



THE COETZEE 1995 CASE – PART 1 – VIDEO TRANSCRIPT

CHAPTER: A MEMORABLE CASE FOR A STRANGE REASON

THANDI MATTHEWS

I want you to speak to your judgment on debtors, judgment debtors, or the history of how debtors were criminalised during apartheid and why. The reason I'm asking is because we are a society that's very dependent on credit, and non-payment isn't always about a criminal activity or action, or the unwillingness to pay, or trying to cheat the system. It's largely because people can't pay, and often the poorest of our communities are dependent on credit for survival. Could you maybe speak to that case?

CHAPTER: CHIEF JUSTICE CHASKALSON THE GREAT ORGANISER

JUSTICE ALBIE SACHS

Yes, I remember it very vividly not for those profound, not for those profound sociological and economic reasons, but because I floundered. Arthur Chaskalson, a great organiser. We were so blessed to have him as the leader of the Court. Invented, created, special, new, starting with nothing for the huge task of ensuring that the gorgeous principles of the Constitution now became meaningful in the life of the nation. We were the people, the frail vessels, if you like, to carry that burden. And he delegated. He delegated tasks, and he delegated preparing initial judgments. And he would say, *'Here's a tax matter, Kriegler knows a bit about tax.'* *'Here's a something else matter, we can get Goldstone,'* you know, horses for courses.

CHAPTER: AND HE SAYS 'ALBIE, WILL YOU DO THE COETZEE CASE?'

At the beginning, I'm getting nothing. I'm not one of tried and tested Judges. I'm not Ismail Mahomed, the brilliant superstar, acknowledged, written judgments and so on. And he says, '*Albie, will you do the Coetzee Case?*'

We've received the documents, they're sent out to us; the people had made the applications; there had been the replies; there had been the answers, rebuttals, the documents ready. '*Albie, would you prepare the first draft for the Court?*' And I look at it, I'm quite excited, it's imprisonment for civil debt. So, it's not criminalising, but it's using criminal structures for incarcerating people who haven't paid their debts.

CHAPTER: INJUSTICE RETURNING IN DISGUISED FORMS

And although, the world has moved away from actually allowing creditors to get their debtors imprisoned until they pay up, and great novels were written in England by Dickens and others about that, the unfairness, injustice; that had been more or less discarded, but it was coming back in disguised forms. And it was something that had happened very strongly during my 24 years of exile and a few more years of working on the new Constitution; about 30 years had passed. So, when I practised as an advocate, these weren't issues. And in any event, we 'superior advocates' weren't dealing with those poor people in the lower rungs of the judicial system being sent to jail for not coughing up R500 or then it would be R100 or whatever it might be. So, I was totally unfamiliar.

CHAPTER: THOUSANDS BEING IMPRISONED – OFTEN THE POOREST OF THE POOR

I know Legal Resources Centre [LRC] felt very strongly on the issue. And it became clear that there was a new class of attorney who specialised in debt collections. It wouldn't simply be sending out letters of demand, there'd be letters of demand followed up with 'if you don't pay, procedures will be taken in court against you.' And it turned out what the procedures were would be to get a default judgment from the court - the person hasn't come, hasn't defended the action, hasn't given promise to pay. And then, if the payment wasn't paid within the two months or whatever it might be given, you're sent to jail for contempt of court. It was said, this isn't an imprisonment, not for civil debt, it's [for] defying a court order. And thousands of people were being imprisoned, I think like every week, and it would be often the poorest of the poor.

I think also the whole hire-purchase industry, credit industry, had grown a lot in the decades of my absence. So, the industry grows, credit has grown and the attorneys now benefiting from, and developing practices, lucrative practices from that are very alarmed. LRC are saying it's unconstitutional and they send Mohamed Navsa to be their counsel. Then a youngish advocate, I think working full time for LRC. Very robust, very strong. He's known today as one of the powerful figures from the Supreme Court of Appeal. I think he acted, I'm not sure if he acted on the Constitutional Court, but he was a Constitutional Court regular. And his main point was saying that what the creditors are doing, with the support of the attorneys, is sending poor people who can't afford to pay, to jail, to terrorise those who can afford to pay into paying. And he said that's unconstitutional.

CHAPTER: 'THERE'S SOMETHING MIGHTILY WRONG HERE'

And I just had that broad feeling that there's something mightily wrong here. But how to put my judicial finger on it? What is the right that's being violated? Why is it unconstitutional? Lots of things in life are hard and harsh. But what's wrong? One of the things that I felt, and if I'd been more mature, I might have developed this a bit more strongly: The richer you were, the more bankrupt you became, the greater the degree of your insolvency, the more you were protected by the law. Then you're not sent to jail; then insolvency proceedings are brought and your properties are collected, you're declared insolvent, and you only get into trouble if you hide stuff away and if you lie about what your assets are. So, you're treated with dignity. Here, the poor are simply thrust into jail. So, is it your right to freedom? What's your right that's being undermined? And I tried out a whole number of different possibilities, and I sent out drafts and sometimes, I'd have just one short sentence, and I'd get a note back saying, we expect paragraphs, Albie, not short sentences.

CHAPTER: JUDICIAL INTUITIONS WITHIN A FIRM CONSTITUTIONAL FOUNDATION

And I want a firm constitutional foundation for declaring it unconstitutional. The strong sense, you know, all my judicial intuitions – and they're judicial intuitions based on years of working in the field; they're not just Albie waking up one day and thinking something - it's just a sense of... it's not only that it bears unfairly on the poor, but there's something profoundly wrong. And it's the mixing of public institutions to collect private debt that's worrying me. That it's an abuse of state power to help private collectors. My feeling is credit is given too easily. People are sucked into the system. There should be much stricter control on the granting of credit and there should be much greater

protection for debtors to ensure appropriate forms of payment. And if they don't pay up, appropriate forms of collecting from wages or earnings, whatever that might be. Or otherwise, they're losses. You don't just indiscriminately give out credit.

CHAPTER: AN OFFER OF SUPPORT

So, I'm thinking along those lines, and I'm coming up with grand theories about the nature of freedom and interference with freedom. I travel with Arthur Chaskalson. He said, *'Albie, would you like a lift to a conference up in Limpopo.'* So, it's about a four-hour journey, and it gives him a chance to speak to me about the case. We've travelled to maybe halfway. He says, *'...you know Albie, this case that you're working on, I'm not quite sure if you really, you know... Do you need any back up or support?'* He put it very delicately, very graciously, but indicating that he's not happy with what's coming out and can I rethink about the drafts that I've been sending out? And I say, *'Sure.'*

Then, we're back in town, and I remember Johan Kriegler comes to see me in chambers. And very nice; he did it very, very nicely. He said, *'Albie, you know, you are working on this case, would you mind if I gave you some just off the cuff, off the record words on it? That you may be trying to cover too much ground, maybe you can cut it down to a narrower point and not try and deal with grand theories of law.'* I'm paraphrasing, it was more delicate than that. And I said, *'Thank you,'* and we went through my text.

CHAPTER: ALL THAT WAS LEFT WAS THE FROWN

And I remember there's one section where I'm dealing with international law, which was a bit ambiguous because some countries held out, they didn't want to completely ban civil imprisonment for debt. So, there were circumstances where it might be left open, and I'm dealing with that. But I'm saying what happened in South Africa, progressively, civil imprisonment for debt was being abolished by law until it was like the Cheshire Cat in Alice in Wonderland - bit by bit, parts of the Cheshire Cat disappeared and all that was left was the smile. In this case, all that was left, was the frown. And I said, *'I suppose that must come out,'* and he said, *'No, I like that.'* So, he said I should keep that. So, I said, *'Well thanks, you know, you've taken the trouble to come and see me, to help a junior colleague not used to judgment writing.'* So, I'd written other judgments-- on capital punishment, on Mhlungu; at least those two. So it's not as though I couldn't write a judgment, but not on this particular case.

The next thing that hits me is, we get this plop of the new roneod draft judgments, and it's on that case – Coetzee – and I see there's a short judgment by Kriegler. And it's very simple. He just says, *'The procedure allows default judgment. The judgment served on the debtor must show cause by a certain date, not to pay, otherwise there will be sanctions. Nothing happens and the payment isn't made, you go to the court and say it was served, there hasn't been payment, you ask the court to order imprisonment until the payment is made. The key is in the hand of the debtor. You get out when you make the payment.'* That was the argument. He said that judgment is given without a hearing. So it denies the defaulter, the opportunity of an actual hearing. So, it's unconstitutional.

CHAPTER: I WANTED THE WHOLE THING ABOLISHED

So, I'm worried about that. Okay. That's correct. That's true. Then all that the lawyers who support this process have to do is say there has to be a hearing, and then the same thing happens, [but] with the hearing. I wanted the whole thing abolished. So, I wrote a broader judgment than just that, to give at least the people in parliament who are now being called upon to make the amendment; a chance to see why it was all objectionable.

So, the main judgment is the judgment by Kriegler. Everybody signs on; it's struck down on that very limited ground. But there is what looked like a concurring judgment, which had originally been the main judgment, by Albie Sachs, giving much wider grounds for striking down. And at least that would've been read by the people in the Ministry of Justice if they were involved and perhaps, hopefully persuasive as far as they were concerned.

CHAPTER: A HUMBLING EXPERIENCE

So, it was a humbling experience for me that I couldn't get it right quickly and get a sharp focus that would bring my colleagues along. In that sense, I floundered. But it was an exploratory floundering, and reaching out, and trying to find some conceptual foundation, not just a little technical procedural foundation, for the more profound objection to the idea of using state resources, which involved deprivation of liberty, in order for people just to collect money.

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