



## THE TREATMENT ACTION CAMPAIGN CASE – VIDEO TRANSCRIPT

JUSTICE ALBIE SACHS

The tension in the country was enormous. People were dying. Thousands and thousands were dying every week of HIV/AIDS. And it seemed like a blight. We fought so hard for our freedom. We've got democracy. We've got a new government. We're moving ahead. We're building houses, we're providing electricity, we're providing water. We're doing so much that's good. But our people are dying. What to do about it? And enormous controversies.

CHAPTER: THE CONTROVERSIES

The top leadership in government, denying that there is such a thing as HIV, that the virus exists, and not going along with what the scientists are saying and people are dying. At the same time, the South African people are not just inert figures around there. We have traditions of struggle, of fighting for rights, of getting together, and the Treatment Action Campaign is formed.

And the idea was to organise the people on the ground living with the virus, to campaign for access to the antiretrovirals. It became huge. Tens and tens, maybe hundreds of thousands of people on the ground, and very astute leadership; very understanding. It's not enough just to have a good legal argument. It's not enough just to have popular support.

You've got to get the story out. You've got to communicate into the press, into public discourse. For me, it's the classic example for the world of how a socio-economic rights litigation could be most satisfactorily advanced. Where the community most directly affected are strongly engaged. Where the issues are canvassed in public, in thoughtful and astute, intelligent ways, and where the legal teams are well focused.

And all of those three operated in this case. At the side of all of that, there was a campaign to get cheap antiretrovirals. And I must say, I was sitting up there just longing for that case to come to the Court. To me, it was scandalous that the Big Pharmas were demanding huge sums of money that could have been used to save literally, literally millions of lives, because of the intellectual property. And to me, it seemed impossible that intellectual property can condemn millions of people to die. That can't be the law. The law can't be that. And, let the case come to us in the Court and, we will hear the arguments, we will find a way ~~but~~ that could be very helpful at that particular level. The Pharmas capitulated.

I think they realised that the South African Constitutional Court wouldn't be scared to interfere with the traditional practices of defending intellectual property. To say you'd make huge investments in producing the drugs, you need a good return, and if you allow cheaper access in South Africa, the drugs will be bought there, and they will be sent to America, and they'd undermine the market. We wouldn't swallow arguments like that, but they capitulated.

#### CHAPTER: THE CASE

So, now it's the Treatment Action Campaign case, itself. And again, the lawyers chose pretty skilfully. There are so many points of entry, but you choose a point of entry that tells the story in the most dramatic, telling, flagrant way.

Women about to give birth living with HIV. If they take the drug Nevirapine, they can cut down the transmission of the virus by ... then it was fifty percent, now it's like ninety seven percent, I think. And, well, you know, it's a simple procedure. The drugs are being provided free, by Boeringher. It's safe, otherwise nobody could use it. If you've got money, you could buy it over the counter. So, it meant, in effect, poor and many black women throughout the country, all they could get - all the government allowed - was two sites in each of the provinces. If you didn't live in that catchment area, you just couldn't get it. So, it's emotional, it's killing, it's flagrant, it's so manifestly unacceptable that, for ideological reasons the government is holding back on rolling out antiretrovirals.

And we come to Court - it was our small Court chamber then - packed with people wearing T-shirts. HIV positive. Black, white, brown men, women. The nation. Dead silence. We hear the arguments; we're going to now deliver our decision. I still remember counsel for the Minister of Health saying to

us, *'Justices, in our democracy, we have an elected government, and it's not judges who decide on drugs and medical treatment. It's the Ministry of Health who determines that full stop.'* I said *'Mr. Moerane, you know, we're dealing with the issue here ... it's one of life's great experiences, for a woman to give birth to a child ... she's about to undertake that moment, and she knows if she takes those few drops, her child who's about to be born will have fifty percent chance better of surviving the illness. Isn't it possible to speak to your client, to speak to the TAC and to get an agreement on an issue like that?'* And there's dead silence in the Court. We come back afterwards, and we feel, you know, that they've got to respond. *'Come on!'* And I think the Minister then, Dr Manto Tshabalala-Msimang said, *'I'm taking instructions from my client, and we can't agree with the kind proposal made from the bench.'*

And we come back to Court. We've now decided to reject the argument about a minimum core. My colleagues don't like it. They feel it's introducing something that's not in the Constitution. It's not required. It has who knows what implications. It ties us down. And so, we reject it. We now have to deal, full frontally, with the issue, do Judges make policy? And the traditional position in terms of judging is, parliament makes policy. We apply the law. We don't make policy. We just make sure that parliament does its job within the framework of the rule of law and the executive and so on. And now we say, we do decide policy. Why? Because the Constitution requires us to do that. To uphold the fundamental rights of people to access healthcare. So, we are fulfilling - we're not exceeding - our powers. We're not overreaching when we deal with policy. If the policy is unconstitutional, we have to declare it as unconstitutional. The lawyers wanted us to issue an order instructing the government to roll out the antiretrovirals. And I remember Arthur, he's got that good sense; you need a sense of timing, it's that judicial statecraft thing. He says, *'We're not picking a fight with the President. We don't want to give him a bloody nose. That's not the issue. Other people can do that. We want to declare the law.'* And we simply declared the law that the state was under a duty to make Nevirapine available in all its places of health, throughout the country, not restricted to two. The restriction was justified on the basis that we need experience in administration, and we have problems about mother to child breastfeeding. But we said, *'You can't allow people to die in the meanwhile, while you're doing that research. Of course you do that research.'*

## CHAPTER: THE JUDGMENT

So, we now come back to Court, very quiet. And, you know, we're all sitting close to each other. It's a small space. And Arthur reads out the key elements of the judgment and declares that the

government is constitutionally obliged to make the drug Nevirapine available throughout the country, at all its outposts, to women living with HIV about to give birth. Very, very simple. Very quietly done. And the court is packed with HIV positive people. And we go out. There's dead silence. We go to corral at the back and we hear cheering, and I started crying. The emotion was so overwhelming. It wasn't just the impact of HIV on our country. I'm a member of a Court that has the power to uphold fundamental rights of people. It was sudden, unexpected, provoked by the cheering, the emotion of kind of joy and exhilaration. I've often spoken about this, and I even tell the story that, as we went into the Court, my colleague Sandile Ngcobo said, *'Albie would you like a handkerchief?'* And I said, *'No, no, no...it's not necessary.'* Because he had given a decision earlier on in the Hoffman case, who wanted to be a steward on South African Airways. He passed all the tests with flying colours. He was HIV positive, SAA said, *'No we'll give you a job selling tickets, but you can't be a steward. What will our customers say, knowing that South African Airways employs HIV positive stewards?'*

And a beautiful judgment by Sandile, knowing that the same people in Court were HIV positive, and that's when I cried for the first time. Then there was silence in Court. He had given the judgment saying that *'We can't use prejudiced conduct of foreign airlines to dictate the duties of South African Airlines. The right to work is so fundamental and we can't base our decisions on prejudice. He can do his job. It's not a danger to the health of anybody that he's serving.'* And that's when I cried. And now we're coming in the Court again. And he says, *'Would you like a handkerchief?'* Because I told that story at Harvard. And somebody wrote to him and said, *'Your colleague Albie said you made him cry.'* So, he says, *'Would you like a hankie?'* And I said, *'I don't need the hankie'.* But I cried the second time, even without the hankie. So that was an immense case. If we'd done nothing else in South Africa, nothing, nothing, nothing else, not a single other case and decision, only the TAC case, the Constitution, the socio-economic rights and the Constitutional Court would be fully justified. It saved South Africa. It saved us. We were entering into a calamitous period of despair and unnecessary death. And to the President's credit - he wasn't happy - he accepted the decision. And we now have the biggest antiretroviral programme in the world. It's a kind of an ambiguous claim to make. But that was the role of the Constitution, the role of the Court.

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