



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

THE NEW CLICKS CASE – VIDEO TRANSCRIPT

CHAPTER: A NIGHTMARE CASE

THANDI MATTHEWS

The next case is New Clicks.

JUSTICE ALBIE SACHS

I don't even want to hear. I don't even want to hear the words New Clicks. I shop at New Clicks. I've got nothing against them. That case was horrible, in so many different ways. We ended up giving a judgment, I think it ran to a thousand pages. A thousand pages. This is crazy. But it wasn't just the length of it and the diversity and the conflict, it was triggered by unpleasantness and a sense of unpleasantness almost, I would say, contaminated the proceedings all the way through to us.

And it started off with a dispute in the Cape High Court between John Hlophe, who was the Judge President, sitting on the case with the Deputy President ... her name escapes me at the moment ... [Jeannette Traverso]... I knew her quite well from the pre-democratic days. She'd attend conferences. She was the daughter of a former Nationalist Party Member of Parliament, who had become progressive, radicalised and was appointed Deputy President of the Cape High Court.

CHAPTER: THE KEY ISSUE

And the issue in the New Clicks case, the key issue, was the Department of Health decided that people were paying too much for their medicines, and they decided that a cap had to be put on the price of medicines, limiting the markup. You couldn't just leave it to the market. Was that constitutional or not? So many side issues came into it, and procedural ones, and John Hlophe, and, I think, one other judge, said the cap was okay, the regulations were okay.

The pharmacy wanted to appeal, and they put in the application for an appeal. And normally it's heard very, very quickly. And gosh, if the court is divided and the Deputy President thinks that the cap is unconstitutional, then clearly there's an arguable case - reasonable prospects of success. A

week passes, two weeks, three weeks, a month ... I think it's even a couple of months that had passed. And John Hlophe, president of the court, is refusing to listen to the application. Counsel don't know what to do.

CHAPTER: DEPRIVED OF THE RIGHT TO APPEAL

Several months have passed and they feel surely we must get leave to appeal in this case. But they're not being given leave to appeal by the recalcitrant Judge President, who won't even hear the matter, and he's in charge of the hearings. So, what do they do? They petitioned the Bloemfontein Supreme Court of Appeal, and they say, *'We are constructively being deprived of our right to make an appeal against the case, and can the Supreme Court of Appeal hear the matter?'*

As I remember, some of the judges are saying, *'We can't interfere, there's a process. It has to be heard in the Cape High Court and only they can decide whether or not a leave to appeal should be granted.'* Others say, *'But this allows the Judge President, for reasons of his own, to frustrate the rights that you have to a proper hearing, a proper trial of your issue.'* So, there's some strong writing in the Supreme Court of Appeal. They listen to the matter, and they decide on some of the fundamental issues.

CHAPTER: A WIDE RANGE OF QUESTIONS

And now there's an appeal from their decision to our Court, and the issues cover a wide range of questions, as I recall, and I haven't looked at the case in a long time, but it was a question of the extent to which the high cost of drugs came overwhelmingly from the pharma's supplying the drugs, and why should the local chemists now be deprived of a reasonable markup?

Another question was, New Clicks was very mechanised, automated and organised. They could afford to mass sell at a lower price. But your rural pharmacy was totally dependent on markups. And if they didn't give a big markup to drugs that were in constant use they just couldn't survive, it would put them out of business. And I mentioned there were knock-on effects and in a new field, a new terrain for everybody.

CHAPTER: THE SADNESS FOR ME

And the sadness for me, it was Arthur Chaskalson's last big case, and he had agreed to step down earlier than he needed to step down, to give Pius Langa a chance to serve as Chief Justice. And instead of ending his term with a case that everybody spoke about, the great Constitutional Court's clear values, firm, clear, precise, fair, just reasoning, it ended up a mess. A total mess, with multiple different judgments. To some extent, I wouldn't say the racial factor came in directly, but people

could see a certain, maybe indirect, influence of race and opinion about, maybe about, John Hlophe and his conduct. I don't know, I can only speculate, and I don't even want to speculate on that.

CHAPTER: A HEADACHE FROM BEGINNING TO END

All I can say is that it was a headache from beginning to end on process, on argument, on judgment writing and on doctrine. And I remember my own position on the question of the capping of the price of medicine, which was the key critical thing.

I think there were eleven of us and we were split five-five, and I was the eleventh one. So, five Judges arguing very persuasively that the process of determining a markup of whatever it was as a percentage is quite legitimate. It was within the realm and the sphere of the Department of Health. They'd taken their work very, very seriously, and couldn't be faulted. And five Judges saying, '*No, there was something arbitrary about it. It had something of a sort of a thumb-suck and it couldn't be justified.*' And I'm oscillating between the two and I finally developed my own theory of what's involved. What's the doctrinal foundation? Is this a case of administrative law, in which case the PAJA - the Promotion of Administrative Justice Act - applies, and it lays down certain criteria that have to be applied and so on, or is it something else? And Arthur and a number of others felt this is administrative action and Parliament passes the law, the Medicines Act, and empowers the Department of Health to regulate in various ways. Have those procedures been followed?

Five people say, '*Yes*,' and I'm feeling very uncomfortable with that.

CHAPTER: ADMINISTRATIVE LAW OR LEGISLATION?

For me, this is not what administrative law was about. This is more akin to legislation. Administrative law is giving a licence to people who apply for that licence. It's granting regulation to build, power to build, in a particular area. It's very much government relations, with ordinary individuals. This is now setting a price for the whole country. And you don't give notice. The ordinary principle of *audi alteram partem* - when you're dealing with that, you publish something, your intentions, but it doesn't go to each individual - the right to have written reasons for the decision - it just doesn't come into it, it doesn't fit. And to me this is making regulations, it's closer to making regulations. It's a deliberative power. It's a legislative-type power because it's not just a decision in favour of a particular citizen applying for certain rights or permissions under a general law. So, I developed a notion of legality, and I said, '*He doesn't require all the steps of subordinate legislation under a big law and parliamentary processes or there could be by-laws in the city, and there are various processes laid down for regulations. And they are regarded as being the kind of laws that are made for ordinary citizens. That's not administrative law. That's, if you like, reinforcing administrative law, but it's not administering the law. It's making it applicable in terms of taking measures to enable*

citizens to do things.’ So, I said, ‘In a case like this, the very least you should do is consult with the pharmacies and find out. Maybe you make exceptions or exemptions for rural pharmacies. Maybe they’ve got something to say and they’re entitled to be heard in that way for the legislation, not only New Clicks in Sea Point, but for all of us. And that the idea that officials can just now, if they’re empowered, make laws for the people, is not acceptable anymore in South Africa, if there’s some generality in what they’re doing.’

And then I said, ‘Maybe once the first time the cap is there, you can change it afterwards. You don’t have to consult each time if you raise it or lower it, because you’ve done the basic involvement of the people most affected at that stage. You’ve got the information. Now it’s correct and courteous and appropriate to tell them this is what we plan to do, to listen to them. But it’s not a precondition for the validity.’

Some administrative lawyers liked it. I think Cora Hoexter, who was the number one writer, she picked up on it and promoted it. I felt very elated because this was a super, lawyers’, lawyers’, lawyers’, lawyers’, lawyers’ kind of idea that doesn’t have much to do with having been or not having been in the struggle ... there’s a bit of that in the background.

CHAPTER: THE CHEMIST FOR THE COMMUNITY

And then I conjured up the figure of the chemist, based on the pharmacy I go to. The chemist isn’t just a functionary. Before chemists used to actually dispense, and they would mix, and it was a very erudite craft that was required. I think, now you need skills in managing medicines and controlling and so on, but you don’t actually mix the medicines. The medicines come pre-packaged. Occasionally you mix. But the chemist isn’t just somebody on demand supplying you. They tell you how to use the drops, and what else to use. Maybe they’re almost like my equivalent of an Inyanga [traditional healer], you know, who would be the chemist-- an important person in the local community, advising and saving the doctors often from unnecessary visits because they can give the advice that you want. And I had this figure of a white coated person helping out people in the community and entitled to be heard and have a say in terms of establishing manageable margins and possibly finding appropriate exemptions.

CHAPTER: UNCONSTITUTIONAL!

So, I came down on the side of saying ‘*Unconstitutional!*’ The issue went backwards and forwards and these aren’t issues today, as far as I know. There’ve been lots of challenges to the ministry in the Department of Health in different ways, but this was a very unfortunate period and what saddened me was, far from the law coming with great compassion, wisdom and clarity and sorting everything

out, some of the tensions in our society that had nothing to do with the law, played themselves out in the litigation process.

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