But interestingly, he was actually very supportive of Judge Mahomed.

Int Interesting...

SS And they actually developed a very good relationship. So there was that sense of hostility, because you've got to remember, I think...you know, Judge

Mahomed...I'm trying to think...he hadn't been on the Bench for very long. You know, this is a profession where you go to the High Court and you're there for fifteen years and then only do you go to the Supreme Court and then you're there for ten years or fifteen years, and if the timing happens to be right and you happen to be good enough, then you're the Chief Justice, you know. He hadn't put in that time, and I think they resented it. And obviously there were other...I mean, I'm simplifying it obviously. There were other political issues and I think there were some people who resented the whole process, but...

Int How did you find it clerking, as the only clerk, in that court, and how did you develop a working arrangement with Judge Mahomed?

SS He was amazing, and he remained the same. I mean, that's...in fact, I was only meant to clerk for a year and I did it for another year. And that was because he asked me to, and I wouldn't have done that for anybody else, because I really didn't like Bloemfontein. It was a very lonely place. Particularly as a fish out of water, because I obviously couldn't socialise with the judges, and there were no other clerks. Many of the secretaries were either older than me. Also there was a very Afrikaans background, I'm a northern suburbs Jewish (laughs)...you know, it was not an easy fit for me. So I did, for him I stayed that extra year. And working with him was incredible. Again it was that process. You know, I'd be given a full opportunity to read the record and then write what I thought the correct judgment should be. And then this incredible learning experience where we would sit and we would debate it and I would go back and I would rewrite it. I mean, it's...you know, and from somebody like him, because he really was, he had a great, great legal mind. And beyond that he was really a man of tremendous passion. He felt very strongly about trying to see where justice should lie, and doing what that dictated.

Int I'm also curious, in terms of the relationship between the Supreme Court of Appeal and the Constitutional Court and issues around constitutional jurisdiction, how did that play out in terms of where common law was placed in relation to constitutionalism?

SS I think initially the judges at the Constitutional Court almost tried to pretend that there was no Constitution.

Int You mean at the Supreme Court of Appeal?

SS Sorry, at the...(laughs) it would be very difficult for the judges...yes, the judges at the Supreme Court of Appeal. You know, they believed strongly like whatever values and rights we need are already there in the common law and we don't really need to look outside of that. And I think a lot of that obviously

was fear. You know, if you've been in the legal profession for a very long time and you've been a judge for a very long time, and all of a sudden there's a new law, but not only is it a new law it's *THE* law, and everything is secondary to it. Obviously that's difficult. So I think where possible they tried to steer clear of the Constitution. And I think generally speaking in the time that I was at the Supreme Court of Appeal there were very...I can't actually think of any case where the Constitution...sorry, there was one case, and that case was the abolishment of the cautionary rule. So there's a rule, there used to be a rule in South African law in relation to rape cases that you treat with caution the testimony of a rape victim. Which obviously works tremendous hardship. And it was this whole notion that women lie about being raped. And that was probably the one judgment that I can recall where the Supreme Court of Appeal drew very heavily on the new Constitution and the values in the Constitution to overturn a common law rule that had been entrenched for many, many years. But, you know, the tension between the two courts, I think there was a resentment from the judges that there's this possibility that having been the highest court that certain of their judgments could now be scrutinised by another body. Which when you're the top dog it's not nice to have that...but in practice most of the judgments were commercial that we dealt with.

Int And then coming back during recess, how did you then adjust... it sounds like a very unusual setup for you?

SS Yes.

Int And how did you adjust to being back and meeting different law clerks, etc.?

SS You know, when we came back we really...we had a very big workload. Much bigger actually than the Constitutional Court. The Supreme Court of Appeal just heard more cases. So there wasn't that much socialising. I think Judge Mahomed liked being back. He felt a lot more comfortable and certainly a lot more accepted by the judges in this Court.

Int That's interesting...

SS I was very happy to be in Johannesburg. And there were, you know, there were clerks who I was friendly with, but obviously at that point there was no discussion of judgments or anything like that. Sorry, just the one other potentially interesting thing about the interplay between the Constitutional Court and the Supreme Court of Appeal is I remember I was responsible for doing the roll allocation. Which is basically allocating all of the cases to various judges. And when I say I was responsible, I would do the first...it was obviously a very contentious thing, because judges felt very strongly about how many cases they had and which cases they got. So I didn't make those kind of final decisions but after a while I would be able to understand where

Judge Mahomed would put certain judges, and then he would obviously vet that. But in relation to the criminal cases, it was very difficult because for a period we basically had a whole room filled with cases where the death penalty had been granted, and there were just piles and piles and piles of records where all of the appellants, the death penalty had been granted against them, and there were all of these appeals. And they didn't know initially what to do with all of those after the Constitutional Court decision in *Makwanyane (S v Makwanyane and Another)*.

Int Interesting. In terms of your memories of this Court, apart from Judge Mahomed, what are your memories of that first Bench and interacting with the judges here...Judge (Kate) O'Regan you mentioned...other judges?

SS Yes. I didn't have a lot of interaction with the other judges. You know, occasional interactions like Judge (Pius) Langa was the judge who was physically the most proximate so occasionally one would interact with him. I remember interacting with Judge (Kate) O'Regan a bit. At some point Judge (Ismail) Mahomed was appointed on a Commission with Judge (Richard) Goldstone. I can't remember the name of the Commission (refers to Judicial Commission Inquiry into the Mandela Coup Plot) but it was some very secret (*laughs*)...and so we went, so we participated in that, I interacted a bit with Judge (Richard) Goldstone then. But, you know, the greatest privilege was to just sit in that Court, to just sit in that Court and watch. All of the judges had read everything and brought something more, and were prepared and were incisive and asked really probing questions. And just to be in Court and to listen to that process was a privilege. Ja, I remember particularly like Judge (John) Didcott and Judge (Johann) Kriegler, you know, when they (*laughs*) had an issue with the submission that a particular counsel was making, I mean, that has to have been one of the most entertaining things, if you're not the recipient, to watch. It really is, it was wit and intellect, probably at its finest level in many ways.

Int After your two years clerking for Judge Mahomed you went to the Bar, is that correct?

SS Yes.

Int And what prompted that decision, had it been something you always wanted to do...?

SS I suppose it had been something that I wanted to do but it wasn't something that I'd ever considered doing. Before clerking I wouldn't have. I would have gone...I would have done my articles first just because it was safer, you know, to go to a law firm, get a salary, just to feel more competent. But I was influenced almost completely by Judge Mahomed. You know, that's where he

came from. He spoke often of his time at the Bar, which in many ways had been a very difficult time for him. There was very real segregation and very real prejudice that he experienced at the Bar. But there was also great collegiality and camaraderie, and he spoke a lot about the institution of the Bar, and I was very, very greatly influenced by that.

Int And in terms of your relationship to the Constitutional Court, have you appeared before the Constitutional Court or have you kept abreast of some of the judgments?

SS I, as I say, I mainly do commercial law, but on occasion I do do some constitutional work, so I have appeared, I have argued before this Court. And I've also been a junior in a case before this Court.

Int When was that and what were some of the cases that you've appeared in?

SS In about...I can't remember, I really can't remember dates. I argued for the Commission for Gender Equality against the laws prohibiting prostitution. I think the case is *State v Jordan (S v Jordan and Others Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)*. And there was a split Bench. I still feel very bitter about that judgment (*laughs*, I think it was a bad one. Or the majority decision was wrong. So that was one case. And I did, I felt that that was a chance for this Court to make the lives of people, whose lives are very difficult, a bit better, which it didn't.

Int What do you think were...why do you think the judgment went the way it did?

SS I think the reason for the majority decision is because a lot of...this is going to sound very judgmental, but I'll say it anyway...a lot of people from a certain background, and I think particularly men, just don't like prostitution. I think they just think it's distasteful. And they don't like it. And I can't...that to me at the end of the day is why the majority decision went the way that it did. Because I do believe that if one approached properly from a substantive equality perspective, I think one would have had to go with the minority. It really is, it's you're taking people whose lives are so difficult already, who are making choices in such limited circumstances and you're making their lives more difficult. So that for me is how I understand...you know, obviously there's the however many pages of legal reasoning that supported that decision but I think at heart that's what influenced it. The other case that I was involved in was the recent *Citizen v McBride (The Citizen 1978 (Pty) Ltd and Others v McBride)*. And I was the junior, for the Citizen.

Int Can you talk a bit about that?

SS Well, I was actually...I was involved in that case...I wasn't in the Court inaudible I wasn't in the trial court, but I was the junior in the Supreme Court of Appeal. And what was quite interesting about that, and our approach at the Supreme Court of Appeal, is that...and I suppose it's...I mean, obviously in hindsight we were very wrong, but we really genuinely didn't think that there was a...you know, just the notion that you could rewrite history, so that what had happened, not only did it not happen but to speak of it, would be to commit the civil act of defamation. If I look back at our heads of argument and the way we dealt with the...I don't know, the Truth and Reconciliation Act, I can't remember the full name of the Act, again impaired memory. But, you know, maybe we gave it four pages in our heads of argument; so it was a very surprising decision for us from the Supreme Court of Appeal, and particularly surprising from Judge (inaudible name of Judge) who clearly felt very, very strongly that one would be doing this huge violence to this whole notion of reconciliation if those who had been granted amnesty could then be spoken of as if they'd committed the acts that they'd committed. And obviously the dissenting judgment of Judge Mthiyane was wonderful. And that's what compelled us to appeal to this Court. Without that it might have been a lot more difficult. And then obviously in this Court things went very differently and the majority obviously upheld our initial view and the focus changed completely. We really did. Then the focus was showing how on the contrary, like not only did the...not only did the Act not authorise you to wipe out what had happened, but there was this very strong and very express and persistent commitment to the truth, which is the antithesis obviously about treating what had happened as if it hadn't and punishing those who spoke of it as if it had...sorry, as if it had indeed happened. Also I think what changed, or what might have influenced this Court was the inaudible of the amici. Very often I think there are a lot of interventions by amici in this Court, in many instances I would think unnecessary. But here you had children of people who had been killed by members of the state police force who had been granted amnesty, who were coming and saying, let this be spoken of and don't let there be a sanction for that. That was, it was an interesting case.

Int I'm curious Shanie, because you do commercial work predominantly, yet you've taken on these really interesting cases that address very core societal dilemmas and issues...

SS Yes. You know, I'm at the Bar, so I...like my work chooses me. My work chooses me. So that's it. You know, I do actually do a bit of defamation work from time to time, which is how I was briefed in the Citizen (*The Citizen 1978 (Pty) Ltd and Others v McBride*) case. And I do, you know, I enjoy commercial law. I don't...it's not that I would abandon my commercial practice for constitutional law. I wouldn't actually. I really...I find it very, very intellectually challenging. I also find it...it's easier. It's morally easier. Less concerned, if you do something wrong about the consequences (*laughs*). Whereas with these, you know, for instance the Jordan (*S v Jordan and Others Sex Workers Education and Advocacy Task Force and Others as Amici Curiae*) case, I

really...I was upset, you know, by that decision in a way that I'm not, if there's a judgment against me in a commercial case, because it really did feel that there are lives that will be...many lives that will be detrimentally affected by this judgment. Whereas in commercial cases, obviously yes, you know, there's precedent, but it's different, it doesn't feel as real.

Int Having been at the Constitutional Court, ...and speaking about the theme in your interview with Judge Mahomed on socio-economic rights, what do you think of the criticism being levelled at the Court in that it hasn't done enough to satisfy socio-economic rights in this country?

SS It's very difficult. You know, this Court...this Court has a very difficult job, and at the end of the day, you know, I think no matter what the Constitution says and the Court's role, I think it's for government to do its job, and there comes a point where the Court can't make government do its job. So I think if there's going to be criticism for lack of delivery for socio-economic rights, I don't think the first place is the Court.

Int I'm also curious, given that Judge Mahomed has passed away, when you were at the Bar, was that when he became ill?

SS Yes, that is when he became ill.

Int Right. And did you manage to see him before he passed away?

SS Yes, I did, I did.

Int What are your memories of that time?

SS I remember going and visiting him in hospital. You know the one time I went there, I think I remember Lorraine Chaskalson was there visiting him, as well. And certainly when he was in the hospital I think there were a lot of...a lot of visitors from his work colleagues. Then I remember visiting him at his house, and I think at that point it was clear that he was...his prognosis was far less optimistic. I think everyone knew pretty much that he was dying. And then his family, you know, was really sort of cloistered around him. And obviously it was a very sad time. You know, personally for me it was a huge loss because even when I was at the Bar, and it was in my early years, and I'd come and I'd meet him for lunch and he'd ask me what I was doing and he was a great mentor. He was somebody who I could ask things of if I, you know, how you go about things, and knew your questions, you know, obviously that weren't going to land up on his desk at some point. And he did, he took the time, he really did, he always took the time. And whenever I came to visit him, you

know, I'm talking now before he was ill, at the Constitutional Court, it was wonderful. He was a very, very...you know, a lot of people...before I started to work for him, he had a reputation as being very irascible. And, you know, I never experienced him like that. You know, obviously we had disagreements and sometimes they were very heated disagreements, but he was always very, very kind to me. And just willing to engage on anything in relation to the law and to discuss that forever and to give me feedback, and useful feedback. And personally as well. You know, he was somebody that I could take personal problems to. So for me it was a huge loss when he passed away. And I think for South Africa, for the legal profession, I think it was a huge loss. I think he had a commitment to judicial independence and judicial excellence that this country needed at that point in time.

Int And for a former law clerk, do you have any fears for the Constitution and the future of the Constitutional Court in South Africa?

SS Yes (*laughs*). Yes, I've got...I've got huge fears as many South Africans do. I worry about a government that doesn't seem to respect the independence of the judiciary. I worry about a government that sees the constraints imposed by the law as a hindrance rather as something that it should respect and be guided by. And now I worry. I worry about judges who don't show that commitment to the Constitution, to the law, but ultimately to doing the best job that they possibly can, to being prepared, you know, very, very basic things, and one doesn't...one sees it a bit in this Court, which one never used to see, but one sees it a lot in lower courts, judges who go into court that haven't read a thing. That don't know what the case is about. That aren't really interested in listening either. Those are all very concerning things. You know, this Court at its inception was staffed, as I said, by people who even those who were inexperienced, what they brought was this commitment to do the best possible job that they could and they were prepared to work. And they were prepared to do whatever they had to do. And they regarded...you know, the more experienced judges as a resource. And it was a very inspirational place and the legal profession at the moment is not very inspirational, and certainly the government's attitude to the law and, you know, those judgments and decisions that go against it is not very inspirational and doesn't fill one with a lot of confidence. But...(*laughs*)...

Int Shanie, I've asked you a range of questions, is there something that I've neglected to ask you that you'd like included in your oral history?

SS There's nothing that I can think of immediately. I suppose just to the extent that I understood this interview to be focused primarily to be on Judge Mahomed, and I think I've spoken about what a kind person he was. I hope I've touched a bit on, you know, just how passion...he was really, really passionate about the law. Truly passionate. You know, my world obviously at the moment is surrounded by legal professionals and there are very few

people that I've encountered that really see the law as an instrument for justice in the way that he did. And it's interesting, you know, if one goes and looks at his decisions, his judgments, even some of his commercial cases, one can read that in them. He really did, he really believed very, very strongly in that. And he was...he really was an exceptional man. Very caring about the people close to him, but then also very, very caring about society. I remember he used to get letters. You know, lots and lots of letters, because everybody would write to the Chief Justice, and a lot of people, you know, my neighbours (*laughs*),...you know my neighbour's been playing his radio every night and I've called the police and they won't do anything, like what am I meant to do? And he'd respond where he could, he really would. He took his job very seriously and he really did feel that he was ultimately answerable to people, that he was there to serve people. And he did that.

Int I'm curious, in terms of life lessons, what did you take away from him that you put into practice?

SS Life lessons.

Int Professional lessons...

SS Well, in terms of professional lessons, I certainly got from him that you don't assume anything, and you have to be thorough. You can't be lazy. You know, he had an incredible work ethic. He worked so hard, so hard. You know, up until he really got very ill. And certainly that is something that I took from him and that I tried to do, to approach every case and do whatever needs to be done. Not to assume anything, not to take a lazy route. I got that a lot from him. You know, some things people, you can see them and you can admire them, but you know that you can never emulate them in your own life. Like as I say, almost the poetic way that he expressed himself. I loved the way he wrote, but I could never emulate that. That was something that was a sort of a poetry that came from within him. Personally, one of the things that I suppose I took from him, and I suppose it's a negative, almost his entire life was committed to his profession and to the legal system, and I wanted for myself on a personal level more balance. I think, you know, partly what makes the difference there is that he didn't have children, and I think that was a huge loss that he felt. A big absence in his life. And maybe that's part of what made him so good to the clerks that he had. But for myself, you know, I wanted more of a...you know, to aspire to be less great than he was but to have more for myself.

Int Shanie, thank you so much for sharing your memories, I really appreciate it.

SS Pleasure, thanks.

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