

Zak Yacoob Constitutional Court Oral History Project 7th December 2011

Int This is an interview with Justice Zak Yacoob and it's the 7th of December 2011. Zak, thank you so much for agreeing to participate in the Constitutional Court Oral History Project, we really appreciate it.

ZY It's good to be here.

Int Thank you. I've not had an opportunity to interview you before, and therefore I wondered whether you could talk about your early childhood memories and your particular experiences of growing up in South Africa?

ZY I am a blind person, as most people know. I became blind at the age of sixteen months, and my childhood was all about coping with that in a way, and doing that properly. I went to a school for the blind, and my experiences at the school for the blind were quite interesting, because the school was a school of twenty-two kids, of Indian blind children, because of course there was apartheid in those days. We had Indian teachers, we had white school inspectors; we listened to SABC radio and only heard those parts of the newspapers that were read to us by teachers. So I didn't know about Sharpeville, didn't know about the African National Congress, and I was really quite a racist when I came through matric. I used to be ashamed of that; I'm not ashamed of it anymore. But I used to be quite racist, because I used to think that the white people were very good, the African people were very bad, because the only African people I came across in those days were gardeners and so on, and I didn't quite understand in those days that they smelled dirty not because they were stupid or something, but really because they couldn't afford the soap, you see. And I thought Indians were okay, and if they tried hard they could be as good as whites were. And then I went to university and there opened up a whole new world. The first thing that happened was that they used to appoint ill-equipped lecturers from...who couldn't make it at white universities, to Indian and African universities, you see. So when I went to university and had my first law lecture, I came up with a stupid white man. So I said, ha, ha, there are stupid white people in the world! The next thing that happened was, that our university had associations with medical school and so on, and I came in touch with African people who could think better than I could. So my whole world-view began to change completely, and I began to learn non-racism, non-sexism, which is quite a process. I mean, it's easier to say you are a non-racial person or a non-sexist person than to actually be one. I found it quite a struggle. I don't know about you? And then I joined the underground of the ANC, while I was at university, and I suppose it was that move towards non-racialism, the fact that I joined the underground of the ANC which I suppose has been...what has shaped all my life for many years afterwards. I hope it's the right sort of thing you want to hear?

Int Absolutely. Absolutely. I'm just very curious, and I want to take you a little bit back, in terms of early childhood and family life, I know you said you were coping with blindness, but I'm wondering also where you think your interest in social justice, and socio-economic rights may have arisen? Do you think it may have arisen from early on?

ZY No, I don't think from then, because until I was in matric, I didn't understand the idea of social justice. I accepted everything. It was only at university that my social justice things came to the fore. I was...I come from a very conservative Muslim family, but the nice thing about that was that my father treated me like you would treat any other child. I wasn't spoiled. If other children were punished, my brothers and sisters, I was punished too. There was no such thing as this blind kid, leave him alone, or let's be nicer to him, or something like that. So that was good. But social justice, at university certainly not before. If you asked me when I was in standard ten whether a gardener who earned fifty cents a day in those days earned enough, I probably would have said yes.

Int I was wondering, what about university prompted this interest and this inclination?

ZY I think the friends I kept. I had friends like Pravin Gordhan, for example, like Valli Moosa, who came from the same university, and many others who were part of the ANC underground with me, we talked about these things, worked with these things, and everything had a different flavour afterwards. So that's where...that's where it actually came. The idea of the law being used to achieve justice, came much later. That came after I became a lawyer, and we had to work out how...the trouble really was, how a law, specifically designed for the purposes of exploitation and oppression, could firstly be challenged at every level, and secondly, how such a law could be turned around somehow to be used in our favour. Because we thought that law was a kind of dialectical weapon almost. It was a sort of weapon; which could be used either way. It could be used by them and it could be used by us. And that's the context in which our ideas of law and justice came up. And then the idea of a constitution came up because in the late 1980s, the African National Congress had begun to think about constitutions and constitutionalism and how constitutions can be used to achieve good things for society, etc., etc. Because settlement negotiations were already on the cards. And obviously if you're a lawyer and you were in the African National Congress you were involved in that process. So I had to start studying, in the late 1980s, '86/'87, about constitutionalism, constitutions in other countries, the relationship between constitution and justice, constitutions and socio-economic rights, and all that sort of thing. So that we studied to equip us to negotiate appropriately in the negotiating process, which started in 1993.

Int I also wondered...you'd mentioned that joining the ANC changed and influenced you in a fundamental way, and I wondered whether you could talk a bit about that, because I know you were also involved in the UDF (United Democratic Front)?

ZY Ja. Ja, it was actually, I think, the most important part of my life. I was an activist organiser. I believed in the idea that we should...we all grow and develop and learn, learn new ideas through struggle at every level. And I believed in the idea that you organise and mobilise people around issues, which concern them, and if you organise yourself and other people around issues that concern them, they will be prepared to be organised at that level. And the organising and mobilising leads to new levels of growth and development and new levels of participation, new levels of involvement, which in turn lead to higher levels of organising and mobilising. So I was a strong believer in the fact that people should empower themselves, and unless people did so, nothing would ever happen. So I used to be the sort of person who would go door-to-door, distributing pamphlets, spend late nights writing them. The thing I liked least was, everyone thought I enjoyed it, I was a good public speaker, so I spoke at lots of mass meetings, which was quite nice. I delivered lots of papers at various conferences, and so on, and so on. So I...what I learnt from that whole process is how ordinary people know what they want, they can be empowered to fight for what they want, and I suppose the dirty lesson I learnt is that it is also possible for opportunists to manipulate ordinary people in to getting them to not know exactly what they want. So there was a level of honesty in organising that you're required to be able to organise properly and effectively. The other thing about the organising is that when you go to someone's house, you know how they live. You know what they do, you know what their problems are. You understand things, it's a question of atmosphere and so on. It's very difficult to say what goes into your own growth and development. There was a guy who said to me a story, you may cut this out later, quite a lovely one. The President of the Natal Indian Congress at the time, had a visit from the Security Branch policeman. And he had a big library of books, and the Security Branch fellow asked him, from which book he had learnt which idea? (*laughter*)

Int I was wondering, Zak, you were so incredibly active during...I can't keep up reading your biography, but I wondered were you ever subjected to police harassment during the 1980s in particular?

ZY No, I was never.

Int You weren't?

ZY I was searched only once. Only once was I searched, and I actually think in a strange sort of way, that my blindness was my advantage. In the same way as

African people's 'Africaness' was also their very advantage. Because I strongly believe that when the ANC was banned in 1961, it was the structure of apartheid itself, which limited their thinking. So they couldn't conceive that an organisation of African people, could go outside the country, form an organisation, mobilise and organise inside the country, and continue to march forward, because in their conception, African people were limited. Now in the same way, I think that the cops couldn't really conceive that it would be possible for me to do all the things that I was doing, and I think that that was my saving grace in the end.

Int I also wondered, Zak, you were chairperson of the Durban Committee of Ten, I wonder whether you could talk about what the Committee's organising principles and aims were?

ZY That was quite a fascinating thing because there were lots of school boycotts and so on and so on in those days, and then the state said, you can't have gatherings of more than ten people. So we said, okay, no problem. We won't have gatherings of more than ten people. So we have one committee of ten people, each person in that committee of ten organises another ten people, and so on and so on. And ultimately through those structures, we were able to reach fifteen thousand people. And ultimately I say, that if they didn't have that law, we would not have learnt that style of organising. Because ultimately it turned out to be a style of organising which was beneficial to us, it turned out to be a style of organising, which we learnt, we understood, we enjoyed, which benefitted us for a long time to come. So in a strange way this was one of the steps taken by the oppressor, to oppress us further, but which made it possible for us to organise with greater discipline and to organise better. So that was really nice because...then you had to make sure that everyone did their bit, you see, and every committee of ten, the people on it, had to report on a hundred people. And those hundred people would then have to report on a thousand people down the line. And so it goes on.

Int Fascinating! I also wondered, you mentioned that it was at a certain point that you saw law as being an instrument that you could use to achieve social justice. But at the time when you started university, what did you think of law, and did you think that it could be used as...?

ZY No, I knew nothing about law. I went to do law only because...that's a strange story that...I went to do law...you know, in those days, primary school ended when you passed standard six, and that was a milestone in everyone's life. Your eighth year at school. Grade eight these days. So I was one of the first lot of eight kids, blind kids, who did the standard six exam, in that class. And of course there was a big celebration, the community was invited, the newspaper was there, and so on. First lot of Indian kids who passed their standard six examination. You can imagine the hoo-ha of it and everything. And one of my teachers made a statement in the newspaper, that he thought

I'd make a good lawyer. Somebody read that to me, I said, okay, I think that's what I'll do.

Int And did the law studies at university meet your expectations?

ZY No, we had stupid lecturers, who taught us nothing, who taught us merely structural stuff. And the idea of law achieving justice, was, I think, even though I knew nothing that idea was much further away, and far stranger to my lecturers at university than it would have been to me. I think they would have died of shock if they even began to think that there could be a relationship. For them, law was a positive way of regulating society and maintaining order, and allowing people to make money improperly and ensuring that poor people were appropriately kept at bay.

Int Before I go on to your legal career, I was just wondering, you mentioned earlier that you came from a conservative Muslim family.

ZY Ja.

Int ...and I wondered what your family might have made of your experiences of political activism, your involvement in the UDF (United Democratic Front), the ANC?

ZY They were very afraid for me, which was very important. And I think it was...it's a mixture. I'm different from them in the sense that I don't read Namaaz (prayer), I wouldn't fast, and so on, and they all know it. So on the one hand they are critical of me for that. On the other hand there is a sense of admiration, which is strong, you know. And I feel sorry for them because ultimately they are in two minds about me, and I think what negotiates between these two for them, is that they care for me, you see. And because they care for me, they drift to the admiration side, and they kind of pretend that the criticisms don't exist. It's quite a strange thing. I'm sure you know how conservative people operate in these situations; it's very difficult.

Int I also wondered, Zak, you went to the Bar during a period where apartheid was rife even within the Bar, and I wondered what your experience was of actually operating in that environment?

ZY It was a difficult environment to operate in, but what made it easier for me was that I soon received instructions from the ANC that for my activities in the underground to be contained and controlled and not to be discovered, and so on, it was very important that I created the impression of being a regular good lawyer. So those were my instructions, and I'll just give you one example of

how I had to carry out those instructions. My first bail application was made in respect of a guy who had committed murder. And of course that took two days to prepare that case, I was very...somebody had died, and that was very difficult, and the balancing exercise had to be done about whether he's a threat to society, and the problem of whether to keep this person in jail, the whole onus of being innocent until proven guilty. I worked quite hard at all of that. And when I go to court there's this prosecutor, I remember his name too, his name was Blom. He whispered in my ear, "Shall we say forty rand?" I got a shock. I said, "What? For such a serious offence!" So I looked quizzically at him. He says, "No, man, let these kaffirs kill each other in the townships so far as we are concerned" He also used the f word in the sentence, and you can imagine how. And I wanted to hit him. I wanted to hit him; I wanted to swear at him, I wanted to create a huge big scene. The instructions from the ANC came to mind, it took me two seconds, and I just nodded quietly, paid forty rand and went away.

Int That takes discipline.

ZY So ja, it was...so that was the one thing. So I had to be a good lawyer, but also I...lots of people liked me, interestingly enough. So I didn't have too many problems about racism. The kind of racism problems I had was, I used to have this sense that my colleagues and judges and so on, used to think of me for an Indian, and a blind chap, this guy is good, you know? Sort of, you are the exception. If all other African people were like you, life would be good. But they're not all like you, kind of thing. So I had a different kind of thing where I had to ignore some of those things. Sometimes I didn't ignore them. Sometimes some people were told to jump off where they could. So that wasn't a huge thing. The bigger problem though was that my ideas were so different. I was against the death penalty, what...completely against the death penalty when I was about twenty-four or twenty-five years old. And at that time, hardly anybody was against the death penalty. So, white advocates used to think I was mad when I used to talk, what they called nonsense, like the death penalty doesn't work, we should have this inaudible, etc., etc., etc. When I said things like, well, you've got to change the country, I used make gentle pronouncements about how the ANC did have a point, and so on, and so on. But I always said in public that armed resistance by the ANC could never be justified. So they liked me for that too. But that's how one had to conduct one's life, to be able to work in the underground properly.

Int I wondered also, what were the main areas of law that you practised during the apartheid era?

ZY Two main brands of law, the one side was a public law element, which was about challenging detentions, challenging house arrests, and challenging laws relating to gatherings, challenging laws, which discriminated between people badly. They had a law in Phoenix some time ago, where each lot of six

houses had one water meter. And they had a law, which said that everybody pays equally for the water, which they use, regardless of how much people use. So that was unfair in itself. But then they had another law, when the water shortage came about, where people had to pay fines of up to five or six thousand rands, or something, in circumstances where they used more than the allocated amount of water, because there was a huge shortage. And the law went further to say, that regardless of which of the six had overused the water, because they couldn't work that out at all, the fine had to be shared by everybody. So we challenged the correctness of that law too in the context of our housing struggle under the Durban Housing Action Committee. We won that case, I must say, as a commercial. So that was the one kind of law. The other kind was defending ANC people, which also I'd say goes into the public law category. So those kinds of things didn't bring much money. Hardly any, if any at all. But then I was a very good...you'll be interested to know that as a blind person, I did hundreds and hundreds of motor accident cases. So I was very good at those, which I enjoyed. I did lots of contract work, delict work, a fair amount of medical negligence cases. So I did virtually everything. So that's what my practice was about.

Int But you were also involved in some very high profile political trials...

ZY Yes.

Int ...and I wondered if you could talk about those?

ZY Ja, there were two, and they were all important. They took a great deal out of you, those trials, and one had to work very carefully at them. The Delmas Trial was a large team, they were long trials, they took a long time, one had to be careful and very precise about them. And judges in those cases, quite often expressed their political tendencies. There were some who were on our side too, which was very nice. So I'm not saying that only those who were against us expressed their political tendencies. Both sides made the mistake of doing that. Now I can tell you that maybe one could say in a positive sense that both were mistakes, but we liked those judges who were on our side very much actually. So there was always that element in political trials. And because of that, greater tension. The other thing about the tension is that, you know, they say you shouldn't be your own doctor. And you shouldn't be your own lawyer either, nor should you be your friend's lawyer. So many people I acted for, I knew. Which was...which complicated life a great deal. And then, essentially I suppose I was being my own lawyer, because I was being a lawyer for an organisation of which I was a loyal member. So in a way, the idea of carrying out the function independently was a difficult one. So that created complications. The next thing is that one had to be a lot more creative and imaginative in doing them, because in most cases, the state evidence was true. You know, they would catch somebody doing something, or something; they'd lie sometimes, but most cases the evidence would be true, and

therefore you have to be a lot more imaginative and creative to get the people out. I remember this case of Operation Vula, which you've probably read about, where all the officials in Operation Vula, who I knew well, Mac Maharaj, Pravin Gordhan, and so on, were all in jail. And the state refused to release them on bail. And I took the point...and at the time negotiations were taking place. So we came up with the idea that one of the ways to try and get them out on bail...because I knew that in a regular sense it wouldn't work because they had all sorts of ammunition and mines and bombs and so on and so on, as evidence, so obviously once they'd produced those, in the mind of the white magistrate, these were dangerous people, you could never let them out on bail. So I took the point that you're acting in bad faith, you can't negotiate with the ANC on the one hand, because negotiations had started, and not grant these people bail on the other, because they're part of the ANC. They're entitled to be in the country, the ANC will look after them, and so on, and so on. So you can't be in two minds about it, and therefore, I want to subpoena the Minister of Justice to come and give evidence in the negotiating process, and what's happening. So we subpoenaed Kobie Coetsee, and the magistrate set aside the subpoena as being irrelevant. I appealed against the magistrate's decision to set aside the subpoena, and the judge agreed in the High Court to hear the appeal on a particular day. A day before the judges heard the appeal; the Vula people were released on bail. It was quite nice.

Int In terms of the Constitution, the ANC at some point had started negotiations, I wondered how privy you were to some of these impending changes during the late 1980s.

ZY Not too much. We were simply told that talks are taking place, we are thinking about constitutionalism, and we have to settle on some bases, so you guys had better learn everything. So that's what we did. So that when the time came, when the negotiations really started in 1991, we were available. So it was no accident, for example, that...I mean, it was only because I had been on the ANC that I had done this work beforehand, that I was asked to be on the negotiating committee in relation to fundamental rights. That's the only reason why I was asked to be on the panel of experts. And all that develops. And then those all become reasons why you end up in a Constitutional Court.

Int Right. Before coming to that, you were also involved in terms of the Electoral Commission, and I wondered whether you could talk about that and your experiences, given that it was such a historic moment in this country.

ZY That gives me an opportunity to tell you a Madiba (Nelson Mandela) story, which was very nice. He wanted me to serve on the Electoral Commission, and he sent for me; he used to call me Boy, still does. He sent for me to see me, he said, "Boy, they told you that I want you to be on this Commission?" I said, yes. "Well, I called you here to tell you that I appointed you onto this Commission, because I know that you won't take our part. My instruction to

you, that you are there not to take our part in the Electoral Commission, but to do your job properly". That was absolutely marvellous. So I...I mean, he knew that I was relatively young, I may be conflicted, you know, which was interesting. So when I was being fair, I was being fair for two reasons. I was being fair firstly because the job requires it, and secondly because Madiba (Nelson Mandela) told me to do so. I think I'd still have been fair. But the fact that Madiba (Nelson Madiba) said I should do it, for me was extremely important. The only thing I can remember about the election is that it was a lot of hard work. We had to set up structures and get a whole election done, in four months. We were appointed in the middle of January. And the elections finished in April. And it was important work, it was difficult work, and there were of course difficulties at the level of making sure everyone participates in the election, getting political parties to agree, setting up structures, sorting out debates, and disputes and so on. But for me, I think the most important thing was to set up systems, which worked. To set up a system by which you know, A: that people will come to the polls. B: that there will be ballot papers there, there will be pens there, there will be booths there, and all sorts of things, and that they'll be able to vote safely and go back home. For me that was the most important thing we had to achieve. We had to make the vote real for many people. So I worked long hours. Those were the days when we worked eighteen/nineteen hours a day, more sometimes. Saturdays, Sundays and all that. But it was a phenomenal experience, and it was emotionally wonderfully satisfying to do it.

Int Did you ever think that that day would come in your lifetime?

ZY Never. Never, never, ever, until 1989, early 1990. I never thought...the ANC had a slogan, which said, "Freedom in our Lifetime!". And I used to say to my friends, I've never heard of a more naïve slogan in my life. And they used to all say, sh! sh! keep quiet, you can't talk like this.

Int You also were in the Panel of Experts of the Constitutional Assembly, and I wondered whether you could talk about that work and what it entailed?

ZY That entailed advising the political parties on options, which they had, and suggesting other options if existing options, which they thought of were not good enough for them to agree. And then drafting...making sure that what they had agreed was actually written down accurately, clearly and as simply as possible. And then to make sure overall, that the Constitution as a whole, covered everything that a Constitution needs to cover generally, but covers also what specifically needed to be covered in our particular circumstances. So that was broadly the role.

Int You were appointed to the Constitutional Court in 1998, if I'm correct?

ZY Yes.

Int Did your nomination and selection come as a surprise to you?

ZY Not really, I had made myself available to come to the Constitutional Court in 1994. And I was then one of twenty-five people shortlisted. Seven people needed to be appointed then. And I was not one of the seven appointed in 1994. And somehow in 1998, you know, when some post has to be filled, talk goes around about who is going to make it, you see? And everyone used to tell me that that job was mine. And that I was going to get it. So, it wasn't a surprise at all that I was nominated and I was glad that the University of KwaZulu-Natal...at that time University of Natal...nominated me. But, I must say that, after the interview, I was not sure whether I was going to get the job. I wasn't surprised that I was interviewed, right, and the interview had gone well. And the two months between the interview and the date of the announcement were the longest two months of my life, I must say.

Int It sounds like you really wanted to be on the Court, and I wondered...

ZY Yes, I did.

Int ...and I wondered, in 1994, when you put your name forward, and you weren't selected, were you terribly disappointed? Was it a setback for you?

ZY Well...the truth of the matter is that...I don't know whether they knew it or not, but they did me a favour by not appointing me. Because in 1994 I was not doing a particularly wise thing applying. Because I had a huge overdraft on account of the fact that I hadn't done much work, and all my practice had been involved in political work, and of course the work available to black people in those days, was little. But after 1994, things opened up. And during the period 1994 to 1998, I made a lot of money, with the result that my debit balance was converted to a credit balance (*laughter*). And when I made myself available in 1998, I thanked my lucky stars that I was not appointed in 1994 because with that overdraft, and judges' salaries were quite modest in those days. Now they're quite high. In those days judges' salaries were quite modest, I would have had a very, very difficult time. So I was disappointed initially, but when the work started coming in, and when my overdraft started going down quickly, I was quite happy.

Int You said that your JSC (Judicial Services Commission) interview went well, I wondered what your memories were...was there any particular question that stood out for you?

ZY Oh, that one question that stood out for me in the second interview...so everybody was saying how good I was during this interview, and not really asking me any questions, and all I had to do was nod, so I was beginning to get embarrassed. And then you know when you get embarrassed a bit much, you get irritated, and after being irritated, your irritation gets to anger in about half an hour. So I was just reaching there, and I think that Arthur Chaskalson noticed this and he was one of the interviewers, and he threw me a most delightful curve ball in the interview. It was wonderful. He said...you see, I was one of the advisors in the Constitution making process, as you know, and the Constitutional Court had ruled, the first time when they looked at the Constitution that had been prepared, that the Constitution did not comply with the constitutional principles. So Arthur Chaskalson said to me, were you surprised when the Constitutional Court did not certify the Constitution the first time around? So, I said, well, firstly I must say I was surprised about something, I was surprised that the judgment was relatively short for the many things that you had dealt with. I was also very pleasantly surprised that I agreed with most of it. But I was unpleasantly surprised about your conclusion about the taxing powers of municipalities or something. But I thought this was a nice question.

Int And your memories of your initial days at the Court, because at that point, the Court was still in Braampark?

ZY Ja. My memories were quite interesting, although many of the people knew me quite well. The first three or four months were very interesting from a blindness perspective, because everybody looked at me like I was some kind of miracle of some kind or another, you know. And if in a read-through of a judgment, I picked up a comma that was in the wrong place, you could actually sense people looking around, you know, saying, oh ja, he's got that, quite good. So that too used to be a bit irritating. So it took three or four months for my colleagues to begin to treat me as an ordinary human being, to insult me a little, to joke at my own expense, you know, all those things. So that's quite a memory, because I think that that accommodation took a very, very long time. The other important thing that I remember about this Court is how we can differ phenomenally and fundamentally, and how we can have very good...genuinely good, not pretending good, but genuinely good interpersonal relationships, and how we could genuinely continue to respect each other. So this element of collegiality, which was started when I was there, was absolutely wonderful for me. The other thing is that I must be the best-resourced blind person in the world, let alone the country. So when I came to Court, the government spent a hundred and fifty thousand rand or something in capital expenditure in the shape of a Braille printer, in the shape of things that made computers talk, in the shape of ensuring that I had a professional assistant who could also cater for my blindness in addition to doing the other work that PAs did and so on and so on. Even now, it's much more costly for the government to have me here than to have a judge who can see. And the importance of that level of accommodation can never be

overemphasised. I could not do my work without that under any circumstances.

Int I also wondered, it's interesting because you said about how difference and your being blind was a factor in the initial months. I'm curious because the rest of the members of that first bench were also very different in background...

ZY Yes.

Int ...and I'm very curious how you may have accommodated them in terms of their differences?

ZY You see, I was...I think that we all accommodated each other. We all understood that the reason why we have eleven judges in this country is that on the assumption that there is such a thing as the absolute truth, and I'm not sure whether there is, but if there is something like that, then it is good for what you might call the final earthly truth. Must make some concession to those who believe in the final eternal truth for a minute. But the final earthly truth actually is determined by eleven people who do come from different backgrounds, who do see life differently, who do think about things differently. So if that's the philosophy then a prerequisite for that philosophy to work is that we have to take each other seriously. We have to listen to each other. We can't be tied to our own positions and our own views. We can't be here thinking that we are right and no one else is, and so on. And that's worked very well because quite often...difficult to think of an example now because these processes are difficult to describe, but quite often you find that if someone gives you an idea, and he wants to write a dissent, if you as a writer of the judgment take her very seriously, and you think carefully about what they are saying, quite often you can accommodate them in your judgment, and an idea which came about in disagreement with my position, becomes useful in making my judgment richer and better considered. So that sort of collegiality, discussion, taking people seriously, was for me a very important thing. And then you know, by our very nature, some of us are softer than others. So for some reason I'm a harder human being than many of my colleagues are. So that I have to listen to their softer positions, and I suppose I've grown a little softer too in the process (*laughs*).

Int I'm curious about you saying that you're a much harder human being. What do you mean by that?

ZY I place...I used to place a lot more store in those days, but now still, I place a little more store on logic, on intellectual soundness, and things following from another, and things making sense, than doing something because it is a good thing to do. Now I'm less like that than I used to be. I've learnt in a way that intellect is a slave to emotion sometimes, and maybe it's a good thing. And it

may be a good thing for your intellect to be a slave to morality as well, and to a growing morality.

Int So do you think that there are certain non-legal considerations that play a part in your judgment making?

ZY Well, no, I think every consideration is legal.

Int Right...

ZY But there are not strictly positivist law considerations. I think that in everything you decide, a context in which you decide it is important, what's happening in society at the time is important, and words mean things only in terms of their context. They have no meaning otherwise. So I think context is extremely important and we must bear that in mind. And therefore in everything that we do...my own sense is that when judging cases we are not repairing motorcars, with the result that it's not an objective business. I think it is a danger to think that a judgment writing is an utterly objective business because there's no such thing. You're not getting the law right, what you are doing is making orders, which affect human beings. So ultimately, if you get the law absolutely right, and a thousand people go to jail quite improperly as a result, it just doesn't work ultimately. Because you've achieved...you've got the law right, so what? So in a sense every human being has his own sense of fairness and justice, which comes into the decision making process. And I think it's wrong to talk about objective judging, because each of us have a level of subjectivity in our own being. We come from different parts; we understand things differently, and so on and so on. So the thing to do, if you don't admit the subjectivity, and you pretend that you're objective, then I think you can be subjective without knowing it, because you believe you're not being subjective. On the other hand, if you're aware of the dangers of subjectivism and you're also aware of the importance of subjectivism, then the struggle becomes a difficult one and a different one. Because the struggle is not whether it should be totally objective. The question is, how much subjectivity must you allow to get into judging a particular thing, and therefore the question becomes, what is the right balance between subjectivity and objectivity? What is the right balance between the normative elements of the society in which we live and strict law? So I think that the balance of subjective and objective, the reliance on societal norms, the reliance on moral norms, the reliance on your own self to the extent that it is permissible to do so, are all actually appropriate legal consideration.

Int In terms of the relationship between principle and pragmatism, with regard to adjudication, how do you understand that?

ZY I don't have a problem with that. Because I have never found...I suppose that's because I determine my principles a bit cleverly...I have never found practice conflicting with any of my principles. I've never had that debate with myself at all. Because if you define your principle broadly enough, and if your principles are sufficiently flexible, then virtually anything goes in practice.

Int I'm curious in light of this discussion we've had, you've really been known for being such a strong proponent of socio-economic rights...

ZY Ja.

Int ...and I wondered how you then balance that in relation to the core issues of human suffering and social justice and fairness?

ZY You see, I am a strong proponent of socio-economic rights. I'm also a strong believer in the fact that you can't ask the government to do what it can't do. That the balancing exercise in this country is a very difficult one. And that's why we've developed a standard, and we apply that standard and so on. And my belief in social and economic rights is also logical. There's nothing emotional about it, because I...you know, we used to have this debate about socio-economic rights and the other rights in our country, which are called civil and political rights, and so on and so on. For me, it is strictly a matter of logic and nothing else. If you have no food, you have no clothes to wear, and you are really physically in a mess, it is ridiculous to talk about the right to vote. Just quite nonsensical. So for me the thing about social and economical rights has to do more with a tight logical frame than with the emotion of feeling sorry for people. I mean, if you said to me that you met with an accident and you are my friend, I wouldn't sympathise with you and say how bad it is, and so on. My mind would go in a different direction. Are you okay? You're sure you're okay? Is there anything I can do to help you? Which would be my approach, you know. I wouldn't be a good comforter, if you know what I mean.

Int I'm just wondering, you're known for the *Grootboom (Government of the Republic of South Africa and Others v Grootboom and Others)* judgment and I wondered whether you could talk a bit about that case and its outcome?

ZY The first thing I would say about that is, that I don't think I would have been given the *Grootboom (Government of the Republic of South Africa and Others v Grootboom and Others)* judgment to write, in any other court. Because the *Grootboom (Government of the Republic of South Africa and Others v Grootboom and Others)* judgment was a big judgment, and we all know that in most courts, most Chief Justices and most Deputy Chief Justices, keep the big first cases for themselves. So the first thing I must tell you about *Grootboom (Government of the Republic of South Africa and Others v Grootboom and Others)* is how flattered I was...because I was a...I had been

here then for only two years or something. And I was very flattered at being given the opportunity to write it. So that's the first thing. The second thing I want to say is that *Grootboom (Government of the Republic of South Africa and Others v Grootboom and Others)* is not my judgment. I did the first draft, but if you know what happens in this Court, from first draft to last draft, and how drafts metamorphose as a result of comments made by colleagues, contributions made by colleagues, and so on and so on. Indeed I would say that if one were to be fair, then I think eighty percent of the judgments of this Court, should have carried the names of all the judges as writers. So, it was an important case, all of us contributed towards it, and what we wanted to do was set out a basis, to make a beginning. Not to lay down the whole law. Many people think that case does that. It doesn't. What it does is give certain pointers, sets out certain principles and gives the pointers. So we're still very early days in social and economic rights. So I think the main thing about that judgment is how we gave to the concept of reasonableness in section twenty-seven, a value content in many ways. And how we linked reasonableness to poverty and vulnerability, and how we interpreted the section to mean that the state must have a coherent, co-ordinated, workable program. So I think those were the important things. But it must be emphasised that it is a...it's my name, but it is one of those judgments to which everyone contributed. And the art in a judgment like that, is to produce something defensible, which your colleagues can look at, and then see how you can accommodate the comments of all your colleagues, but at the same time create a piece which is defensible in itself. Which doesn't go all over the place. So that's what I want to say about that.

Int Now in terms of the *Grootboom (Government of the Republic of South Africa and Others v Grootboom and Others)* case, when I undertook the Oral History of the Legal Resources Centre, and having interviewed advocates and attorneys in South Africa, some commented on the sadness of Mrs Grootboom not receiving a house in time. And I wondered, given the fact that you've just said that your job is not to ensure that government provides this, how do you then settle that in some way?

ZY Let me tell you how. The point that everyone forgets about, is that when we decided *Grootboom (Government of the Republic of South Africa and Others v Grootboom and Others)*, to lay down the principles for housing, the actual case between Mrs Grootboom and the government was settled. They had already an arrangement in terms of which the government was going to do something for her. I don't know what the details of that arrangement are. So strictly speaking, we didn't have to decide *Grootboom (Government of the Republic of South Africa and Others v Grootboom and Others)* at all, because the case was not decided to benefit Grootboom, because Mrs Grootboom's case had been settled with the government. The case was decided in relation to settling the principles for other people. And I am not sure, newspapers say that the government hasn't done enough. And that they haven't followed *Grootboom (Government of the Republic of South Africa and Others v*

Grootboom and Others), they're not doing enough and so on and so on. But there have been some cases, which have been brought, where we've said the government hasn't acted reasonably. There have been other cases in which we've said, well the government has acted reasonably. But it's very difficult in a difficult social area, without conducting a very careful study of what the government has done, how much money it has spent, the quality of what it has provided, how many more people have housing now compared to the time when (*Government of the Republic of South Africa and Others v Grootboom and Others*) has been decided, to know whether overall the government is doing reasonably well. I do wish there was no corruption, because even if the government was doing reasonably already, if there was no corruption, I'm quite certain they would have done much better.

Int How do you define reasonable?

ZY We define, in *Grootboom (Government of the Republic of South Africa and Others v Grootboom and Others)*, reasonableness as being something... firstly it's not the Court's view of reasonableness. It is, if there is doubt about whether something is reasonable or not, and if the case is such that our view of reasonableness differs from the government's view of reasonableness, then we defer to the government. As long as the government is within the margin reasonable. Having said that, we said that a program, which does not do certain things, is not reasonable. So we went the other way. We had a reasonableness standard and then interpreted it backwards in a way. And what we said was, that, for example, a program that does not cater sufficiently for vulnerable people, is not reasonable. A program, which does not take housing forward as time progresses, is not reasonable. So we've set those sorts of conditions for reasonableness, and then we have to decide in every case what it is. And there are differences of opinion on these things. So you'll find that quite often when we say something is reasonable, if we say government policy is reasonable, the activists in the community will say, this Court is gone out of its head. They say this is reasonable, within our view it's not. So it's a difficult concept to work with. It's a concept, which is more difficult to work with because you are walking very, very close to the border between what the government must do, and what a Court must do. Now if you stray too far from that border, as a Court you're not doing your work properly, at all. If you cross that border, you're still not doing your work properly. So the point really is, is to get as close to that border as possible and not to intrude. And because the border is not a bright line, and because the border is not a fixed line either, there will be huge differences of opinion about whether we have crossed the border or not, and there will be... I mean, nobody would have said, we've strayed too far away from the border. They will say, we perhaps didn't go close enough to it, or something like that.

Int In terms of your other judgments, I wonder what are some of the cases and judgments that have stood out for you and have in some ways exemplified your judicial philosophy?

ZY I don't know...I don't know. I've written every judgment. I'm the sort of judge who just does my work, you know. So I suppose I haven't had time...I do what I have to do and I never look back and get excited about things, I'm not that sort of guy, actually.

Int Right. I have had the opportunity of interviewing people who have worked in your chambers and they've described your Chambers as the hardest working and the one that produces the highest quality...

ZY You mean they're praising themselves (*laughter*).

Int It sounds like it, doesn't it? And that produces the highest quality law clerks and researchers. I wonder what makes your Chambers tick?

ZY Oh, hard work. I make it quite clear to my clerks, firstly that in chambers you call me Zak, and I call you by your first name, because respect is not about what you call each other, respect is about something else. I have to earn your respect, you have to earn mine. The next thing I say to them is, you do things properly or you don't do them at all. If you don't do them, that's fine. You won't grow and I won't bother about you and that's the end of that. The third thing I say to them always is that, they must give as good as they get. So they must not, if I advance a particular point of view, keep quiet about things, because they must look after themselves, and advance their own point of view properly and effectively. And I work on the basis of my clerks that I give no quarter, and I expect none from them, and they should expect none from me, and that is going to be the relationship. And we get on quite well. We end up being good friends and so on. Some of my clerks even feel guilty when they're not working, which is quite nice.

Int (*laughs*) And the other thing that's also been said about your Chambers, is that you are an exceptionally warm person and that you have mentored people socially, in aspects other than the law. And I wondered whether you could reflect on some of the law clerks that you've worked with?

ZY Ja, I've worked with all of them. I don't want to single any of them out, but I mean, everybody has done well. But as to whether I'm a warm person I suppose you might as well judge that instead of me judging it. I think you'll know enough about me to judge that at the end of this interview.

Int (laughs) I want to come back to the issue of collegiality, in terms of your colleagues. Certainly you were very fortunate to be part of that first bench which has been described as the Glory Bench. And if I'm not mistaken, you are the only remaining member who's currently sitting.

ZY Absolutely.

Int Right, and I wondered if you could reflect on some of those relationships with other judges from the first bench, in terms of both socially and professionally?

ZY Ja, we got on well, we ate together quite a lot, we went to each other's homes quite a lot in those days. We don't do so much of that anymore; it's quite an interesting thing. We chatted a lot. We still chat a lot actually, we still talk a great deal to each other; we still discuss common things. But in a way the Court is interesting and vibrant in a different way. So that...how can I put it? We probably spoke less about jazz with those colleagues (laughs) than I do now. That sort of thing. So there is a shift, but not a shift for the worse, or anything of the kind, it's a shift, which reflects that even collegiality is the dynamic thing, which changes as it goes along. So I think that...how can I put it? The collegiality today may be said to be a little more vibrant than it was. We were a little more formal with each other in that first bench; just a little more formal. But now I think we express ourselves as human beings maybe, a little bit more than we expressed ourselves then. So it's a different kind of thing, a different kind of vibrancy, a different kind of even respect for each other, and so on. So it is a bit different, it's changed, but it's still quite vibrant and good, and with every new member coming into the Court, you get a slight redefinition of collegiality, most often for the better.

Int Right. You've also been probably the only judge who's worked with four Chief Justices (laughs). I wondered whether you could talk about, certainly the first three, in terms of the styles of working and leadership and what struck you about those experiences?

ZY Ja...all of them were intellectually admirable and fair people. All of them were helpful, all of them understood issues well. But I think that in a sense Arthur was more formal than Pius, and Pius was a lot less formal. He had a greater sense of humour. I started wearing caps to Court, and when I went to a Court conference with a cap on, Arthur would clean his throat ever so slightly, and you could feel him looking at you, you know. Whereas if you came to a conference with a cap on in Pius' (Langa) day, Pius (Langa) would very warmly say, "I like your cap, where did you get it from?" So that sort of quite fascinating difference. So I think Pius was a little more formal (means informal). And then Arthur (Chaskalson) did very much of his own work, he was not a delegator at all. He did everything himself, he did everything well, he did it and we always got the finished product, and the finished product

would always be good. Pius (Langa) was different. What happened under Pius (Langa) was that we all began to do things, so that the Court got a better flavour, we had turns to set out court orders, and to draft directions, to write letters, to draw memoranda in relation to particular things, and so on and so on. So that I think was the essential difference between Pius (Langa) and Arthur (Chaskalson). And then Sandile...Sandile (Ngcobo) I got on very well with, he was quieter, he was more to himself in a way, he continued the delegation trend and so on and so on. He might have consulted a little less than Pius (Langa) did, maybe, but those are all little differences in personality in a way, because some people are more restrained than others, even in terms of consulting. Not because they don't think consultation is a good idea. But because if you're the kind of...you have to be a particular kind of human being to be able to open yourself up to a consultation process in relation to everything completely, you know. Whereas some people are just...they're not, not consultative, but they keep to themselves a little more. So that's how I would typify the three Chief Justices. The fourth one I just don't know him.

Int Yes, of course. I also wondered, in terms of the three members who have passed away of the first bench, did you know any of them well, and did you work with them closely, John Didcott, Tholie Madala, and Ismail Mahomed?

ZY I knew Ismail Mahomed and John Didcott much better. I began to have a meaningful relationship with Tholie Madala, only when I came to this Court. And I knew John Didcott as a judge because I used to love arguing cases before him, and when I had political type cases, I always won them before John (Didcott), which was very nice. So I knew him and I knew his element of fairness and I knew exactly how to win a case before him. Because he was an advocate for three or four years while I was at the bar. I went to him for advice. He was in Durban. I went to him for advice quite often and he gave me very good advice, and so on. And I remember...you learn things from people, I asked him about something, and he gave me the answer, and he said, where do I find it? He said, my boy, there are many things you will never find in any book (*laughter*). So I got on very well with him. Ismail Mahomed too, he and I were advocates together for a long time. And we worked on similar sorts of cases, we talked about similar things, we went to similar conferences, and so on and so on. So I knew Ismail (Mahomed) extremely well.

Int I wonder what you could say about Ismail (Mahomed), given that he has passed away, and what your sense was of his experience of being a Constitutional Court judge?

ZY He...unfortunately I didn't experience him in this Court at all. Because I replaced him here. And some people who were saying that I'd come to this Court, were doing this Indian-Indian trick you see, one Indian goes, you've got to get another Indian to replace him. So I'm going on the 31st of January (2013). I wonder whether people are thinking that some other Indian will

replace me; we'll wait and see (*laughter*). But Ismail (Mahomed) was a phenomenally hard worker. A greater combination of hard work, absolute writing flair, and a particular sense of fairness, and the ability to justify a position which he considered fair, I thought was really, really, very good. And like all hard working people, he had a temper. A bad temper, but once you learnt to cope with it, he was good. He was one of those people who had a temper and who also had a sense of humour. And he did an improper thing as chair of the Judicial Services Commission, but now that he's not around, I suppose I can talk about it his improprieties a little. He phoned me up when the vacancy came, and asked me to make myself available and to ensure that I was nominated. So I said, "Ismail (Mahomed), what if I'm not appointed a second time?" And he said, "I am the Chair of the JSC, don't you know that?!" (*laughter*)

Int I also wondered, normally when people talk about difference, they talk about gender and race, and I wondered whether they talked about difference in terms of, for example, Albie (Sachs) not having an arm, and you being blind? Were those issues ever discussed openly, or in terms of perceptions?

ZY They were never discussed so openly. But I think disability is an extremely important factor, and I wonder when next we'll have a person with disability in this Court? One of the historic things about this Court is that it had two people on it with disability, for a period of eleven years. And the interesting question I ask myself, is when are we going to have the next judge, and if you look around the lawyers and so on and so on now, then that seems to be a very distant dream. So I'm glad you mentioned it, I wouldn't have said it if you hadn't mentioned the disability element. But one of the remarkable features of this Court is the over-representation of people with disability on it, for a period of eleven years. But it hasn't been an issue. Well it...I don't know about Albie (Sachs) but blindness is an issue in a strange way because, it doesn't happen now, but up until recently even, you could go to a conference, and because you can't make eye contact with anybody, and because you're a judge, nobody will come and talk to you. So you could stand quietly somewhere, without anyone coming...the inability to make eye contact with people is perhaps the greatest communication problem. But I suppose I'm such a good talker that that's not been a problem (*laughter*).

Int Given your strong political credentials, I wonder what you thought about being called a 'counter-revolutionary' in 2008?

ZY Agh, no, I didn't mind (*laughter*). I think that this is the...look...when...I suppose this story will explain it...when we entered our democracy, I was pretty high up on the ANC's election list, and...I was not worried about that because for me, there was a huge difference between fighting for democracy on the one hand, and then oiling and working that democracy on the other. I found the first absolutely honourable and wonderful to do, and I was honoured

to do it. But I would not have been as honoured to be the Minister of Justice, if you know what I mean. I was on the ANC's list and for me there was a huge difference between being in government and doing something else. So, word went out that I was to be nominated onto the Electoral Commission, and Cyril (Ramaphosa) phoned me at 6:30am on a Sunday morning, which is an indication of how hard he worked in those days. Going through his lists, and he phoned to say I'm pretty high up on their lists, but I'm also on the IEC (International Electoral Commission), and he has to ask me to make a choice. Does he take me off the list, or do I stay on the list and will I take myself off the Commission. I said take me off the list. And that's because being in government is... (*Telephone rings*) shall we just wait for that to finish?

Int Yes, just hold on a second, I'll switch it off. Thank you. Sorry we forgot to switch one phone off; there are too many phones in the room.

ZY I wondered what we were going to talk about in two hours. But never mind...

Int (*laughs*) You'll be surprised!

ZY I thought to myself, two hours! Alright. Ja, so...where was I?

Int You were mentioning about how Cyril (Ramaphosa) asked you to make a choice.

ZY Oh, ja, and I said, take me off the list, with no problem. And that shaped me ever since, because I mean, you see, it is expecting too much to expect any government, even ANC government understanding power and so on and so on, to take well and to take impassively, when they perceive that judges are doing things that they think we shouldn't do. And they have a very limited ability to criticise us, unfortunately. And that's why they overstep the mark sometimes. And my sense about that is that this will happen, we must take it quite seriously, but we mustn't let it affect our decisions, nor must we overreact to it. It's part of the norm of society. So in a sense, I'm not saying we must ignore it. Because if you ignore it too, you're not doing well, you've got to take into account the fact that there is a particular government discomfort, and that government discomfort doesn't mean that you're going to be for them in the future. It may mean that, although the result is the same, you may have to do it a bit differently or something. So you have to find a way of doing justice, but at the same time, alleviating the discomfort which government feels in some way. And that can be quite a challenge. But you cannot...what you can never do, is alleviate their discomfort by compromising the Constitution, or by compromising justice. If you do that, then you're wasting your time. So...and governments in all parts of the world don't like judgments against them, and they love the judgments for them.

Int Of course...

ZY And, I mean, what are they going to do? Are they going to pretend? So I really don't have a problem, they can call me a counter revolutionary, they can call me what they like. And you see, it may be that depending on how you define revolution...and I could quite easily define revolution in a way which makes my compliance with the Constitution legitimately counter revolutionary, given the definition. And I could even think it's a reasonable definition of revolution that, in terms of which I would be complying with the Constitution be counter revolutionary. But so be it. My job is not to be revolutionary, nor to be counter revolutionary. My job is to comply with the Constitution. It is my job and I must do it.

Int I understand that perfectly. What I'm interested in is the issue of power, and your exercise of power as a judge, and how does that sit in relation to state power?

ZY I think that we have different powers, we use it differently, and we must use it to the best of our ability. And without commenting on what has happened here, which would be invidious, you know, there have been all sorts of rumours and stories going around in newspapers, that government is trying to appoint judges who suit it, then they want to appoint the Chief Justice who suit it, and so on and so on. Now I don't want to say a word about whether it's happening or not, because it will be improper for me to do so. I must say I do have decided views on whether it is happening. But leave that aside for the moment. I think that everyone, every government in the world does that. Which government in the world can anyone point to, who doesn't make every effort to ensure that the judges they appoint, have a moral philosophy, have an attitude, have an approach, and so on and so on, which they would like. Now I am quite certain that the majority of people on the Judicial Services Commission are people from the African National Congress. And there is no doubt that I was appointed to this bench, because at that time the people on the ANC, who were on the Judicial Services Commission, like my philosophy, they like my policy, they like my human rights record, and it may be that if I went up for an interview for something else before the JSC (Judicial Services Commission), the current members of the JSC, in their perception of what a judge should be today, might consider me entirely inappropriate. But these changes have got to take place. There's nothing you can do about it.

Int In terms of transition to democracy and the role of a Constitutional Court, what do you think are the challenges then, earlier, and what are the challenges remaining?

ZY The challenges are the same but what's become easier, is that when I came then, the Constitutional Court had been in existence for only four years. So every problem was virtually a new problem. Every problem needed a determination of principle in terms of which future cases would be decided. Now what is happening is that, as time went on, we had more and more cases, right? And if I have it right, ever since I came eleven years ago, we probably decided something like 240/250 cases. So there is an area there, and there's principles there, and there's material available now, to look at and to develop principle in terms of what we've done before. So in a sense we don't have to dig into the ground and plant a seed for every case. What we may need to do more often now is to produce hybrids and to get these trees together, produce new fruit of a different kind, like nectarines and so on and so on. So the job is a little different now. But the challenges remain about...because you see, democracy is not about people going to the polls every five years. Democracy is about a value system, and every judgment we make defines our democracy in a particular way. And that's inevitable. And if the government doesn't like the definition of that democracy that our judgment entails, they will, and this is natural again, by the exercise of their power, legitimately attempt to redefine that democracy back the way they wanted it, or to take it in a particular direction. So I think that that is a conversation, which will go on between the Courts and the government forever. It will get nasty sometimes. We will never get nasty, I'm sure about that, but politicians do get nasty sometimes. And so that will continue to happen. It will depend also on the party in power and what happens, and how old the people are within it, and how much wisdom they have and so on. Some of this conversation may take place quietly. Other discussions of this type might look like a brawl from outside. But that's inevitable, and I think that's going to be the challenge. And the greatest challenge is to ensure that the people of this country get the benefit of the Constitution and the protection afforded to them by the Constitution, by not testing the separation of power principle, and by not stepping into governmental terrain too much, or not too much, but more than is required by the Constitution. Sometimes the Constitution requires you to step a little more into it. Sometimes the Constitution requires you to step a little bit less into it. And hopefully there will be greater a level of understanding between the state and the judiciary as time goes on. But the government, the executive and the legislature on the one hand, and the judiciary on the other, I know are never going to be completely agreeing with each other. That's a dream, which never occurs.

Int I also wondered, what you think have been some of the failures of the Constitutional Court?

ZY I think we've written judgments which are too long, too scholarly, and inaccessible. I think that's been a big failure. I suppose the second failure is that sometimes we talk too long about things, and we go in circles too much, which is another weakness...

Int But what do you mean, sorry to interrupt you, but by that do you mean the conferencing, the work shopping?

ZY Yes, yes.

Int That was something that was started during the first bench and seemed to have worked very well at that point?

ZY Yes, it works very well now too, but you know, it...we do tend to repeat ourselves a little more now than we did in those days, but that's just maybe me the old man, you know, becoming a little impatient and maybe the time has come for me to retire or something. But definitely our judgments have been too long and too scholarly and we have not made...we really have not made our Court accessible in that way. That's the only serious criticism I can make of this Court. But we've made it accessible in many other ways, so that's wonderful.

Int What do you think have been the greatest achievements of the Court, besides accessibility that you've mentioned?

ZY I think that I am proud of the body of law that all of us have created together. I think it reflects an interesting balance between the different values, which are at stake in our country. And I really have been proud to be associated with it. But that's a contradiction in terms, isn't it? Because on the one hand I moan about the fact that the judgments are too long, on the other hand I'm proud...I'm proud not of the length of the judgments, but of the values and the body of law, and the honesty with which we have done things, and proud of the fact that people can try and guess, as much as they like, which judge on our Court is on the side of government, and which judge is not. And they will never get it right. They will always be wrong, they always try to make predictions about who's going to go which way and it is not as easy to make pred...it's virtually impossible to make predictions in our Court. It's quite easy to make predictions in America. It's a bit more difficult to make predictions in England, but certainly more difficult than ours. I'm proud of that. That tradition, where no one can say of any of my colleagues, this is a pro-government judge.

Int Having interviewed your colleagues from the first bench...

ZY How many have you interviewed already?

Int A number. And they all are claiming to be in retirement, and they give new meaning to the word retirement. So I'm very curious what you will be doing post-January in retirement?

ZY I have...it's going to be January a year's time (2013), but I have an arrangement with three universities. I want to teach young people. I think that I have the power to inspire young people about our Constitution and get them to truly understand it. So I've got indirect arrangements, which will be formalised in January, where I will deliver a module maybe eight weeks, ten weeks or something, every year, on an aspect of constitutional law, to their students. And then I'm talking to the Department of Education, because I would like to see if they can structure a program in which...you know when I was a kid we used to have right living classes or something. They could arrange for me to visit a school, even if it was a school a day, and to talk to kids about our Constitution and how important it is, and so on. And then the third thing I'd like to do is a bit more selfish, I'd like to travel, I'd like to enjoy life, I'd like to eat lots of good food, and I'd like to lecture in some American and Indian and other universities if I can.

Int Oh, wonderful, you have great plans! I wondered, do you have any fears or concerns about the future of the Constitution and the Constitutional Court, for the public life of this country?

ZY Not yet. I'm close to it now, but as I told you, up to now I regard what has been going on as part of the ordinary debate. So I think, let's say on a scale between one and a hundred, let's say I've made up my mind that the time to start worrying is when we get to a hundred, then I think we're around eighty, eighty-five, somewhere there. Not really time to worry yet, I think.

Int You've done so many things, Zak, I wondered what you would place as your greatest achievement?

ZY Being in this Court, undoubtedly. It has been an absolute privilege to be here, and to be paid for it on top of that, which has been absolutely wonderful. It is...I can't value that achievement enough. The second would be working the Electoral Commission and the successful election. The third would be my life in the ANC. But, I mean, because I think about the ANC differently now, that's the real reason why I will not be biased in favour of the ANC, because I'm not truly speaking, a member of the ANC that's a political party, you know what I mean? I'm a member of the ANC, the liberation movement, which are hugely different animals, and therefore for me, the idea of giving judgment against the ANC or people in it, or against government is not a problem at all.

Int Sure. I was curious why Madiba...Mr Nelson Mandela called you 'Boy, is that a function of age?'

ZY Yes, I think so. And once he started it...you see, when he first met me...you see, our age difference is thirty-two years, or something, so when he first met me he would have been sixty, and I would have been thirty-eight, and in his frame of reference I would have been a kid still, right? No, no, I would have been twenty-eight.

Int I've asked you a range of questions, and you've been extremely generous, I wonder whether there's something I've neglected to ask you that you'd like to...

ZY Yes, my family...

Int Yes...

ZY My family and friends have been absolutely wonderful to me, and without them I could never be where I am now, and I still...I have probably twenty or thirty good friends who would do anything for me at any time of the day or night, you know. I could phone them up and they'd be sleeping, and say, I need to do something urgently, they'd come immediately, which is absolutely wonderful. Of course, the reverse applies too. I would do for them anything at any time. And my wife and children have been wonderful. My wife...I still can't understand it actually because...I came from a conservative family and...you'll love this story so you can decide what to do with it, but what happened was, I don't know how conservative your family was and whether you understand how these things happened, but you send out applications to families to say, look here, my son, I want to get him married, is there a daughter available? And there are three possible responses. First response is, yes, which is wonderful. The next best response is, no. And the worst response is when they don't respond at all! Because that is saying, you have no business to come and approach me, and you can't ask why, you see. So anyway, so my parents, when I was at university, made a number of applications of that sort. Yes, I was a bright kid at university and so on and so on, but being a bright kid at university, and actually working and earning a living, are two different things. No parent in their right minds would make themselves available. So in all five or six cases the applications were ignored totally, it's amazing (*laughter*). So in that context, the fact that Anu married me when she was working and I was a student, and supported me somewhat, and all that, is quite fantastic, isn't it? She now says, she knew I was going to be a Constitutional Court judge (*laughs*).

Int Really!

ZY She's joking, of course, she knew nothing of the kind. So, ja, that's the only thing. My wife and my friends and my children, they've been absolutely wonderful in my life.

Int And what do your children think of your role as a Constitutional Court judge?

ZY They...I think they're in absolute awe of it. My daughter has trouble, because she is an advocate and she said, 'I have to keep walking in your shadow all the time' (*laughs*). And they expect all kinds of things of her and all sorts of things like that. And my son, in 1995, said to me, 'There's no apartheid in our country, so what do I fight against?' I said, 'No, no, those questions simply change. It's not what you fight against now; it's what you fight for. And you've got to fight for a truly democratic society.' So that's it. So I think that...I think they hold me in high esteem, but our relationship is a straightforward down to earth one, in which they began to express those views, they themselves who feel embarrassed, if you know what I mean. They don't talk about those things. I mean, if you were my daughter, and you said to me, you were in awe of me, you'd probably get a tongue lashing of your life.

Int (*laughs*) Zak, I wonder what memory you'll take away from your experience of the Constitutional Court, a particular memory?

ZY Ja...I haven't thought about those things yet (*laughs*).

Int Or perhaps a story...

ZY The story I would take away it's actually quite wonderful; it's about the Chief Justice, Arthur Chaskalson. Quite wonderful. We used to be driven by government garage, the drivers, all the members of the Court. I knew that Arthur (Chaskalson) and George Bizos, had been at the same function in Durban, and they had been driven by the same driver, who was going to drive me to Court that evening. And he was very thrilled with himself. He said, you know what, I met George Bizos today! And I actually shook his hand, it was delightful! So I said, who was he with? I don't know man, some or other white man (*laughter*). I told Arthur (Chaskalson) the story (*laughs*). Now that says so much about Arthur (Chaskalson), it's so true. I don't know who wins the competition to humility between Arthur Chaskalson and Pius Langa. That would be a very, very hard one to call. And I suppose, I would venture to say, Pius (Langa) wins it because he comes across a bit more relaxed than Arthur (Chaskalson).

Int Zak, thank you so much for your wonderful interview, I greatly enjoyed it, and I hope that you enjoyed it.

ZY I enjoyed it, but I hope that was not part of the script. You tell me now, to what extent was that part of the script?

Int (*laughs*) Thank you.

ZY You didn't answer my question.

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