



A Curated Conspectus of the Life, Love, Law,
Literature and Laughter of Albie Sachs

THE BARKHUIZEN CASE – VIDEO TRANSCRIPT

CHAPTER: TINY PRINT CLAUSES DEEPLY EMBEDDED WITHIN A CONTRACT

THANDI MATTHEWS

Judge Albie, in the Barkhuizen Case, the case dealt with clauses deeply embedded in a contract.

JUSTICE ALBIE SACHS

You know that tiny print? Pages and pages and pages. You can barely see it. And you don't look at it when you sign, but you sign and then they catch you with it afterwards. That was the issue.

Throughout the world during the latter part of my exile, there was a huge consumer protection movement that that was challenging a whole range of different things. Shoddy goods - you couldn't get anything back. People wanted to know what's in the product - no information given. And this *pacta sunt servanda* was the foundation of it. And the feeling amongst the majority of my colleagues was, 'This is ordinary contract law. It's there, it can be changed by legislation, results are sometimes unfortunate, but there it is. It's got nothing to do with the Constitution.' My view is it has got everything to do with the Constitution. It's got to do with power. The insurance companies... you can't shop around and find an insurance company that doesn't have these clauses, they all have them. So, you can simply choose, maybe get a slightly lower rate of payment or quicker payment from a particular insurance company that you see advertised on TV. So, they have the power. And you have to have insurance if you have a car because the cost of repairing cars, and injury you might cause to others is so great. So, there's automatic protection of third-party injury. Damage to people. And the fund is supplied by a tax on petrol. So, the injury part that could run into millions and millions, that is protected. But the damage to your goods, it's done privately.

CHAPTER: AN ARCHETYPAL LITIGANT

And the basic feeling amongst my colleagues is, this guy Barkhuizen in a way, he was the worst, if you want to choose an archetypal litigant for whom you'll get immediate sympathy. He lived in

Constantia. His car was a Mercedes. He was driving, crashed, went to hospital. Took quite a long time to recover. Was very confused. Didn't know what to do. And eventually, after a delay of two years, occasioned very much by the shock of the injury and so on, he goes to a lawyer, and they file a claim. And the insurance company says, 'Sorry, but if you look at clause 4.3.2 little one B or something like that, it says that if you don't file your claim within six months, you lose your right to sue.'

CHAPTER: PRIVATE LAW WITHIN THE VALUES OF THE CONSTITUTION

Now, our Constitution gives everybody the right to settle their disputes in a court of law. That's a fundamental constitutional right. This right is now, I say, being taken away. My colleagues say, but this is private law. It's got nothing to do with the Constitution. Judge Dennis Davis in the High Court, says 'Private law has to be developed in keeping with the values of the Constitution and certain basic elements of fairness and respect for human dignity have to apply.' So, he purported to strike down that clause in the contract.

CHAPTER: DISAGREEMENT AMONGST COLLEAGUES

And my colleagues disagree. And, you know, you can be stubborn on some things. I can be very stubborn on a lot of things. We just butted heads on this. And it wasn't... it's almost hard to explain. One of the main critics of my approach was Justice Edwin Cameron, an absolutely brilliant pro-freedom, pro-liberty Judge, with a superb legal mind and a marvellous personal career and a courageous person in every way. And he said, 'Freedom of contract is part of personal autonomy. It's an important element of freedom in the world.' Now, that was the kind of argument that was used by the conservative judges in the United States in the Roosevelt period to strike down legislation that was providing for minimum hours of work - or even before the Roosevelt period - saying it's interfering with freedom of contract; the fundamental right. It's a philosophy, to my mind, very antiquated and very unreal. Are you saying that there's a real meeting of minds when you sign something you haven't read? If you read it, you wouldn't notice it. At the very least, if you want a clause like that, and you want to justify it, put it in red, big. You've got to draw it to the attention. Then, if they mess up, okay. And you've also got to allow for some exemptions in cases of somebody who's in a coma or whatever, which wouldn't be permitted under their reading. So, it was just a clash of legal culture in a way that's still ongoing. Dennis Davis did quite a lot in developing the law of privacy to permit possession, smoking marijuana. All along similar lines. Similar lines in terms of enlarging the scope of freedom. So, freedom isn't just freedom from the shackles of apartheid and the pass laws and forced removal. Of course, it is primarily that. Freedom isn't just the right to vote. Freedom is the right to go about your life, buying things with some sense of security as to what you're buying, that you can make real choices. And if there is to be a bargain, and the whole point of

the freedom idea is that it's a bargain, that's the market at its ultimate, it's a bargain. The bargain is free, without interference. Then you must know what's at stake. If people lie to you, you can get out of it. But if they don't lie to you, they just hide something away in the small print, you've had it. So, my judgment is very long. It goes into the history, it goes into what other countries have done.

CHAPTER: 'THE RICH ARE ALSO ENTITLED TO RIGHTS'

And, you know, I made an interesting comment. I don't know if it was from the bench or if it's in the judgment. 'The rich are also entitled to rights'. And that idea was planted in my head before I became a lawyer. I read a book on Clarence Darrow - *Darrow for the Defence* - by Irving Stone, about this brilliant progressive lawyer early 20th century. He challenged the laws forbidding the teaching of evolution in Tennessee. He took on cases for workers who had gone on strike. And he became almost like the paragon of the people's lawyer. And for a large portion of my life, I admired him. And then for another portion of my life, I hated him. Not hated him. But that it was wrong for the lawyer to become the centre of the case, not the litigant. For the focus on the brave individual Atticus, whatever his name was, standing up for freedom. It was inappropriate. But one of the cases dealt with two young law students, I think at Harvard, got a weird idea that they wanted to see what it's like to kill somebody. And they killed somebody. And he [Darrow] wanted to attack capital punishment.

And he said the rich have rights. And the problem was the jury would look at these guys and say, 'They come from affluent families, they've got everything, and they go in for this bizarre conduct, teach them a lesson.' So, he emphasized the fact that they were rich. But he said human rights - he didn't use the term human rights - human rights are for everybody. So, the phrase 'the rich have their rights' stayed in my head from long before I became a judge, even a lawyer, till very near the end. And of course, that is important. The fact Barkhuizen lived in Constantia, he could easily afford another car, it wasn't a calamity for him. That wasn't the point. Even the wealthiest businessperson not doing something about the business, a huge contract, you send it to your lawyers, and they advise you. But just signing insurance, he looks at the cover page and that's it. The poor person does the same. The poor person might even be illiterate, and somebody reads it for him.

CHAPTER: THE UNIVERSALITY AND INTERDEPENDENCY OF RIGHTS

And it does emphasise the universality of aspects of human existence and interconnection, and the universality of rights. So I'm - how can you say - existentially, as well as jurisprudentially pleased that I stuck up for this guy living in Bishopscourt who wanted to claim on his Mercedes that was smashed up.

THANDI MATTHEWS

But just to add to that Judge, beyond the universality, the interdependency, because the implications of the equitable application of the law would mean that that same provision would apply to someone who's not wealthy. And it would have more of a cost.

JUSTICE ALBIE SACHS

Overwhelmingly, the poor are the ones worst done by these little clauses. And they won't have lawyers, and they won't look at the clauses. And they just have to take whatever insurance they can get, or whatever tenancy they can get, or whatever it might be. Clearly, they are the main losers. But it's not only to them. And it's not because you're rich or poor. It's because you're a citizen, you're a consumer, you're living in our society, and you have certain rights; appropriate rights. And often the middle class have led campaigns that have helped the whole of society. Environmental law started off very much middle-class people, usually not super-wealthy, and later on poor people realised their environments were being made toxic, affecting them very directly. So again, these are themes that, campaigning for rights, become important for humanity to manifest itself as humanity.

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