



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

## THE NM AND OTHERS CASE – VIDEO TRANSCRIPT

### CHAPTER: PROTECTION FOR THE VULNERABLE

THANDI MATTHEWS

Just one last freedom of expression case that also links to the issue of access in the court, it has to do with the disclosure of the names of women that were quoted in a book, but they were HIV positive.

How do we balance between ensuring that the needs of marginalised groups are protected?

Vulnerable people are protected, while at the same time ensuring that we do have the access that you are referring to?

JUSTICE ALBIE SACHS

I remember the case. It was a painful case for many reasons. Somebody had written a biography about Patricia de Lille, one of our very feisty politicians, and it was a lively, fulsome biography for a lively, fulsome person.

I think the writer had accompanied Patricia on a tour of townships near Pretoria, where she had gone to give support to some women living with HIV. It was to show she's compassionate, she's concerned about the poor and so on; and the women complained. The story was they didn't complain. It was a professor at the university who objected to the way that Patricia was presenting the issues and making complaints about the university, who told the women '*you're being used in this way*' and was behind the complaint. But whatever the source of the complaint, the complaint was there.

### CHAPTER: THE PRIVACY OF THE HUMBLEST

And I remember my law clerk, Frank Pelsler, whose grandfather had been a minister of police in South Africa in the days when I was an activist, brilliant guy, thoughtful, and he said, '*you know, Albie...*' - I was called Albie by my clerks at my request, so that I could make them work harder after midnight, and feel proud that they're like happy slaves working even harder – '*... what's interesting*

*is that, when looking at the big cases of violation of privacy in Europe and North America, they're all about famous people, about Prince so-and-so, Lord so-and-so, billionaires. In our courts, it's actually about protecting the privacy of the humblest.'* And it was a beautiful observation by him. It's so obvious when he says it. And we're divided.

#### CHAPTER: VIOLATION OF MEDICAL PRIVACY

I think there were three or four different judgments, but it all ended up requiring the publishers to pay damages to the women for violation of medical privacy. And it was important at that time in South Africa, when there was such intense stigma associated with HIV, and people would be fearful of going to doctors if they knew that their HIV statuses would be publicised. And so, the maintenance of medical confidentiality was particularly important in cases of that kind.

#### CHAPTER: BALANCING FREEDOM OF SPEECH

And we had to deal with the balancing of freedom of speech. Freedom of speech - we fought so hard for it. My books were banned. My thesis, I got a PhD from *Sussex University*, printed by *Sussex University Press; Heinemann; University of California Press*, publishers of scientific work with footnotes and everything; banned in South Africa. Because I was banned, the book was banned because it quoted banned lawyers like Mandela and Tambo.

We just lived with that all the time. We fought hard for freedom of speech, the right for people to know, to circulate, to challenge. So, we want as much openness as possible. But freedom of speech can be destructive. Hate speech can lead to genocide, cruelty.

It can be hugely demeaning to vulnerable groups that have been targeted in the past, that are still marginalised in different ways. And in this particular case, the breach of the medical confidentiality was extremely distressing. So, the approach that our court adopted - I didn't write in that case, I signed on to the decision - we were urged to adopt an approach similar to the *New York Times and Sullivan* approach in the US Supreme Court, where a very strong judgment, written by the Supreme Court in its most ... what was called the-liberal phase... said that, *'Freedom of speech, particularly in relation to public officials and things that they do, it's so powerful and so important for democracy.*

*If you get it wrong, it doesn't mean you have to be liable for damages. More is gained by allowing, even indiscreet writing, as long as it's not intentionally malicious and false. You're okay, if it's a public official, and then afterwards they extend to public figures.'* And these were people who were living by their public reputations. So, the public must have a chance to challenge. And we felt, no, that's going too far. It gives too much power to the press. The press can be very oppressive, they can go for people, destroy reputations. And we wanted a more balanced, more nuanced approach.

#### CHAPTER: PRESS TO TAKE REASONABLE STEPS

So, your point of departure is, yes, you can criticise, robustly, but you have to take reasonable steps to verify defamatory statements. Reasonable steps, and that means codes of conduct for the press, checking up the way you handle hearsay, the number of people who report on a whole series of things, that have to be followed. So that introduces an element of responsibility, different from the US approach, which is almost unlimited speech when it comes to public figures. And this medical confidentiality would have been an example of a kind of limitation that we that we did very, very strongly cherish and protect.

#### CHAPTER: AN AMUSING OUTCOME

And there was an amusing outcome for me, because the publishers of that book were going to republish, I think, either my *Soft Vengeance of a Freedom Fighter*, or my *Jail Diary*. They'd put it on hold, and when I came to speak to them about it, they said, '*Sorry Albie, we love your book, but we've just had to pay out heavy damages and costs, and we don't have any funding to publish your book.*' So it wasn't republished by them.

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