



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

## THE SOUTH AFRICAN POLICE SERVICE CASE – VIDEO TRANSCRIPT

### CHAPTER: A NEED FOR VISIBLE TRANSFORMATION AND CHANGE

JUSTICE ALBIE SACHS

The last case, I don't remember too well, I just remember the main aspects of the outcome. It dealt with a senior police officer, a woman who was white, who was particularly skilled for a certain job in the senior ranks. I can't remember exactly what it was. There was a determined move on the part of the new national commissioner of police to increase the number of black people in senior positions in the police force. The police force had been created at the time of the transition to democracy, taking over the old South African police. Instead of calling it the police force, they now call it the police service, SAPS. All the top positions were held by white men, mostly Afrikaans speaking. There was a need, not only for the rights of black police people to advance, but for the public to feel and see that there is transformation and change.

### CHAPTER: A CASE THAT TURNED ON THE WORD 'MAY'

The case turned on the word 'may'. And this was now like the real old-fashioned lawyering; and you get out your dictionaries and so on. 'May'- does that mean it gives a discretion? And the national commissioner of police said, *'I'm sorry but you're not going to get that promotion. It's been recommended, you might be the best person for the job in terms of what's available, but we've got to keep on trying, we've got to change the representivity in the senior spheres of the police force. It's important for the nation, for the country, to see that, and feel that, and it will take some time.'*

But already, it had been held in abeyance, and already they had tried, and now I think she's approaching retirement age, and it just seemed to us to be unfair now. It wasn't unfair to hold back her appointment, pending attempts to find someone else, but you've tried that. That's where the proportionality aspect comes in. So 'may' means 'may', it means you don't have to but in deciding the 'may', in exercising the discretion, you've got to act fairly. You've got a very big range, but now it becomes unfair. Now it becomes racially discriminatory, maybe even gender. But let's accept it wasn't because I think they wanted to promote women as well. It wasn't based on that. So that was an

indirect way, if you like, of seeing how the Court, in as sense, was supporting Pius Langa's position that being white could be a disadvantage in circumstances where it would be just unfair to say, *'sorry, your whiteness prevents you from getting the job.'*

#### **CHAPTER: A STORY FROM MY 'GAP' YEAR**

I remember, when I took a gap year in 1954. I went to England, and I became active in very left-wing circles. The group I was in had a black guy from Trinidad, I think. He was a member. He shocked us a little bit by singing a song, *'If you're white, you're alright, if you're brown, stick around, but if you're black, get back, get back, get back.'* And now it was almost like saying, if you're white, you're not alright, if you're brown, stick around, if you're black, you've got a good chance. We didn't want that in the new South Africa. It was somehow, just a feeling of just wrong in those circumstances, where you were so appropriately focused on the need for transformation, visible transformation. But it can't become like an absolute.

#### **CHAPTER: PROPORTIONALITY IN TRANSFORMATION**

THANDI MATTHEWS

Or essentialised, and I suppose that's kind of the challenge sometimes. How do we promote change and transformation without getting fixated on race essentialism? That is why the distinction and proportionality is so important and the balancing.

But Judge, then I do have a question about which factors would... I do understand that it depends on the circumstances of the case.... but in terms of factors of proportionality. That evolves over time, I presume. Socio-economic marginalisation, in my view, would be a strong factor. But then as you say with Justice Langa's position, that his approach to race and non-essentialism also outweighed socio-economic circumstances for him. So, I find that distinction to be quite interesting in terms of how you visualise society.

#### **CHAPTER: A FALSE DICHOTOMY AND A TRUE CONTRADICTION**

JUSTICE SACHS

I think it's a constant juggling that you do, and you acknowledge it. You acknowledge the tension; you acknowledge the difference. That's what I call a false dichotomy and a true contradiction.

THANDI MATTHEWS

Well, as lawyers, we often told that because the law is neutral, there's no space for bias.

JUSTICE SACHS

I don't like the word bias in that context. It's values. It's required values. It's the principles of non-racism and non-sexism foundational to the Constitution. So that's not a bias. It's a bias in favour of the Constitution. It's not personal. It's not based on your own life experience. It's dictated by the Constitution; the Constitution dictated by the people who chose to establish certain profound fundamental values to direct all future people in office. So that's the distinction I make between neutrality and impartiality. Impartiality really is fundamental. And that sense of intrinsic basic fairness of what we want has got to be there all the time.

#### **CHAPTER: THE HANDS OF JUSTICE ARE NEVER TIED**

My colleague Sandile Ngcobo used a beautiful phrase once; he said in discussion around the table-- in constitutional adjudication, you can never say the arms of justice are tied, too bad, the results are unfair, leave it to parliament to change. There's something wrong in the law that needs to be corrected if the result is going to be injustice through the law. The hands of justice are never tied.

And that became quite important in a case where I didn't write the judgment... might have been Fredericks... but dealing with the provision of electricity to tenants in a lower middle income housing estate, who had paid for their electricity to the landlord; he didn't hand it over, and City Power cut off the lights. And they went to court, and they said, *'That's unfair. We paid.'* And the court said, *'Too bad, you can sue the landlord, but he didn't pay. You can be cross with him.'* And we felt that can't be right. City Power have a duty to provide electricity to everybody. And there's an old doctrine of privity of contract. The contract was between the landlord and City Power and the only remedy was against him. And we said no that old privity of contract rule has to give way to the public duties of City Power to provide electricity. And the very least they had to do was to put up a notice to say, *'Your money's not being paid, pay it directly to us. And if you don't pay it to us, we're going to cut off your electricity.'* To give them the chance to remedy the situation. That was the example of following the Sandile Ngcobo *'hands of justice are never tied'* in constitutional law, in a constitutional democracy.

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