THE MASETLHA CASE – VIDEO TRANSCRIPT

CHAPTER: CIVILITY AS A CONSTITUTIONAL REQUIREMENT

JUSTICE ALBIE SACHS

It certainly was a very, very, very live issue. And I knew the personalities. It was inevitable. A huge liberation movement with thousands and thousands of members, different continents, fighting, coming together, all aspiring for the new constitutional order in South Africa. And now, I'm a Judge, with separated powers from the political class, and I'm seeing and being asked to review conduct by Thabo Mbeki, whom I'd known when he was part of the ANC Youth in London. We were in exile together. Billy Masetlha, I had known him from around, not very well-- very sharp, quick. And Thabo a brilliant political thinker, great persuader who made a huge contribution to pioneering the way to our democracy.

But now it's not Billy and Thabo. It's the President and the Director of the National Intelligence Agency. And we read in the newspaper, *President sacks top spy, or top intelligence officer*. And the next thing we know there is a challenge that reaches our Court. And Masetlha is saying, '*You can't just sack me like that. It's my reputation. It's my job. I'm entitled to a hearing before you sack me. This is just very, very abrupt, unconstitutional conduct*.'

CHAPTER: THE POWERS OF THE PRESIDENT

And now we have to look at the powers of the President, in making appointments and discharging people. And to what extent is it completely within the authority of the President to decide. Sandile Ngcobo feels that the basic principles of natural justice should apply. That means that, at the very least, Masetlha should have been given a hearing before he was sacked.

I'm thinking about it. And I don't feel employment in that context is subject to administrative law forms of control. It's employment within the public service and these are political appointments, and political appointments very much within the discretion of the officer concerned - in this case, the President. But I feel that there is something at stake. It's less than administrative law remedies of a

right to be heard. It's a right to civility. And civility is not just a question of politeness. And something that you want to see. It’s part of democracy. It's being civil to people you're angry with. It's being civil to everybody. And it's a demanded virtue.

Billy Masetlha’s labour rights would be protected. He’d continue getting his salary, so that wasn't an issue. But there was serious damage done to his reputation, and the manner in which it was handled fell below the forms of conduct that one would expect of a president exercising a function like that. There's something to that extent in the judgment.

CHAPTER: THE THREE QUALITIES OF A GOOD JUDGE

And this is a theme that came through to me very strongly in my functioning as a judge, when I was once asked to speak at a conference of prosecutors, where they were in training, and I said, ‘*What do you think are the three most important qualities of a good judge? We assume a good judge is clever and fair and so on. But personal qualities, that you want from a good judge.’ A*nd the hands go up and people suggest this, that and the other. And I think they’re surprised, maybe by all of them. ~~One is…~~ I call it the three C's; civility and collegiality and courage.

And they are the intangibles, but they are so important for a good judge, and to some extent by implication, a good anything - a good president. Civility is much more than just being courteous. Of course it’s been courteous, it's part of democracy. It's an ability to deal with and manage relationships with people you might disagree with profoundly, and who you might even dislike very much.

But instead of the dislike ending up in forms of exclusion and denigration and tension, you listen, you participate, you hear, you’re all part of that same project. That’s civility. Civility is an element of democracy.

CHAPTER: COLLEGIALITY IN DIVERSITY

Collegiality, the third C, particularly important in a Constitutional Court. Eleven Judges, completely different backgrounds, life experiences, philosophies, outlooks, legal experiences -- we've got to agree, we've got to work together. And the diversity is a big plus. The fact that we are so different is a big plus, because it means different energies, life experiences get in. But it’s also important for the institution that we get on, we support each other, that we feel that we are part of a group of people. We don't have to agree on things - we can really agree to disagree - but we do so in a manner that's respectful, each respecting the other. It was very, very moving for me to be on that Court and to find how I could connect up with colleagues so different from me in so many different ways through the Constitution.

The Constitution became, in that sense a binding factor in our lives, but absolutely crucial for the functioning of the institution. And it came through in the workshops that we had -- discussion, discussion, discussion, round and round the table. In other courts, you have the junior judge giving his or her views, the next junior judge and so on until the chief gives an end of matter and they would go out and they'd write their judgments. We were totally different. Spontaneous, interactive, 'what about' thinking. And terrific debates, particularly in the early years when we had no lodestars. We had to create our own templates - legal templates suitable to the South African situation - for the writing of our judgments. And we carried the collegiality to the point where we would have what was called a read-through. We all hated the read-through just before delivering the judgment, to check on commas and punctuation and spelling and correct citation, but sometimes on nuances that could be quite significant. Boring and tedious, but we had to do it. And I remember saying once, to my colleague Zak Yacoob, '*Zak, you're on your own on this issue. You're claiming certain things in defence of the city council action that as you can see, I disagree with. But I think your argument would be stronger against me if you phrased it in another way*.' And he would do that with me. He'd say, '*Albie, I disagree with you, but I think you could get your argument more powerfully expressed if you did something else.'*

It was the quality of the product that mattered, not the author of the product, but the quality of the product, and the pride we took in the documents that came out - checked and rechecked and re-rechecked – and trying to get everything right, because we have the last word and we owe it to the country, to the Constitution, to the people, to make our decisions as accurate and precise and dependable as possible. And all that's part of collegiality.

CHAPTER: A PERSONAL STORY

It came through in other ways. I'm going to mention a very personal story, but it gives you some idea of the Court and the relationships. When Dikgang Moseneke's son died of diabetes, it was terrible, but he had been ill for a long time - very popular person. And Pius Langa is the Chief Justice and he said, *'Can we go on Tuesday afternoon'* or whatever it is, *'to the family, to pay our respects'.* And we're driving there, and Pius says, '*Albie you know, it's part of the African tradition that when you go to the family, and you speak to the elders, the oldest man leads the singing and you're the oldest man.'* Now, it's a kind of a Pius tease, you know, the sort of thing he would do. But I was up to the challenge. So, we go upstairs and the grandmother is there, and Dikgang, and the mother of the child is there, very, very solemn; and I start singing, '*Abide with me: fast falls the eventide ...'* And Zak Yacoob joins me, *'... the darkness deepens; Lord, with me abide ...'* and we all join in. Now I had learned that at school during World War 2 when the father of a schoolchild was killed in action we'd

all sing *'Abide with Me';* and I'm secular. Zak had learned it in his school, and he's also secular from a Muslim background. But we both joined in, and everybody joined in, and it was a strong moment of collegiality, you know, between us and respect. And that sentiment of connection and togetherness was there all the way through.

Some of my colleagues would irritate one another from time to time, I'm not going to mention any names. But overwhelmingly there was a sense of concern and respect and support and listening and thoughtfulness and trying to find consensus wherever possible, and agreeing to disagree when we couldn't agree. And Arthur Chaskalson had a lot to do with that, to the extent that sometimes I felt that he was almost too neutral, that sometimes he didn't even pick up on some of the undercurrents because he was only thinking about the words and the thoughts and the statements, and he's not even seeing that those tensions are there. In a way it became a good thing, because he wasn't distracted by them. He would just stick to the issues, the facts, the tasks, and he made that huge contribution.

Ismail Mahomed I've already spoken about. He left us after a couple of years. He became Chief Justice of the general courts. And so, we would just read about him; a brilliant Chief Justice who gave panache and penetration and vigour to a court that was… I wouldn't say musty, but it didn't have that very special energy that he gave. And he did wonderful work, very specifically in relation to Muslim marriages, having grown up in a community that had been segregated. When he appeared in the top court in the land [as an advocate during apartheid], he wasn't invited to the tearoom for tea. He's appearing in the top court, appellate division of the Supreme Court of South Africa, and he'd go down to his car and drink from the thermos flask because of the racism there. That same kind of racism that would have said that he was born illegitimate because his parents were married under Muslim rights, which were potentially polygamous, therefore not a proper marriage. He found a way of underlining the dignity of the relationships, done with solemn ceremonies, very, very meaningful. But that was just a particular portion of his work. His grandeur lay in his capacity to have the big vision, the large vision. And I think, he was without equal in the world in that respect; of that trenchant, clear, lyrical language that he could use.

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