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

THE COMMERCIAL CATERING CASE – VIDEO TRANSCRIPT

CHAPTER: WHAT CIRCUMSTANCES REQUIRE JUDICIAL RECUSAL?

THANDI MATTHEWS

The issue of judicial or judges recusing themselves from a matter, that was the issue for discussion in Commercial Catering. Under what circumstances is it permissible for a judge to recuse him or herself?

JUSTICE ALBIE SACHS

We happened to have very intense discussions about that. Not only on this particular case. In this particular case - the Commercial Catering Case - there was an appeal, I think, to the high courts from the labour courts. There were a whole series of cases arising out of, I think, some particular strikes, and some of the judges who heard this particular appeal had sat in another case, where various similar facts were being discussed, and had come down quite firmly in favour of, I think it was then, the employers. So, the factory workers said, *'…we don't want Judge so-and-so to hear the matter. He's already expressed his opinion and he's against us.'*

TITLE: YOU CAN'T HAVE LITIGANTS SHOPPING AROUND FOR FAVOURABLE JUDGES

The majority of the Court felt that the connection wasn't all that close, and you can't have litigants shopping around for favourable judges. You've got to take the judges as they come. A some judges tend to be more, if you like, conservative in their approach, some more liberal; it all depends. The law is there, you have the system of appeals, and they rejected the application to set aside the decision of that court, or the sitting of that particular judge in that particular court.

Yvonne Mokgoro and I felt that our Court had gone a little bit too far in saying you take the judges as they come in this particular case, and that the perspective should be one, not just of the reasonable person who's well-informed about the issues and so on, but of the factory worker who's had that adverse decision given in a very similar case. So, we dissented. We were in a minority, and it's a

question of judgment. I don't want to say the majority were wrong; I thought they were wrong, but it was a narrow case which could have gone either way.

TITLE: THE ISSUE OF RECUSAL IN THE SOUTH AFRICAN RUGBY FOOTBALL UNION CASE

But the issue of recusal had affected us, ourselves, Judges on the Constitutional Court in the South African Rugby Football Union Case, where President of the Rugby Football Union, Louis Luyt, was now challenging the President of the Republic of South Africa, Nelson Mandela. And Mandela had been persuaded by then Minister of Sport, Steve Tshwete, to create a commission of inquiry into racism and corruption in the Rugby Football Union.

Louis Luyt was shocked. Self-made millionaire, blunt person - I'm not being indiscreet by describing him as such - who had done actually quite useful things to break down, in the very late period, racism in sport… very late period. He'd supported negotiations and change. And his lawyers challenged the appointment by Mandela of the commission. And they used fairly standard themes that we used to use in the apartheid era to challenge the kinds of administrative action. The matter is heard before a judge in the High Court in Gauteng. A very respected judge from the old regime. From Afrikaner nationalist background, in general terms. A thoughtful, intelligent judge.

TITLE: 'I MUST BE THE FIRST TO SHOW A WILLINGNESS TO RESPECT THE RULE OF LAW' - MANDELA

One of the first issues is Mandela is invited to give evidence to explain why. And his lawyers are saying don't go. And he said, *'I must go. I must go to the court. I must be the first to show a willingness to respect the rule of law.'* Now, in most countries of the world, presidents don't testify in cases like that; they sign affidavits; they're not cross-examined. But Mandela is eager to make a point. He goes. He is treated with great courtesy by the judge, but he is disbelieved. [The judge] doesn't actually call him a liar but says *'…we can't accept his statement that he had applied his own mind. He'd simply rubberstamped the decision of the Minister of Sport, and he hadn't actually applied his mind himself and thought about it.'* The application is upheld, and the commission of inquiry set aside.

The minister appeals to the Constitutional Court, and we're getting ready to hear the matter. This is big. The president has testified. What's going on here? How do we respond?

And before we can hear the matter, we get an application from Louis Luyt saying that, I forget who all the justices were, but it was certainly Arthur Chaskalson, must recuse himself. Why? Because he had defended Mandela. Not only that, but Mandela had attended Chaskalson's son's wedding. Albie Sachs must step down, recuse himself. Why? The allegation was that Albie Sachs, frequently, he and his wife had lunch with Mandela. The idea is, we're too intimately connected. Not ourselves to be

objective, but to be seen by a reasonable person as being objective and impartial. Pius Langa, something similar. I think it was either five or six of us, the challenge.

This is serious because we if we accept that, the Court has a quorum of eight. If there are not eight people sitting, it's not a Court. So, there are 11 Judges altogether. You can have some on leave, on holiday, or stepping down for one reason or another. But if it's not eight, it's not a Court. So, if the five of us recuse ourselves, there's no Court, and then the decision of the high court remains, and Louis Luyt is triumphant, and the commission is set aside. So, we have to decide how to respond.

TITLE: 'NO ONE SHOULD BE A JUDGE IN THEIR OWN CAUSE'

And you know, there's a general saying, 'No one should be a judge in their own cause.' So, even less should a judge be a judge in the cause of their judging! But you have to make the decision. You can't refer it to somebody else to say you're objective. And you have to make the decision objectively about whether you can be objective. It's intrinsically a very invidious situation, and we're very, very uncomfortable.

To make it worse, at the actual hearing, I remember counsel for Louis Luyt dealing with my own situation, and I'm saying to counsel, *'… your papers say that my wife and I frequently have lunch with President Mandela. I've been divorced for - then, I think it was 15, 20 years - so, it's just not possible. In fact, I've never had lunch [with Mandela]. I'm just telling you as a fact.'* Then he answered something, and then I answered, and I remember being criticised by my colleagues afterwards, that I allowed myself to….[gestures]. And that's what happens when you are adjudicating, and you are dealing with evidence as well. It was very, very unpleasant. So, in the end, we had to determine objective criteria for when a judge should refuse to sit in a matter.

TITLE: TO SIT OR NOT TO SIT?

The starting off point is, you sit. You might not be comfortable, you might not want to, you might not like the case. You sit. You have a duty to sit. A duty to appear in cases. But if the circumstances are such that a reasonable - now this is a lawyer speaking – person, well informed of the law and the facts, could have a reasonable apprehension that you might not be able to bring an objective, impartial mind to bear, then you must not sit. It's not up to you. It's an objective decision that has to be made based on those criteria.

We decided - I forget exactly how we phrased it – that the fact that many of us have had frequent contact with Mandela in the struggle days and afterwards, that's not enough. That means I can never sit in any case where any government person who was in the ANC with me, who was involved; with any person I've shared platforms with in seminars; it would exclude us completely, and almost only

leave people who were so insensitive and so abstracted from the struggle as to have done nothing. You'd only have people left who had actually made no commitment to the values and principles of our Constitution. So, the mere fact that there had been close association wasn't enough.

I think the high point of the evidence against us was that Mandela had attended the wedding of Arthur Chaskalson's son, Matthew, who went on to become a very wonderful advocate himself. And even then, he'd attended for a short period of time and left; it wasn't like that close family friend getting together every weekend, it wasn't of that kind at all. And it clearly wasn't enough for a reasonable person to have a reasonable apprehension of bias. So, we rejected the applications. We refused to recuse ourselves.

TITLE: RECONSIDERING THE WAY WE LOOK AT THE EXERCISE OF POWER

I think a very important judgment came out, because now, for the first time, we were dealing with the exercise of powers by the administration in a democratic South Africa. One of the points we made was under apartheid, the only way you could trip up the apartheid people from applying the obnoxious laws was through: *'They didn't follow the right procedures. They exceeded their powers on technical grounds.'* Now, the law was not based on these technicalities created by judges in England and imported into South Africa and becoming South African law. Now, we have a Bill of Rights. We have fundamental rights. You can use them. Now we have laws dealing with the promotion of administrative justice. We have to reconsider completely the way we look at the exercise of power, and some of the very technical approaches about giving notice in advance to people who might be affected - that's not the way to go anymore. It's laid down in the Constitution what the president can do. He can appoint commissions of inquiry. He's not required to give notice to the people that are going to be investigated. It just doesn't belong.

TITLE: DID THE ACTUAL EVIDENCE SUPPORT THE FINDING OF THE JUDGE?

Then, we looked at the actual evidence, we read the cross examination, and we found it was clear that the finding of the judge was not supported by the facts. Mandela, in fact, was meticulous. That's the way he worked. He would read all the documents and papers. He'd write little memos, make little notes. He'd get other people to advise him. So, the facts didn't support that conclusion at all, and the commission of inquiry then was able to proceed.

TITLE: A WORLD-LEADING DECISION

So, out of that whole process, a bit stinging for us as Judges; uncomfortable; but a world-leading decision on judges' recusal, because this wasn't just one particular judge who spent a weekend duck-shooting with one of the litigants - a case that cropped up that was discussed in America - this would

have destroyed the Court for that particular case, and could have had very, very negative results. But so be it. If the law requires, so be it. But it wasn't a ‘so be it’ case at all. Not even close. And it's an important case for the supremacy of the rule of law, and the integrity of the Constitution, and institutions being created. And not allowing subtle mechanisms in the law to be used to prevent the law from taking its course.

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