



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

## THE VOLKS CASE – VIDEO TRANSCRIPT

### CHAPTER: HOW PATRIARCHY REPRODUCES POWER

THANDI MATTHEWS

Another important case, in which you exposed how patriarchy reproduces power, was in the Volks judgment, which had to do with long term cohabitation, and the fact that a long-term partner wouldn't be recognised as a spouse in a deceased estate. So, what happens to the maintenance of that partner? For me, that's become kind of common that you can claim [maintenance] from a deceased estate if you're in a long-term cohabiting relationship.

### CHAPTER: A CASE THAT GOT ME SO WORKED UP

JUSTICE ALBIE SACHS

I got so worked up in that case. I'm not quite sure why I got so worked up. Mrs Robinson lived for ten years with Mr Volks, who was an attorney. He'd been in a previous marriage, he had children, the children were now living in California. He was bipolar, so it wasn't an easy time that she spent with him. She was kind of middle class. He died and he left her a third of his possessions in his will. So, he didn't leave her with nothing. I got the impression that there was tension between her and the children, that she felt the children had more-or-less abandoned him. She'd looked after him.

There was a law that was called the Deceased Spouse Maintenance Act. That law had been passed in the apartheid era, in a case where a very rich man had died and had completely disinherited his wife, and I think given all the money, might have been to a lover or whoever it was. She was left with nothing. The case went to the top court in the land then, and the Chief Justice said, '*... well, this is harsh, but it's too bad. We have freedom of testation, which means the owner of property can leave property to whom he wants. And although it's very unfair in this case, the courts can't intervene.*'

So, parliament passed a law entitling a disinherited spouse to not get property as such, but at least get maintenance. She'd been getting maintenance during the lifetime of her partner. She could sue for maintenance, so she could sue for maintenance after death.

#### CHAPTER: DISCRIMINATION OF THE GROUNDS OF MARITAL STATUS

The Women's Law Centre supporting Mrs Robinson says that she was the life partner, she looked after him in sickness and in health and so on. Even though she got something under property, the law unfairly discriminates on grounds of marital status, which was mentioned in the Constitution as a forbidden ground of discrimination. I'm looking at the case and I'm thinking not of her, she's okay - maybe on the facts it's the worst case to bring because I'm thinking of overwhelmingly poor African women who have lived with their partners 40, 50 years, borne their children, looked after the home, made him sandwiches for work, nursed him when he was sick; and she hasn't gone out and earned anything herself; she's got no capital, no home, nothing. There's no will, she gets nothing. That can't be right. Otherwise, why is marital status even in the Constitution?

I'm thinking, there might be a million affected widows in that situation at any time in South Africa. There might be a case where a lover is a companion for the last three months, or six months, or a year. It's not the same. So, you can't say automatically, *'I was living with him at the time he died, I'm entitled to maintenance.'*

#### CHAPTER: 'I DON'T DISAGREE WITH YOUR LOGIC; I DISAGREE WITH EVERYTHING'

We are sitting around the table, and Thembile Skweyiya has been asked to write the judgment. He says, *'It might be hard in certain circumstances, but that's the law. During marriage, when you are legally married, the husband is obliged to pay maintenance for the wife. It makes sense that after death, that continues, if the husband doesn't make provision for her. But you're not compelled to marry, you're not forbidden to marry. Maybe, if you're gay, you might have a claim that you couldn't marry in those days, but that doesn't apply in this case. That's the end of the matter. Agree, agree, agree... Albie?'* *'I disagree.'* *'What do you disagree with?'* I said, *'I don't disagree with your logic, I disagree with everything.'* *'What part do you disagree with?'* I said *'... with everything.'* It became a question of how you frame the issue. The same facts. If you frame the issue as an issue of marriage law, he's dead right, and I'm wrong. But if you say you frame the issue as family law? Families are constituted in multiple ways. Marriage is one of them. Cohabitation is another. It's so common in South Africa, and there are so many reasons people don't marry. Sometimes, the man doesn't want to marry. You have no choice.

#### CHAPTER: IMPLICATIONS OF THE MIGRANT LABOUR SYSTEM

THANDI MATTHEWS

You also spoke about the implications of the migrant labour system that had a destructive impact on many families in our country.

JUSTICE ALBIE SACHS

Huge. The man has married in his rural area. That's a marriage, he doesn't want to dissolve it. He goes to the town, he's living there now, and he sets up a new family there. That's the reality for a huge number of people. And I felt that it was just, in those circumstances, so unfair. If you frame it as family law, then the interests that the law are protecting are not just marriage, but protecting the family, and recognising that the survivor, in that case, has dedicated her life to the family. She's borne the children, looked after the home, looked after the man in sickness. She should get maintenance. It's unfair discrimination. So, the law should say we look on the facts, whether Mrs Robinson qualifies, but the law is clearly unconstitutional to the extent that it blanketly shuts out the people in the circumstances that I mentioned.

CHAPTER: A HAPPY ENDING

My judgment, minority, was twice as long as the main judgment. But it has a happy ending. You know the ending?

THANDI MATTHEWS

No, you can tell us.

ALBIE SACHS

Last year, I get a phone call from Justice Madlanga - Mbuyiseli Madlanga - from the Constitutional Court. He said, *'Albie, you might like to read the press summary of a decision that the Court has just given.'* I look it up, and the case starts off with a quotation from Justice Albie Sachs saying, *'Should a woman who has dedicated 40 years of her life to looking after her companion - borne his children, nursed him in sickness and in health, maintained the home - be a stranger to his property after his death simply because they were not legally married.'* It's quoted there, and the Constitutional Court last year decided that the decision given in *Volks vs Robinson* was wrong. He explained to me afterwards, didn't say it was clearly wrong. If it's clearly wrong then you just wipe it out. But they said it was wrong, and they found a way to get around it in a case of a woman, happened to be a black woman, who'd been the domestic worker of a wealthy property owner in Camps Bay. They'd loved each other, and she'd looked after him for three or four years, and she claimed maintenance from the estate, and she got it.

So, the Court found a way of saying that the decision in *Volks vs Robinson* was wrong. If you like, holding up my statement as the foundation of the new approach, without saying the old decision was clearly wrong. I remember once, Dikgang Moseneke saying completely off the record, the one case where he regrets the decision he gave was going with the majority in the *Volks vs Robinson* Case.

#### CHAPTER: 'ALBIE, YOU CAME OUT TOP'

There was an amusing outcome. Kate O' Regan comes to me one day full of smiles. Professor Goldblatt - I forget her first name.... Beth Goldblatt, Wits University, I think she's in Australia now - had done a survey of gender sensitivity amongst the Judges on the Constitutional Court. She said, '*Albie, you came out top,*' ahead of her.

Kate was actually pleased, because she likes the idea that your gender doesn't influence your writing on gender; your race doesn't influence your writing on race. I don't agree with her on that. I think your experience is very important, whether it's race or gender, and appropriately comes into your decision-making. But she was very amused by that fact; that my decision in the *Volks vs Robinson* Case gave me a higher score. She and Yvonne wrote a judgment also critiquing the provision as a violation of the right not to be subjected to discrimination on grounds of marital status. But it wasn't as dramatic, and pulsating, and if you like, judicially passionate as my decision was. I remember working very hard on that, and part of it came, for me, from the struggle days, and the struggle of women inside the ANC; to be heard; to be taken seriously; not just to be looking after the men doing the fighting; and combating sexism.

#### CHAPTER: THE TRIPLE OPPRESSION OF AFRICAN WOMEN

Then, the work and writings of Professor Jack Simons from the University of Cape Town. The lawyer, who had been imprisoned; his wife, Ray Alexander, was the organiser of women workers in the Food and Canning Workers Union; and he became a strong feminist in that particular context. He wrote a book on the legal status of African women, and he introduced the notion of the triple oppression of African women, who were oppressed as black people, as women, as black women, and under the way native law was being interpreted at the time, and under the way public law was being interpreted - the triple oppression of African women, and widows in particular. It wasn't whether they were married or not.

There were lots of cases from Canada where judges, mainly women judges, had said the fact that you are theoretically free to marry doesn't mean that it's just available to you and it's your choice. That

discrimination on grounds of marital status was held by mainly women judges to be unfair in that context.

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