

Int This is an interview with Faizel Ismail, and it's the 27th of January 2012. Faizel, thank you so much for agreeing to participate in the Constitutional Court Oral History Project, we really appreciate it.

FI It's an absolute pleasure.

Int I wondered if we could talk about early childhood memories, in terms of where you were born, your family background, and some of the formative influences that may have led you down a particular career trajectory?

FI I was born in the inner city of Johannesburg, in the industrial end of the city, the business end as it were. And I grew up there, lived there all my life until I was about twenty years old. It was a building hidden amongst and between several factories. We lived there illegally against the Group Areas Act, and one of the major concerns as a child that I had, and which caused me endless nightmares, was to be discovered by the relevant inspector, that we were living in an area not designated for Indian people. That was one of the major memories I have of growing up. In terms of the influences, we didn't have any neighbours as such. It was the inner city, we were living in an industrial zone, and it was a very lonely experience. I absolutely hated Sundays more so than any other child hates Sundays. Assuming they do that is. I hated Sundays because they were lonely; we were there all the time, unless we went out to visit family in Lenasia, wherever they might be.

Int So it was quite isolating?

FI Very much so, very much so. We never had a television and because neither of my parents had an education, they placed a great premium on us being able to learn and read, and they, at great sacrifice, personal and financial, sent us to a private school because they wanted to break that cycle. That was another abiding characteristic that shaped my life. It was a multi-racial school, one of the few at the time, Sacred Heart College. And it really proved a huge and constructive influence in my life. I had teachers from all different religious backgrounds, all different races, and several different cultures. And we were thrown together into this rich smelting pot. Which at first challenged me enormously to no end; it led me into a severe identity crisis. But slowly but surely as you develop through the years, I saw it in myself, at least with hindsight, and in other people, that they grew accustomed to the new South Africa identity, where race became secondary, if that at all. And the differences in culture, religion, etc, became complimentary rather than adversarial. So those were two key characteristics. I'm not sure if that geared me toward a particular profession. In fact I don't think I chose law intentionally,

it was rather by accident. I changed my undergraduate degree several times, chopping and changing, and I ended up in law, simply because I didn't want to do anything else. In other words, I finished my BCom degree and I thought, let me try my luck at an LLB because I don't want to start work yet. And que sera sera.

Int So you did actually do a commerce degree before?

Fl I did a commerce undergraduate, yes.

Int That's interesting... just taking you back a little bit, in terms of experiences and observations of social injustice in the society around you, growing up where you did, what were your experiences of an awareness and conscientisation of racial disparity?

Fl Well, I suppose as any young person in South Africa at the time, you're exposed to these massive chasms between the races and the inequities and unfairness that flowed from that. My parents would...certainly my father, would constantly wail and rail against the injustices of the white minority. Yet at the same time, in a classic sort of contradiction, he would then perpetuate those injustices by treating the domestic unkindly. Or speaking about black people in the pejorative sense. And as a young person going to a multi-racial school, immediately it dawns on you that there's something quite amiss there. And it eventually led me, as I developed into teenage-hood, into a very considerable conflict situation with my father. I mean, he didn't have the life skills to deal with a new South Africa; he had the courage to send me to a school that dealt with it, but he wasn't equipped to deal with it and ultimately I clashed with him very severely. And as a young child I didn't have the necessary skill set to realise that he comes from a very different vantage point, and he's unable to be sophisticated enough to deal with life in that sense. So he's got his ingrained prejudices and the like. I'm not sure if I've answered your question.

Int Absolutely, absolutely. In terms of university, you went to Wits University?

Fl I did, yes.

Int And at what point was that in the country's history?

Fl Well I remember quite vividly because my motto in my first year was fifty is a pass, fifty-one is a first, and anything above that I'm neglecting my comrades. I had thrown myself headlong into the first democratic elections and the process preceding that. I joined several community organisations. Bearing in

mind that I came from an almost opaque identity-less environment, from Sacred Heart College. And I moved into a university environment where everyone was still very much segmented. You had the black kids coming from a black environment where they only saw black teachers and black nurses and doctors. And only encountered black professionals if they encountered any. And similarly Indian kids again, exposed only to their own. And white children similarly. All as young adults coming to university and still very much riven by those compartmentalised senses of identity. And when I came through, it was very odd. In fact all of us from Sacred Heart found it very strange. We've analysed it with hindsight and we each migrated toward our perceived own, and I joined the liberal strand of the Muslim Youth Movement, which was an ANC (African National Congress) aligned organisation. And I threw myself into that process in terms of going into the Muslim community and trying to garner support for the African National Congress in the first democratic election. Drawing up posters and plastering them all over town, organising election rallies, getting speakers in, and so on and so forth. And my year in that first year was really subsumed by political activity rather than academic. And I scraped through, barely, but I did. I had a good schooling background to assist me because, for example, maths and stats, I didn't attend any lectures, but I had done that at school level, so that helped me to no end. So in short, I was happily and joyously involved in a very excited period of our country, and I neglected my studies in that first year.

Int That's really so interesting because it seems like you really blossomed in a transitional democracy but under the wing of activism...

FI Very much so. Very much so.

Int And then in terms of the LLB degree, did you find your studies, in some ways, part of a transformational agenda? Did you find that people were talking about constitutionalism, and then there was a real attempt in engaging with the social issues of the country at the time in your studies?

FI Very much so. There were superb academics at Wits, not that there aren't currently, but certainly at the time I recall the likes of Etienne Muriénik, and so on. And they taught us, and it was an incredibly rich environment to be in. These were academics with a hand in fashioning a new Constitution. They were on the cutting edge of academia, as it were, which had a very practical bent to it. And their ideas...Matthew Chaskalson was one of them. He was teaching at the university. Their ideas were drawn from practice and they had a very real bearing on the future constitutional democracy of the country. So it was terribly exciting and interesting, and yes, I enjoyed that process enormously. It really invigorated my interest in my studies.

Int I also wondered, at the end of your LLB, what you had envisioned for yourself in terms of a career, and at what point you decided to apply to the Constitutional Court as a law clerk?

FI I honestly hadn't set my standards very high. I didn't have great aspirations or expectations at all. I'd simply imagined that I would apply for articles, serve a stint of articles, climb up that hierarchy of a law firm, and engage in the profession of a solicitor or attorney. But what had happened is, after I completed my LLB, I enjoyed it thoroughly, and I interviewed at several law firms and I was offered articles. And I can't recall who, but someone mentioned to me the prospect of clerking at the Constitutional Court, and that certainly stimulated my interest bearing in mind the academic debates that had been raging at the university. And so I submitted an application, I was fortunately interviewed, and thank my lucky stars; Pius Langa offered me a stint clerking for him.

Int And this was 1998/'99?

FI I think it was '98.

Int I wondered, in terms of the interview process, were you interviewed by several judges and then chosen to clerk for (Pius) Langa, or was it just Justice Langa?

FI It was just Justice Langa.

Int And your experience of that interview?

FI It was odd. I now know that he's very reticent but my initial impression was that it was a little odd. He wasn't terribly interrogative in his questioning. He asked a few slow measured questions, to which I responded with much vehemence, if I can recall correctly, and lots of excitement. And then I waited for a few tense days until I got his result.

Int And then the experience of clerking at the court, what are your memories of being at Braampark, and your memories of your particular cohort?

FI It was a very, very challenging experience. I recall in the first week my dad's car, which I was loaning, was stolen.

Int From the Court?

FI Just outside the Court. And I was devastated, absolutely devastated. This was my father's prize possession, his only vehicle and it was a huge loss. It wasn't obviously insured. And I was absolutely devastated. And I was really broken up. But one of my fellow clerks, who I'd just recently met, looked at me and started laughing. And she made a huge joke about it, which really cracked me up, because everyone was commiserating and being terribly despondent about it and joining my melancholy-ness. But she just made a huge joke about it, and it just broke the ice and it allowed me to get a sense of reality and get a grip on life. As it transpired I saved up over the course of that year and replaced my dad's car with a Tazz (*laughter*). Not one that he was keen on but nevertheless. So that's the environment I came into where clerks came from all sorts of different areas in the country, with different world views, and experiences and from different universities. And again that rich sense of diversity was incredibly beneficial to me. I enjoyed it tremendously. It gave me a sense of other people's views of the world and their background, the hardships and tribulations that they'd put up with. And it was a very enriching experience, both at a personal level – some of those friendships still last till today. I'm in touch with many of those clerks on a personal level and we interact. A number are around the world, we still keep in touch. But yes, an altogether very rich experience. In terms of clerking at the court, it was a great learning opportunity. I threw myself headlong into the process with the aim of skilling myself as much as possible. And I did so at least at two levels. First in terms of the substantive law, the embryonic jurisprudence at the time, I quickly picked up on and tried to internalise as best as possible. And a skills set of typing, critically reading, critically writing, and analysing. Which is crucial to any lawyer, is something that was also happily handed down to me through a process of osmosis in that learning environment.

Int In terms of the culture of the chamber, what was the work ethos, what were some of the critical debates and discussions around cases? What sort of life lessons do you feel you took away from working with Justice Langa and probably the other law clerk that was with you?

FI It was initially Justice Madala, Tholakele Madala. And I have a vivid memory that's quite stark in relation to both Justice (Tholakele or Tholie) Madala and Justice (Pius) Langa, in relation to Justice Madala. We had a case, I think it was, if I'm not mistaken, it was the *Fedsure (Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others)* case, which was a very contentious issue in administrative law. And I'd drawn up heads of argument. Justice (Tholie) Madala took a very hands-off approach. He was a...I don't mean it pejoratively, but he was a happy-go-lucky sort of judge, and he didn't give me much feedback, which I initially found disappointing. But on this particular case he had a look at the heads, which I handed him several weeks in advance, and the day before the hearing he summoned me into his chambers, together with my co-clerk, and there was a degree of competitiveness between the clerks, as you can imagine. And she was much brighter than I was but on this one occasion I

was happy that I'd pipped her to the proverbial post. Because he said to me, he said, well done, you'll make a fantastic advocate, I thought those heads were superb. And I was chuffed to no end, my pride had swelled up, it had ballooned, and my co-clerk was, in a sense, a little disappointed that I'd gotten more of the glory than she did (*laughs*). So that was the one memory that I do recall. And with Pius Langa, we had a case dealing with the right to equality for gays and lesbians (*National Coalition for Gay and Lesbian Equality v. Minister of Justice*). And I know that Justice (Pius) Langa came from a relatively staid and conservative background, and he was not irreligious. And I always wondered how it was that a judge was able to reconcile his personal worldview with what he thought and reasoned the Constitution said. And so on one occasion I challenged him very directly, and I refused to let the bit go. I pressed and pushed. And I can't recall what I said, but it was rather impertinent, and I was basically challenging him to reconcile his personal worldview with equality on sexual orientation for gays and lesbians. And he responded in a very neutral sense, without giving me insight into his world view, but he did say to me that, "in any event, Faizel, irrespective of what a judge feels, they've got to uphold the Constitution. Their personal feelings should not intrude on an exposition of the constitutional values and in the application of those values". And he gave me an example of a boxer. I can't remember how the example panned out. But the analogy related to a boxer. I think it was a boxer who...it was a black and white competitor in the ring, one was against the other, there was a history of racial division between the two, and the black boxer was compelled to enter into the ring and fight according to the rules, notwithstanding the fact that he absolutely hated that white boxer and could have really given him a blow below the belt. I think that was the analogy, but I can't quite recall. Those are the two vivid memories I recall of our work together.

Int How did the other law clerks perceive your chamber? Was it considered a very hard working chamber? ...I'm sure everyone discussed their chambers.

FI When you say chamber, you're talking collectively, the ethos applying both to the judge and the clerk and possibly even the secretary?

Int Yes

FI Justice Langa was considered to be very hard working and dedicated, incredibly perseverant. Justice (Tholie) Madala was considered to be more relaxed.

Int And your interactions, Faizel, with the other judges, besides Justice Langa and Justice (Tholie) Madala...you clerked first with Justice ...

FI First for Madala.

Int First for (Justice Tholie) Madala and then for (Justice Pius) Langa, okay.

FI Correct.

Int And then what were your experiences of interacting with other judges from that first lot?

FI My interactions with other judges was rather limited. Generally the clerks kept their noses out of other chambers and squarely in their own. To the extent that we interacted with other chambers, we interacted with the clerks rather than the judges. I did have one occasion where Justice (Johann) Kriegler exploded, as he was wont to do, but in a very good-natured way. Of course at the time we shook in our boots at the prospect of him bellowing out and letting us know where the lay of the law lay. A fellow clerk of mine working in another judge's chambers, was designated to draw a draft of the judgment which Justice (Johann) Kriegler ultimately had some input and oversight over. And he had penned in some changes manually onto the typescript and handed a copy to the clerk to effect. And she was getting them wrong because she couldn't work out his handwriting. And he came down to her chamber, and I was present in the chamber, screaming and shouting, absolutely livid. And she took the full vent of his fury for a few minutes, and she remained completely silent, and he ended off shouting words to the effect, did you not see what I've written on that judgment! She calmly looked up at him, and she said, I'm terribly sorry, but I can't make sense of your hieroglyphics. To which he just went off his rocker, he exploded and he said, I did not come down here to be insulted! And this was a standing joke between her and I. I knew she was going to say, 'Is that so, then where do you go to be insulted?'

Int *(laughs)* Really?

FI But I was so glad she didn't say it. She bit her tongue. And instead of being upset we just burst out laughing, as he left. Needless to say he apologised afterwards. But it was a hilarious moment.

Int *(laughs)* It was brilliantly handled. Faizel, in terms of artwork and all the things about the new site, were you at all privy to discussions around that?

FI The art work, yes, but in Braampark. The new site, no. That was a debate that was raging between the judges, and hadn't yet at that point in time spilled over to the clerks. We knew that there was a new site in the pipeline. Certainly there was talk about it. Albie Sachs was...Justice (Albie) Sachs was keen on sorting that out. He was artistically inclined. And happily so because he contributed enormously to the development of that aspect as well of the Court.

He gave us walking tours through the Court, illustrating the various pieces of work that he'd picked up across the world and explaining its significance and the background. Which at the time I took for granted, but with hindsight I realise was enormously beneficial and a wonderful experience. So, I understand that the...I've done a tour of this Court a few years ago when I brought some foreign guests through here, and I saw that the art works had just grown in number, which was fantastic to see.

Int I also wondered, in terms of the key cases and judgments that you were involved in, in that period '98/'99, I wondered whether you could talk about those?

FI What aspect of those judgments would you be keen on?

Int I think I'm very curious about whether there were particular debates and strong points of view that you may have held, and you may have learned or reflected on? Or the nature of writing those judgments and what you felt were important contributions and methodological ways of working?

FI The process and the methodology by which the judgments ultimately came to be written, was most interesting for me. And that's where I learnt the most, in several respects. Firstly, the notion of a consultative decision making process came to the fore in a very huge way. The judges weren't always inaudible, they were by no means sheep, they were strong-willed and independent-minded people. And yet, more often than not, they sat down in a collaborative process, in sometimes a very tense environment, and they thrashed out their ideas, ultimately producing one or perhaps two opinions in the course of a judgment. Which was a great achievement I thought, to sit en banc with nine or eleven judges and produce a single piece of work with one or two minor differences, is a very difficult thing to do for those sorts of people in a contentious area where your personal worldviews refracted through the Constitution. And I thought that a significant achievement. I know that once or twice things became very tense and heated but nevertheless they managed to pull that off, and I think a great credit has to lie there with the then leadership of Arthur Chaskalson and Pius Langa, in managing that process. The second aspect of the decision-making process, which I learned an enormous amount from, related to the hearings in open Court. The different judges brought their different personalities to bear upon the theatre of court. Some of them were impatient and irascible. Others were infinitely patient and unbelievably tolerant. And that mix of judges gave a healthy spread of ears, as it were, to the advocates arguing before them. Although on one or two occasions I was despondent to have seen an advocate brought to tears because a judge was berating him in strong and stern terms. And that gave me great displeasure. It showed me immediately from the inner sanctum, sitting there with the judges, how much of significance this notion of dignity has in the Court. Not only for the litigants in person but for their legal representatives, to show a measure of

dignity and decorum in Court is absolutely crucial from both ends of the Bench, the judicial and as well as the counsel's end. That is the second key lesson. And a third was the actual process of writing the judgment. That was also a useful lesson in methodology in terms of our constitutional jurisprudence. Where a lead judge would be designated with the task of writing the judgment, and that would snowball the debate depending on whether or not that judge took with him or her their colleagues. They'd have a majority or unanimous decision. Alternatively there'd be several dissenting opinions or judgments, and that process would then ultimately merge into an en banc sitting behind closed doors of the judges, where I would have loved to be a fly on the wall. And they'd basically fashion out a judgment and attempt to reduce it to one essential judgment, and if necessary two or more. And I found that process invaluable in terms of the personal skills brought to bear by the judges and also their legal skills.

Int You mentioned some judges being particularly hard on counsel, did you find that over the time that changed? Was there a sense that this was not appropriate behaviour? Were there discussions around that amongst law clerks and even the judges that you might have been privy to at all?

FI I wasn't privy to any of those discussions. I'm almost certain that things would have changed in that those judges who, in my view, unnecessarily and aggressively berated counsel, will have either themselves realised with hindsight that they ought not to have behaved in that manner, alternatively would have been spoken to by their colleagues. But happily that wasn't a trend that lasted for a long while or was discernible in the sitting of this Court. It happened infrequently, in short.

Int And I'm just trying to understand, you were interviewed by Pius Langa...

FI That's correct.

Int But there was a reason why you clerked for (Justice Tholie) Madala first?

FI Correct.

Int And I wondered whether you could explain?

FI Sure. Justice (Pius) Langa's then clerk, Adila Hassim, she stayed on for a few months. I think she was going to study abroad, I can't recall. But she stayed on for a few months longer. And Justice (Pius) Langa asked me if I wouldn't mind then temporarily being with Justice (Tholie) Madala, to which I could well not say no, and I ended up there for a few months.

Int And it seems to me that after your experiences of clerking for Justice Madala and Langa, you then clerked for Ismail Mahomed?

FI That's correct. The term 'Court whore' comes to the fore. That's what I was dubbed by a few of my colourful colleagues (*laughter*). Shanie Stein who had been previously clerking for Ismail Mahomed, let it be known that he was calling for CVs and interviewing people with a view to taking on a new candidate once she had left. She was going to go the Bar or to study abroad. I think she was undecided at that point in time. And so I put in my CV, and had an interview. And after the interview Ismail Mahomed called me up again and he said he wanted a second interview. And it was a rather lengthy and in-depth interview. And at the end of which he made it absolutely plain, in terse and unvarnished terms, that the work was...that the work was monumental, relative to that of the Constitutional Court, and he expected me to be there 24/7, and he expected me to shoulder a lot of responsibility. And if I wasn't up to the task I should let him know right up front. To which I obviously said I was.

Int And he at that point had been appointed as Chief Justice of the Supreme Court of Appeal?

FI That's correct.

Int So you would have gone to Bloemfontein with him?

FI During recesses he was sitting up here in Brampark, and during court term we stayed in Bloemfontein. Correct.

Int What are your memories of working with Ismail Mahomed. It sounded like the first interview was quite...

FI Hair-raising.

Int Yes (*laughs*).

FI It was very much so. He was a very hard taskmaster. An incredibly hard taskmaster. I relished the opportunity to work for him. I enjoyed it enormously. I developed a very close bond with him that went beyond a working relationship. I think the fact that we came from similar backgrounds, assisted to no great end. I learned an enormous amount from him. He didn't treat me as a clerk when we engaged intellectually. He'd treat me almost, bizarrely enough, as a fellow lawyer arguing the law. And what Shanie had said to me,

which served good advice, was that when I get to that court, I should prepare for him by drawing up a mock judgment of the papers, i.e. read all the papers before he does in any particular case, and then prepare a mock judgment as if I was the authoring judge, from inception all the way through to costs. And then debate it with him. And that's precisely what happened. It was an incredible experience. I'd draw that judgment up, and he would grill me solidly for hours on end, in chambers. And we'd go back and forth, and this is before even the hearing. And that consultative process in relation to each case that we sat in on, was of enormous benefit primarily to me. In fact, only to me I imagine. So intellectually, from a substantive legal point, I learned an enormous amount, both in terms of procedural and substantive law. But also in terms of the ability to critically read and write and think. From a work ethic perspective, he was a slave horse both to himself and to me. Give you one example. On a Friday evening...but he meant it with no malice or wickedness, this was the ethic that he'd imbibed as a lawyer and served him well as a judge. On a Friday evening, in Bloemfontein, he'd say to me at about six o'clock, "alright Faizel, I think it's time for you to go off, have a good weekend, see if you can do something fun this weekend". And the very next minute he'd come back into the office with a pile of paper, give it to me and he'd say, "see you tomorrow morning at eight o'clock". The next morning was Saturday (*laughs*) so it was a bit of a disjuncture there. But having said that I can't foist all the blame on to him. I too steeped myself in work, because I wanted to impress him, I wanted to do my very best, and most importantly, learn in the process, which I did.

Int Ismail Mahomed has quite a reputation for being very poetic in his judgments and in a way he was very eloquent. I wondered whether that in some ways, whether it influenced you, whether that was something that you were in admiration of?

FI As a clerk, what was very important, was to read the writing of your judge, to read the previous judgments and speeches of your judge. Because you had to get into the mould of being able to write for your judge, to make your written document useful for that judge, your draft. And the only way you could do that was to a certain extent by mimicking how they wrote and their style. One would never get it entirely correct or in sync with their style, but you'd attempt to do so. This lesson still holds good today at the Bar, if you're working with a silk, and you work often with that particular silk, you're going to best provide assistance if you almost get into their proverbial shoes and try and emulate their style of writing. With Ismail Mahomed, as you mention, I mean he did have a very flowery style of writing which bordered on the poetic, and I found it very difficult to imitate that. Enormously so. In a sense, I thought it unique, I hadn't encountered many judges writing in that fashion. He, on many an occasion in the evenings, because we'd be working late, we'd have dinner together, he'd ruminate about books that he was reading. We'd discuss them. He read a lot of philosophy, especially Eastern philosophy, and I think that he got a sense that his mortality was closing on him in those last two years.

Some sort of internal instinct as it were. Because death was a theme that he constantly harkened back to. And his philosophy of living, and his religious belief...I came from a very sort of liberal sort of almost agnostic background, and I was happy to reconcile the liberal strand of Muslim-ness with living a life as a South African, in the multi-cultural pluralistic sense. And he found that very interesting. So we constantly had debates about that, with a view to wondering what happens afterward. Are we embracing a broad humanism? Are we embracing a parochial faith? Is there any right answer? What about the year after? What about all those teachings we were taught when we were younger? He, I think, found it very useful to explore those themes with a young person growing up in a similarly community from...but much younger than he. Another theme that he constantly marked on about, or harped on about rather, or rather discussed, was his mother, his late mom. She had an abiding influence on his life. And he'd constantly lecture me about treating one's mother correctly and appropriately. Not that I ever discussed my mother with him, but he would simply talk about, in the abstract, looking after one's mother. And he would regale me with story after story about his upbringing and the role of his mom. I think that was a very influential...and often he'd be at his most lyrical when speaking about his mother. I found that very interesting.

Int I'm also curious, did you ever get a sense from him that he was unhappy in Bloemfontein and would have preferred to have been at the Constitutional Court? Were there tensions within him about being where he was?

FI He grew up...his most formative years, were in a South Africa that was riven with racial divide and a lot of ugliness. And I think that marked his character. He was a very complex man in that respect. He was both unhappy and happy in Bloemfontein. He was happy because he appreciated and the enjoyed the intellectual rigour of working at that court, and the ethos and ethic that prevailed at that court of incredibly hard work with an onerous workload. And very dedicated judges staffing that court. But he was unhappy in the sense that living and working in Bloemfontein was associated with incredibly negative memories for him. He mentioned on several occasions, how when as a counsel, he argued in Bloemfontein, he had to get a special permit to stay there overnight, if the case ran over. And on more than one occasion it was refused. So he had to drive out, and drive back the next day. That legacy left a little tinge of, I think, sadness, rather than bitterness. And to a certain extent he felt a sense of loneliness in Bloemfontein from that perspective, bearing in mind also that Bloemfontein was a lonely and isolated existence. When I first moved there I could empathise with that feeling as well. I felt terribly alone. I drove up to Bloemfontein, I knew nobody there. Afrikaans was the dominant, in fact, the only language spoken. And I went out to a bar one evening, there was a huge Afrikaans man standing behind the bar with mutton arms folded akimbo and a moustache with handlebars, grizzled face. And I said to him, 'ekskuus meneer, kan jy asseblief vir my se, watter soort kroeg is hierdie?' You do understand Afrikaans?

Int Not really.

FI I said, 'excuse me sir, what sort of bar is this?' And he said to me, arms akimbo, with a gruff Afrikaans voice, "Seun, hierdie is nie Bloemfontein nie." "Son, this is not Bloemfontein." Which was magic. That was an oasis away from Bloemfontein, as it were. And I spent a lot of time there, because it was away from this austere notion of a very Afrikaans dominated city or town, as it were. So that sense of loneliness crept into me as well. I looked forward to coming back to Johannesburg with great relish and finding a home here at the Constitutional Court in Brampark. Where you had that multi-cultural diversity, multi-racial diversity, which was considerably absent in Bloemfontein. So I can appreciate his sense of loneliness as well.

Int Faizel, did you ever get a sense that Ismail Mahomed was very unhappy about not having been the Chief Justice of the Constitutional Court, or initially being appointed as the President of the Constitutional Court?

FI He never discussed it with me. So I never got that sense from him. But other people mentioned that to me. They did say that he was enormously disappointed that he wasn't appointed as the first President, as it then was, of the Constitutional Court.

Int How long did you clerk for Ismail Mahomed?

FI Including his illness period, where I saw him at home, and travelled back and forth, it was a total of two years.

Int And during that time when you clerked for him, did he ever discuss...I'm sure he did, but I'm wondering in terms of constitutional jurisdiction, the relationship between common law and constitutional law, and the role of the Supreme Court of Appeal in relation to the Constitutional Court?

FI In terms of their respective resources, he was a little disappointed that the Supreme Court of Appeal was underfunded and under-resourced. To give you two stark examples: each of the judges in the Constitutional Court, had at least two researchers assisting them in their task. The number of judgments dealt with by each of the judges in this Court, or rather by the judges of this Court, paled in significance compared to the number of judgments dealt with at the Supreme Court of Appeal. That was, in Arthur Chaskalson's words, a 'sausage factory', the Supreme Court of Appeal. Whereas this Court had time and the luxury of resources. It had a phenomenal library. Second point is the library. The Supreme Court of Appeal really had, and I still understand today, has a shoddy library. It wasn't out of the ordinary to be working at 2am on one

of the weeknights during term, in the library, and to see a judge roaming around in the Supreme Court of Appeal, desperately looking for a law report or a journal that almost inevitably wasn't there. Whereas that would be a far removed reality here in the Constitutional Court. So he was disappointed at the disparity in resources between the two courts. There was some debate about whether or not there should be an apex court, even at that time. I don't know where he stood on that debate. But there was also a tension between the development of our common law and the development of our constitutional jurisprudence, which bore itself out in a number of decisions. But ultimately this Court then pronounced with finality and authoritatively that the Constitution was the supreme law of the land and the development of the common law had to occur under its rubric and within its parameters. So that dispute was resolved here. Where Ismail stood on those debates, I can't tell from interaction with him. But I can certainly tell from having read judgments where he presided, or where other judges presided, but he was the Chief Justice. And those judgments initially suggested some sort of divergence between a common law jurisprudence that fell within the jurisdiction of the Supreme Court of Appeal, and a constitutional jurisprudence, which fell within the jurisdiction of the Constitutional Court, and never the twain shall meet. But any suggestion like that, as I say, was ultimately and correctly scuppered by the Constitutional Court.

Int Did he pass away during the time you had clerked for him or later?

FI It was during the time I was clerking for him.

Int That must have been very traumatic for you?

FI It was, it was, I was rather emotional at the time, very much so. I'd established a great bond with him, which went well beyond a working relationship. It went very well beyond that. And I'll always treasure that enormously.

Int When you say it went well beyond, do you think that he treated you as family, as someone very close to him, how would you describe that relationship?

FI I never ever referred to him as judge. I called him Ismail. I'm not sure he was entirely comfortable with that. In addition, when death knocks on your door and your mortality looms large, your walls tend to fall down and you open up. Some people do in any event. And in many respects he did to me at the time. Which was a very interesting and privileged opportunity for me. And even before then, as I say to you, he found it very useful to debate with me his sense of identity, and mine, and notions of religion and philosophy. Bearing in mind that I came from a very different worldview and a different upbringing, albeit from a similar community. To this day I'm still in touch with his family, most especially his...well, mainly his wife. Intermittently I ring every now and

then, it's difficult. And some of the lawyers that he worked with in his formative, or rather in their formative years, when he was a celebrated senior counsel, to this day still keep in touch with his wife. And they in turn kept in touch with him at that point in time and even before then. So he does have a capacity, or he did have a capacity rather, to build very strong bonds that went beyond a working relationship. I wouldn't go so far as to suggest family, because one always has a different interaction and relationship with one's family. But it was a very liberating, both from mine, and I think to a certain extent from his perspective, to engage with one's inner ghosts, as it were, and to tease them out, use someone else as a board.

Int He's been described as a very passionate man, would you (*laughs*) attest to that?

FI Passionate, yes. In every sense. When he was happy, yes, and when he was angry, yes. I vividly recall Pius Langa speaking to me at the Constitutional Court during one recess, after he'd heard Ismail shouting at the top of his lungs at me, in Chambers. We were debating something and I'd gotten it wrong and I refused to see the light. Not because I was intransigent, simply but because I was incapable of seeing the light. And Ismail (Mahomed) lost his temper with me, because I drafted something according to my own likes, and not according to what he wanted. And Justice (Pius) Langa called me in afterwards, and his corridor was way down the other end, and ordinarily one wouldn't hear another judge, and he called me in and he said to me that...words to the effect...they were comforting words...to the effect that, don't take it personally; he could see that I was a little shell-shocked. He said, "don't take it personally, Ismail (Mahomed) can be tough at times. You're doing fine." He gave me words of encouragement to that effect. So he was passionate in every sense. He was very passionate about what he did. He was a complex man, he grew up in a very difficult time and it had shaped his personality.

Int In terms of his legacy and life lessons that you may have taken away from working with him, what do you think those might be?

FI A very important lesson, a very, very important lesson, which took me by surprise. Which was that, I should only aspire to be a great lawyer after I've aspired to be a great father and a husband, and general human being. Because one can achieve greatness as a lawyer, relatively easily if one ignores the other aspects of life. And as simple as that...and as clichéd as that sounds, it was a very laminating lesson for me. That's an abiding lesson that I've picked up.

Int That's important. When you compare your experiences of clerking at the Supreme Court of Appeal and the experiences of clerking here at the Constitutional Court, what do you think would be the essential differences?

Fl Well, certainly the environment was one key difference. That environment, at that point in time, as I say, was worlds apart from what obtained here. You had this smelting pot of diversity, to coin that expression, here.

Int In the Constitutional Court?

Fl In the Constitutional Court. This rainbow nation, exemplified in the staff of the Court, from the cleaning staff, all the way up to the judges. And a spirit of democracy that it had invested itself into the very people and the fabric of this Court. Whereas that court was literally rooted in the past, at that point in time. I'm speaking at that point in time. It was rooted in the past. We were hauled in and summarily told not to use the judges' toilets there, for example. And here, the lowliest person to the Chief Justice would be...or the then President of the Constitutional Court, be using the same bathroom. The other difference of course, as I've alluded to, is the work ethic. I did think that the work ethic there, of necessity, was much more intense, simply because of their workload. Things may have changed in the intervening period but simply at that point in time the workload in that court was astronomical relative to here, and they were considerably under-resourced, simply intensifying that workload more so. Those were two essential key differences.

Int So after the experience of clerking at the Supreme Court of Appeal, did you go straight to the Bar?

Fl No, no, god no. I happily went abroad and I studied for a few years. Then I returned to South Africa and I came to the Bar, once I'd worked up a considerable black hole of debt, I needed to fill it in.

Int Right (*laughs*). Did you study the law when you...?

Fl I did, yes. It was a convenient platform from which to operate. So I did a Masters.

Int And this was in the US or UK?

Fl In the UK. And then I got called to the English Bar. I also worked for the Chief Justice there.

Int Oh, really! Who was that at the time?

FI Harry Woolf, which was remarkably different and incredibly interesting experience.

Int And how would you rate it in comparison to the Constitutional Court?

FI Apples and oranges, in many senses. We're comparing two different things. But I must say, those judges were taken by surprise because they didn't expect a clerk to do what I was attempting to do. For example, they never anticipated that I would have the temerity to take the record from the registrar's office, read the entire record beforehand, and draw up a full mock judgment before the hearing. And when I'd done this, Harry Woolf then pulled me into the judicial conferences. So pre and post hearing, I'd sit in with the judges and my memorandum would be sent to all the judges. And then as the junior most person in the conference, I'd be the one who'd start out laying out my ideas and defending them when the other judges spoke. So it was an incredibly riveting and interesting experience. Again, their resources even outstripped that of the Constitutional Court. The Chief Justice there had several offices with innumerable staff, enormous assistance, and his workload wasn't as anything as intensive as the judges of the Constitutional Court. But he did have a number of other obligations that attached to his office, which kept him busy. So overall, it was a different environment. Similar work but very, very different environment. Very staid and more conservative there than here. For example, one wouldn't dare call those judges by their first names. Here I'd get away with it, perhaps with a wry look and a raised eyebrow, but there, not on your life. It's just not the done thing. And there everyone came, the clerks that I clerked with, they all came from very privileged backgrounds, almost without exception. There was one exception. We all clerked for the heads of the various divisions. And with one exception, they were all...well, I was the exception, but with one other exception, they were all qualified barristers, a few years in practice, all of them had double-barrelled surnames and came from immensely wealthy families with trust funds behind their name. they were from established sets...chambers, that is, and they, in my view, to a certain extent, took life for granted. They didn't have the trials and tribulations of growing up in this crazy country, and there wasn't that spirit of a democracy, which enthuse our Court. But one last observation if I might, the Constitutional Court's jurisprudence, was held in extremely high regard by that court and particularly by that Chief Justice. And any new decision that came out here was eagerly read by those judges, because the Human Rights Act had then simply been, I think, at about that time, been imported into their law. And they were embarking upon a process of constitutionalisation with the European Convention of Human Rights. And so our jurisprudence came to the fore in many different ways.

Int Interesting. When you were at the Court here, did you have any interaction with Sydney Kentridge or in England?

FI I didn't, no, no.

Int Faizel, when you were in England, did you observe the Constitutional Court cases, did you keep a close eye on what was going on in the country constitutionally?

FI I didn't, no. I was subsumed into that life. You'll imagine that I...I hadn't formally qualified as a lawyer there. I was entirely unfamiliar with their process. And to a large extent, their substantive law in many aspects. So I was up against experienced barristers in the same team. And I really had to pull my weight to get somewhere.

Int Fair enough. So when you came to the Bar, at what point did you then start appearing as junior counsel before the Constitutional Court?

FI In one of my (*laughs*)...I think in my very first or second year, I was fortunate enough to be brought in by the Treatment Action Campaign. Adila Hassim and Jonathan Burger, both of whom were clerks at this Court, I think for Pius Langa and Kate O'Regan, respectively, they pulled me in as junior counsel for the Treatment Action Campaign (*Minister of Health and Other v Treatment Action Campaign and Others*) and we acted as an amicus to the Court in the New Clicks (*Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others*) matter. And then I then delved into commercial law; that's the mainstay of my practice – happily pays the bills. And I tended to take on public interest cases on a pro bono basis, and I still do a lot of that. A lot of media law cases for the newspapers, the Mail & Guardian and so on and so forth. I generally act in a reduced fee or pro bono basis for them. And most recently have come to the ConCourt on this Khampepe report (*President of the Republic of South Africa and Others v M & G Media Ltd*), where the Mail & Guardian sought access to the Khampepe/Moseneke report, which was a report by those two Constitutional judges on the situation in Zimbabwe immediately prior to the last election. And the President's office refused it. We went all the way through the High Court, through the Supreme Court of Appeal, and ultimately came here where we got a decision, which we didn't particularly like. It simply sent us back to the High Court to argue the case because they claim that the judge should have taken a judicial peek, or should have considered whether to take a judicial peek into the report before ordering its disclosure. So those are the two key cases where I've come before this Court. I have had one or two other matters, which ultimately I've settled. So even though the application for leave to appeal was ripe to be lodged, the matters have settled.

Int I know this may not be a fair question but I'm going to ask it nevertheless. In terms of your experience as a law clerk, observing the cases, and then appearing before the Court, what do you think are the essential differences and what are some of your criticisms?

FI It's a different approach entirely, depending on which side of the Bench you are. If you're behind the Bench as a judge, I think there's a lot more freedom to think, There's a lot more room to explore, there's a lot more scope for creativity, than if you're a counsel behind the Bar. Counsel tend to be restricted by the case that they have to argue and by the instructions that they're bound by. And it's almost in a sense refreshing to be free from those strictures as counsel and to sit behind a Bench in an adjudicative process as the adjudicator and to judge a matter. But with it comes enormous responsibility. Counsel, in a sense, get away with it. Their job is to argue their client's case, with the responsibility, the heavy responsibility at times of making weighty decisions that have far-reaching impacts on the society, ultimately reside with these eleven men and women. And so, to a certain extent, counsel absolves themselves...to a large extent, absolve themselves of that responsibility, by simply arguing inaudible. So those are, I think, some of the marked differences. I don't think there's any criticism to be laid at anyone's door in that regard. It's just a function of the different roles of counsel and the judges.

Int What do you think of some of the criticisms that have been levelled at the Court in relation to socio-economic rights?

FI I think there's always a tension between the Court walking a strictly judicial line and a Court intruding on the other functions of government. That tension was inherent in the socio-economic right debate from the outset when those rights had been included in the Constitution. I think the Court has, in many respects, walked that fine line very carefully, and in my view, properly. It's a very difficult line to draw at that. And I think it's a line that constantly changes, depending on the context of the country. A Court may at times be required to be more activist, as opposed to less so. Depending on the particular facts that it's presented with. But as long as the judges are consciously aware of their proper role, and they walk that line with much trepidation, I think they'll find the right balance. There are always going to be critics on both sides of that line, and it's a very difficult line to draw. But in my view, I think thus far, they've done an appropriate and adequate job. It's a very difficult line to draw. There has been comment in some quarters that perhaps the inclusion of those socio-economic rights in the Constitution were a mistake, but I don't agree with that at all. I disagree. I think those socio-economic rights are very crucial in our country, where there's a massive disparity in wealth. It just requires creativity and caution, a critical combination of the two, by these eleven wise men and women, to fashion an appropriate jurisprudence that's politically palatable and jurisprudentially sound. It's difficult.

Int The issue then comes up of how judges have to grapple with the issue of pragmatism and principle, and I wondered how you understand that?

FI I mean, broadly put, it's essentially what you suggest, or what you state. They've got to do justice in any particular given set of facts, as the case presented to them, and that's where pragmatism comes to the fore. But in the same breath they've got to maintain a fidelity to principle, to ensure that in the future the Court...and in the present, the Court retains its proper role, rather than intruding on the role of the legislature or the executive, and to ensure that they don't lay down a bad precedent from that vantage point for the future. Again, as I say, it can only be assessed on a case-by-case basis. It's a central tension, which I think, a Court is alive to, commentators are alive to, and the judiciary and certainly the executive and legislature are alive to. And it's a tension that can never be resolved with finality at any given point in time. It's a tension that will always exist, and as long as it's managed in a healthy and constructive fashion, it will lend to a great jurisprudence, and to complimentary arms of government. How it's managed and the particular context and circumstances are absolutely crucial. And that's why the calibre of people we have on the Bench is of absolute significance. It is crucial to manage these very difficult questions. I'm sorry if I can't take that debate any further.

Int No, fair enough. I just also wondered, in terms of your relationship with the TAC, etc, do you think that social movements are crucial to cases coming before the Constitutional Court? That they somehow buoy up the argument, etc?

FI Absolutely. In the dark days of apartheid, many a leading case, which struck a blow in favour of freedom and justice, were brought by or supported by in critical aspects, NGOs and organisations in civil society. The fact that we have a constitutional democracy has by no means meant that there's no role for them. On the contrary. I think that they need to be ever more vigilant now in ensuring justice and equality and freedoms, as espoused in the Constitution, are upheld. And often individuals who are in a vulnerable position, don't have the resources and the wherewithal to do that, and it's these organisations that act as a conscience for society, and who bring the relevant wherewithal to be able to ensure that these cases are ventilated before Court. So I do think they play a crucial role, a vital role.

Int In terms of judicial transformation, what do you think are some of the more broader issues that play in South Africa?

FI The coalface of justice for the ordinary South African really operates at the level of the Magistrates' Court. That's where it operates. And I think notwithstanding the great publicity afforded to the Constitutional Court and the

Supreme Court of Appeal and the debate about the apex court, and the role of the respective courts, a neglected aspect concerns the Magistrates' Courts. because that's where everyday people experience justice, practical justice, or the workings of the justice machinery. Whether or not they get justice is another matter. And I think that's a crucial challenge to ensure that the lay magistrates are sufficiently skilled, provided the requisite expertise, are drawn from a disparate background, are provided with on-going and continuing education and training, are given opportunities to develop themselves, are provided with sufficient resources in order to enable them to administer justice. I think those aspects need to be highlighted more and publicised more. And certainly coming from one or two Magistrates' Courts in the last few years...I haven't been there in the last three years. My practice has unfortunately left the Mag Court, which was interesting. But having been to those courts, I did find a few of them to be dismal in the extreme. So that is one crucial challenge.

Int In terms of the role of the Constitutional Court in a transitional democracy, what do you think are the challenges that remain?

FI Well two primary challenges which...at least two, which we've already alluded to. One is the debate about the apex court, which debate is raging amongst the academics and the legal practising fraternity. And the second debate concerns the hotly contested issue of the appointment of judges. Are we getting the right candidates? Are we appointing the right persons? Those debates are never going to be resolved with any finality. As I say, they're an on going...they constitute an on-going debate. But it's important to be alive to them and to ensure that the debates are conducted in a constructive and a useful fashion. I think that's very critical. To have a damaging debate that results in mudslinging across the board that can taint a particular candidate who takes a position on the Court, I think can be very unhelpful.

Int Faizel, what are some of your fears and concerns about the independence of the judiciary and the future of the Constitutional Court?

FI The current judiciary gives me no cause for major concern in relation to its independence. However, the mutterings from the occasional government minister or the executive in relation to...or a spokesperson of a political party, in relation to the judiciary, in relation to particular judges on the judiciary, does leave one gasping for breath. I think it very worrying when politicians, in particular, overtly or even underhandedly attempt to influence the judiciary either by appointing yes men, and women, as they did in the dark old days in an attempt to garner some sort of influence. Or even make pronouncements denigrating the judiciary and calling into question its legitimacy. Bearing in mind that post '94 the judiciary was almost entirely bereft of any legitimacy and so has painstakingly clawed its way back to a point where it's sufficiently legitimate in the eyes of the majority of the population. To undermine that

legitimacy, intentionally or otherwise, through political utterances by politicians who are reckless in many respects, I think is unfortunate. Similarly, where politicians attempt to install people lacking in ability or experience, possibly a combination of both where that's objectively clear, I think is also problematic. And where those persons are through their track record shown to be politically expedient appointees who kowtow to the powers that be, that is a terribly worrying thing. But as I say, I have not yet seen that rear its ugly head. But it's always a fear that lurks at the back of one's mind.

Int In your estimation, what do you think are some of the failings of the Constitutional Court, and some of its achievements?

FI I'll answer that very broadly.

Int Okay.

FI I think one of the crucial achievements, which I've not heard spoken of before, concerns its clerkship programme. If I look at the Johannesburg Bar, and my chambers in particular, I see a pool of candidates who had gone through the ranks of their clerkship of this Court, from '94 to date, those people are invariably of exceptional ability. They show great deal of perseverance and dedication, and they've got a solid commitment to the Constitutional values. So much so that when a debate crops up in the legal fraternity, at the Bar for example, you almost have a coalition, an unspoken coalition of those persons, even though they've not been in contact with one another and they don't know one another, they come together and they rally behind a particular position. Which is very, very interesting to see. And bearing in mind that the Bar is an antiquated institution. And the views of the senior members of the Bar, which often hold sway, are really twenty years behind the times, in my view, with respect. I think that's a very, very important tool for change, and a constructive one at that.

Int So there's a sense of real collegiality, of having been at the Constitutional Court?

FI Not expressly, it just happens inadvertently. To give you one example, two years ago, or a year ago, there was a terrible article written by a senior lawyer, against one of the judges in this ConCourt. Against the Constitutional Court itself and in particular one of the judges. That lawyer was playing a race card. And it was the Constitution...none of the other senior members of the profession reacted. They didn't speak to this chap, they didn't berate him, and they should have. The clerks of the Court all bandied together, inadvertently, but we didn't know we were fellow clerks. We said that was unacceptable, we started passing emails around, we eventually got a list of thirty odd people, all members of the Johannesburg Bar. We drew up an email, bandied ideas

about, and we challenged this all publicly. And he climbed down from his position. We were a little terse and embarrassing toward him but I think it was very important. But it's just one instance where you have a collective position, adopted by people of a similar mind, who are rooted in the new South Africa, if I could put it that way. And who don't ascribe to the old system that still to a large extent dominates the Bar.

Int That's wonderful. Faizel, I've asked you a range of questions, which you've answered very generously. I wondered whether I'd neglected to ask you something, which you'd like, included in your oral history?

FI No.

Int (*laughs*) Thank you very much.

FI Thank you kindly.

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