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This is an interview with Justice Chris Jafta and it's Friday the 2<sup>nd</sup> of December 2011. Chris, thank you so much for agreeing to participate in the Constitutional Court Oral History Project, we really appreciate it.

Thank you.

I wondered if we could start this interview, if you could talk about your early childhood memories, where and when you were born, family structure and also events that may have prepared you for a legal trajectory and life on the Bench?

(laughs) Okay, well, I think at an early stage one would not even have dreamt of reaching the level of being a judge. But let me take a step back and start. About my childhood, I was born in a village in Matatiele, which is on the border between the Eastern Cape and KwaZulu-Natal. My father was a builder, my mother was a housewife, but at an early stage I was living with my grandparents. During the time I was doing primary education, I think, until standard four, I was living with my grandparents, my grandfather and grandmother. Then at about the time when I was doing standard four, I went to live with my mother. My father was always away on work; he would come back for short periods when he was on leave. So I did my primary education in the village where I was born until standard six in 1974. And then I moved to high school in a village far from where my home is, and I did my high school there until matric. Now I went to one school, I did two years and then I moved to another school for standard nine. And during that year we were involved in a strike, boycotting classes, lessons, and we ended up being arrested by police, and they beat us. I think that was the first experience against authority, and I felt that it was unjust for them just to beat us, not understanding the reasons why we got involved in a strike in the first place. I spent about a week in police custody, and thereafter we were released but we were never charged with any offence. And when we tried to go back to the same school, some of us were excluded because we were regarded as now ringleaders of the strike. So I had...in 1977, I had not to sit for the end of the year exams. I was in standard nine then, and then I waited the next year. I went back to my original school where I started the high school, and I did my standard nine in 1978, and did matric in '79. Passed matric then. By then I had had some influence of what had happened around us. There were people who were sort of linked to the ANC underground, who'd give us awareness lectures of what was happening in the country then, and there had been stories about the death of Steve Biko, and thereafter there was an inquest, which had to determine who was responsible for the death of Steve Biko. And I was attracted to seeing how the lawyers were reported to have stood up against the government, against authority, in pursuit of determining what actually happened to Steve

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Biko. So that was the first time that I got attracted to law. I just wanted to practise law because I had seen that lawyers could stand up to authority; I had seen people being ruffled around me by Security Police, beaten up, so I thought a lawyer stands a good chance to stand against the system and to help those who are on the receiving end of the system. So when I passed my matric, I told my father that I wanted to do law, and he encouraged me, and I went to the University of Transkei then, which is now called the Walter Sisulu University, to do law. And that's where I did my law degree.

Was your family in any way political? Prior to those experiences that you've mentioned, had you ever understood what apartheid meant, what it meant to be black in South Africa?

Yes, my father was pretty so...he liked, you know, buying newspapers and reading them, and he would narrate some of the stories to me whenever he would be at home. And that sort of prompted interest in me in understanding what was going on around me. I would see, for example, if we had gone to town, see a young white boy, perhaps, you know, hitting an old man, who would be working in their store, and the old person would not hit back, and those things were strange to me because from my background we were taught to respect the elders and for me it was not on to see a child of my age acting in that fashion. And when I would be asking my father for explanation, he would give it and say, it's because of the system, and in this environment you may be elderly but if you're black you're treated as if you're a child, at times. So that's why we had that kind of treatment of elderly people by white children even. So that made me to be conscious that in this country we're not treated the same. black people are treated in a manner that it's unfair by the white people. And at times I would not understand why we would, for example, if we would have gone to the post office, why we would have to use a separate door into the post office, a separate counter, which you'd almost have long queues at that counter, and on the other side you'd have few people being served but because they are white you are told that you couldn't go and get service through where they were being served. So those shaped my outlook of the environment around which I was. So when I went to high school, yes, consciousness was already there, but, you know, the talks that were given by the ANC people just affirmed my views on the system.

And when you started studying, at that time it was called the University of Transkei, is that correct?

Yes, indeed.

And I wondered whether you could talk about your experiences at university because it was a very crucial time in the country's history?

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Yes. Then you had what was regarded as black universities, and you had your white universities like Wits, UCT, University of Natal, Pretoria, Stellenbosch, and because of oneâ\200\231s conscious background of what was happening, you could only go to the so-called white universities with permission granted by the Minister of Education. And some of us then thought, weâ\200\231re not going to do that, weâ\200\231re not going to beg the minister to give us a right to go to university.

We would rather go to the black universities. And the University of Transkei, it started mainly with a group that, you know, | was part of in 1980, when they started operating from the campus where it is today. And then we had the opportunity of having lecturers who were not welcome to the wider South Africa. They couldnâ\200\231t get work permits because they were regarded as politically unacceptable to the then government. So we had good lecturers. We were the envy of the so-called black universities then. And we had good lecturers, we were conscious about what was happening, and who would express views which were strongly against the system. Even our law lecturers, those who taught us constitutional law, would criticise strongly the system, the legal system that was operating then. the so-called supremacy of Parliament system, Westminster system, where whatever is legislated by Parliament had to be upheld by the courts and everybody else had to follow that. Even though a large section of the population was not represented in the Parliament that made the laws. So those were factors that sort of nudged one towards having interest, basically, in constitutional law and human rights. So | drifted towards constitutional law and it was closer to my heart. And later, after Iâ\200\231d graduated my LLB, and an opening happened at the university for teaching constitutional law, | took it, and then | taught for a couple of years before | focused on my practice as an advocate.

Right. | was wondering, in terms of political activism at university, were you particularly politically active at university?

Not really, not really. There were people who were quite active. | guess, you know, at that time one was a bit on the shy side. Public speaking was not my cup of tea. | would be involved behind the scenes during discussions, but not taking the leadership role.

Itâ\200\231s interesting that you became interested in constitutional issues at that stage because it really was the height of apartheid. | wondered what vision you may have had for how you could use law in an oppressive system?

Well, in the main was to be there as a lawyer, defend those who could not defend themselves, be able to make it better for political detainees, for example, because it was only lawyers who could have limited access to political detainees. It was only lawyers who could have the ability of bringing cases to court, and in a few occasions have orders made to release those who had been in detention. So | saw my role as that of a lawyer and as at that stage | never thought liberation would come or democracy would come in our

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lifetime. | thought my role was just going to be that of a lawyer defending human rights.

At some point you decided to leave university and go into practice, and | wondered if you could talk about some of the issues that arose for you while you were in practice?

Well, | started practising in December 1992, and by then, you know, the winds of change were already blowing in the country and we were thinking that liberation is not too far and it's going to happen. But my main focus in practice was human rights, constitutional law, challenging decisions of government. | think about eighty percent of my practice was on constitutional and administrative law, challenging decisions made by government, mostly because the area where | was practising in Umtata, we were servicing poor people from the villages. And in the main, the cases would arise in matters relating to social security, relating to obtaining official documents, and so on. So my main focus in practice was that. | did a few criminal cases but that was not my area of interest.

Chris, | wondered if you could take us a little bit back, when you'd been at university and then during the 1980s, | understand that you'd worked as a prosecutor at some point, | wondered if you could talk about that experience during apartheid of working within a legal system that was so unjust?

Yes. Ja, | was appointed prosecutor in 1984, and | thought it was...well, it had to be so because during my last year at university | had received a scholarship from the government of Transkei, and | had to pay back that, so | had to work for government. And that created a bit of difficulty in me because | knew that one might be required to prosecute not only in the ordinary run-of-the-mill criminal cases, you might be required to prosecute in political cases; there were still few political cases that were in the system then. But luckily for me | was never asked to do any of those. But there were moments where one would feel that you're being pressured to do what you believe is not right, especially by the Security Police. Because | was prosecuting at a district court, and this is what saved me from coming into contact with prosecuting political cases. Political cases were prosecuted in the higher court, the Regional Magistrate Court. But once one is arrested the case will start in the district court for appearance and the application for bail and the like. So you would have to work with Security Police, the dockets relating to matters which are regarded as security cases would be kept by the Security Police officials, they wouldn't bring it to you earlier to look at the docket, formulate the charges properly and if it is going to be an application for bail, look at the contents of the docket, make up your mind as a prosecutor whether you should oppose bail, not to rely on what they tell you. So they would always want you to follow their instructions, and | would refuse. The only cases that had that leaning of political were prosecutions of people who had been arrested for violating

Emergency regulations which required people not to walk on the streets after, | think, nine oâ\200\231clock in the evening. So the police would normally at about five to nine, go with their police van, park at the door of clubs, bars, waiting to pounce on people who would come out (/augh) at nine oâ\200\231clock...a minute after nine oâ\200\231clock. At times you would get stories of people who would be taken even before nine, just shortly before nine, and they would drive around with them in town and then lock them into the police station after nine oâ\200\231clock ,

and then they are brought to court the next morning and you are asked to charge them. So | refused flatly to prosecute such people. | would withdraw all the charges. And whilst | was at the district court, one of my friends at the university was killed by the Security Police. And after his killing...ne was a cousin to Dumisa Ntsebeza, and after his killing Dumisa Ntsebeza was arrested and detained, together with his younger brother, leaving the whole situation with nobody who would help in organising the funeral for their cousin. And | got involved; there were some relatives of theirs who came from another town, | got involved in organising the funeral, and because that funeral was considered as a security threat, an order was issued by government that it cannot happen over the weekend, it has to happen during the week. And they elected Wednesday as the day on which the funeral could be conducted. So obviously, being a prosecutor, | have to be at work on Wednesday. But fortunately we didnâ\200\231t have contentious cases on that Wednesday and | approached the magistrate and asked him to have the court set up early and that we were going to postpone most of the case because they were not ready for trial and then the few cases that were ready for trial could be stood down until late in the afternoon after the funeral. And | think they had put time constraints on it that it should take place before one oâ\200\231clock. So | went to the funeral. And | came back to work and we did the cases and after we adjourned, | think it was at about four oâ\200\231clock in the afternoon, | went back to my office and shortly thereafter Security Police came. Well, in the area there were lots of Security Police and members of the Defence Force as well, you know, just to keep order, as they said. So the Security Police came to my office and they asked me to come with them to the police station, and the police station was just a few blocks from the courthouse. They said, well, the head of the Security Police would like to see me and | thought perhaps it might be related to work and | told them, well, look Iâ\200\231m still busy, canâ\200\231t he wait, I'll see him later. They insisted. And | went along with them. And when | got there, | just got an unwelcoming reaction from the senior police who were there, and they started asking me as to how | knew this guy and why would | leave my work and go to a funeral of somebody like that one described as a terrorist; do | know how many people died through the hand of the guy? So it was just an interrogation, and well, | wasnâ\200\231t assaulted but | would be pushed around, people poking me with fingers, which took place for around three to four hours. And thereafter they told me that theyâ\200\231re going to report me to the then State President of the government of Transkei, because | was biting the hand that fed me, so to speak. So they wanted me to be out of the system because theyâ\200\231d had reports that | was not co-operating with those who would have arrested people for walking on the streets. So they released me after about four hours, and it was...ja, the next Monday | received a telegram from

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the then Attorney-General...as a prosecutor you would get your authority from the Attorney-General to prosecute. If he doesn't give you that because in terms of the law the authority lied with the Attorney-General, you could not prosecute in any case. So I got a telegram that my authority to prosecute had been revoked. And soon thereafter I got another telegram that I'm being transferred from that station, that was the town where Dumisa comes from...Dumisa Ntsebeza Cala. I was transferred to another town near Umtata called Mqanduli, and I was being transferred as an administrative clerk. And that, the transferring telegram came on a Friday, just about lunch time, and it was addressed to the magistrate, the head of station, and he came to tell me that you are required to go to this place, the department has arranged a truck to take your possessions, it's standing here, and I said, well, look, I'm not going to go now. I mean, I have friends here, I need to let everybody know that I'll be leaving. I would leave on Monday. And he said, no, I've been told by the Security Police that you are declared a persona non grata in the area, you have to leave. And I said, well, I'm not going to leave, and if the Security Police want to do anything to me after hours, that's not the responsibility of the department, it's my own responsibility, but I'm not going to leave. The furniture and stuff were taken that afternoon. And I remained until the following Monday, I went to Mqanduli, where I became a clerk. (laughs) You can imagine from being a prosecutor and to being a clerk, and filling up forms. But they didn't know that one could use that to the advantage of those who were denied access to documents, because they used to issue what they called travel documents, which were recognised in Lesotho, Swaziland and Botswana, and those were the countries through which those who wanted to join the ANC in exile would go through. So we had a number of applications coming in and I was the one who would approve them, and people would get their documents and leave the country. So I took solace in that because I was being helpful to those who required documents to leave the country. I remained in that position a couple of months, I think, about eight or nine months. In that process the president of that government was retiring and then after he had retired I got a letter from the Director-General, the Department of Justice saying, well, you'll be transferred again, you'll be reinstated as prosecutor, and I was transferred to another town called Ngqeleni, where I started prosecuting again. But it was for a couple of months, I think four months, before I was appointed a magistrate.

Interesting.

(laughs) Ja. Now I was a magistrate for three years, I think. And then I was doing my LLB part-time with the university because I had done a B. Juris degree earlier. And I completed my LLB and I thought to myself, now I want to leave because I wanted to practise law. And I left. Then I thought I could be an attorney, I joined the firm of attorneys to do articles. But after three months or so, having joined that firm of attorneys, and as a trainee, I tell you, you would earn quite little. I think my salary then was about two hundred and fifty rand per month. My father lost his job and I had to be the sole breadwinner of

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the family, and I couldn't carry that out on my salary of two hundred and fifty rand per month. And then an opening at the university, they advertised for lecturers' positions and I applied, then I went to the university, I didn't pursue my training as an attorney. I went to the university and then I started teaching.

Right. I was wondering, Chris, if you could talk about when you did pupillage and that experience, and also a little bit more about your practice before you actually went to the Supreme Court of Appeal.

Okay. I came to do pupillage here in Johannesburg and Advocate Kemack who was my Master, a very nice man...well, because of my experience in prosecution, magistrate and university lecturer, it wasn't as difficult as it was as to people who came straight from university to do pupillage. So I was quite familiar with the procedures in court and stuff like that. But I did my pupillage for four months, we had to write an examination and then you do oral examination thereafter. And fortunately I passed. That was 1992, from July to October. And then I went back to Umtata to start practising as an advocate. I practised from December 1992 until 1997 when I was invited to act as a judge in the High Court.

And that was in the Transkei?

In the Transkei, yes. I was invited quite earlier but I thought I was still new in practice. I was invited, I think, in 1996 I declined, and the Judge President persisted in wanting me to come to act, and I had to relent in May 1997. And I was acting as a judge for four months and then I went back to my practice. In December 1998, he came back to me again and said, look, I have just had one of my judges go to the Supreme Court of Appeal at short notice, I need someone who is going to replace that judge. I want you to come because you have acted before and the others who have acted before are not available. I'm prepared to work out any problems that you might have relating to your practice. Any cases that you have lined up for the next term can be postponed to other terms, so that you can come. And then I said, okay, is it for one term only? He said, yes. And then, I said, I will come, let's make arrangements, and then I did. I started on the fourth of January, 1999, not knowing that would be for good. I wouldn't go back to practice. I remained acting for the term. At the end of the term he was not saying anything, and then I said, well, my acting appointment has come to an end, I've come to say goodbye, I'm leaving. And he said, no, no, no, hang on, there's a problem, this judge you're acting in the position of, he won't come back from the SCA, please stay on. Then I said, but what about my cases? I can't tell my clients to wait until I come back after six months, those cases have to be heard. He pleaded with me, and ultimately I gave in and I had to make arrangements that all the cases that were waiting for me had to be given to other advocates, then I remained until the end of June. At the end of June, there was a vacancy now in the same court. He said, now, you don't have to go back to practice, you're

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doing well here, we need people like you, please. And I was reluctant. And because he knew my wife, he went to speak to my wife (laughs), and my wife agreed. And when I discussed the matter with my wife, she said, well, look, you guys have been talking about transformation of the judicial system, when opportunities come up and there are no people who can come in to advance that transformation, you have to go in. And I relented and I stayed. I applied, I was interviewed and appointed on a permanent basis in October 1999. Then I spent...after a year, the...no, no, it wasn't after a year...at the time I was appointed on a permanent basis, the Judge President got transferred to Grahamstown, so we didn't have a permanent Judge President. And the most senior judge acted as the head of the court.

Was the Judge President at that time, Solomon?

No, it was Cecil Somyalo.

Oh, yes, of course.

Yes, it was Cecil Somyalo. He went to Grahamstown. He's the guy who pushed me to get into the judiciary, actually, I always blame him for that (laughs). So we had a senior judge acting as the head of the court. After a year, they came to me because Selwyn Miller, who was acting as the head said, no, it should be given to a black candidate. They came to me, and I was hardly a year, I thought, no, I'm not ready, I can't lead a court. But they insisted and the Minister of Justice appointed me as the acting Judge President. On the recommendation of Selwyn Miller and Cecil Somyalo who thought I could do the job (laughs). So I became the acting Judge President for two years. The reason being, by then, we had discussed it already, we thought, well, you know, it doesn't make sense to have, within one province, the Eastern Cape, three provincial divisions of the High Court. We should rationalise and have one. And then I told them that I wouldn't want to fill in the position of a Judge President on a permanent basis for that reason. So I acted for two years. And after two years...within that two years I was approached by people who wanted me to make myself available for appointment at the Supreme Court of Appeal. By then, I think, there were only two black judges at the Supreme Court of Appeal. So they wanted me to go there, and I was not too keen, because I thought it was too soon for me to go there, but they pointed out that the two that were there, had been in the High Court for about the same period as I was. So I need to go there to increase the numbers of black judges. But I thought, before going there, I should, you know, go to the Labour Appeal Court, I had been approached by Judge Zondo who is now here, he was the Judge President at the Labour Court to go and act there. Labour law was one area of interest to me because I thought the role played by that court in social change, it might bring about the change into a just society that the Constitution envisions. So I thought I could make a little contribution there. I went to the Labour Appeal Court, I thought I would do one



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term even there, | ended up doing the whole year at the Labour Appeal Court, and whilst | was there, | was approached by the President of the Supreme Court of Appeal, who wanted me to go to the Supreme Court of Appeal.

Who was that?

It was Craig Howie. Yes. So | told him that, no, once | finish with my stint with Ray Zondo, | will consider going to the Supreme Court of Appeal. But my problem with the Supreme Court of Appeal was that of language. | knew that they do cases in Afrikaans and English, and then my Afrikaans is very poor. | said to him, well, look, you have to know that my Afrikaans is not up to scratch, and then | canâ\200\231t come to your court if Iâ\200\231ll be required to read records

written in Afrikaans, because | wonâ\200\231t be able to do it. He said, no ways, you should come, weâ\200\231ll make arrangements for you, we won't put you in cases where records are in Afrikaans. So it suited me. And then | went to the Supreme Court of Appeal in July 2004. And they advertised soon after we were there, they advertised three posts in the Supreme Court of Appeal, and the head and deputy, who is now the President of the Supreme Court of Appeal, Judge Lex Mpati, were quite happy with my performance, and they wanted me to make myself available for a permanent appointment. And my problem then was | had been away from my family for a year, they were still living in Umtata, so | would go home weekends, and | thought this didnâ\200\231t suit me. And then | told them that, look | may only consider coming to Bloemfontein on permanent basis if my family is prepared to move from Umtata to Bloemfontein. Iâ\200\231m not prepared to be commuting between Bloemfontein and Umtata. But fortunately when we discussed it with my wife, she was quite prepared to give up her consultancy business in Umtata to move to Bloemfontein. And then | accepted the nomination and | was interviewed 2004 October, and | was appointed in Bloemfontein, where | spent about five years.

And after the five years, was that during that time that you actually began acting at the Constitutional Court?

Yes, | was invited to come here in December 2007, because my acting stint ran from January to end of May, 2008. So | came here. Again it was through the influence of Judge Mpati because he came to act from July to December 2007. So he gave my name to Justice Langa, who was then the Chief Justice, to consider inviting me to come and act here. So thatâ\200\231s how | came to act here.

Right. And soon thereafter you were appointed as a judge on the Constitutional Court, if Iâ\200\231m not mistaken, in 2009?

Yes, yes. Well, let me start with my experience whilst acting.

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Before you do that, I was wondering, you had been involved, when you narrated your experiences of becoming a judge in different courts, you did so with enormous reluctance, and Iâ\200\231m wondering why you had such reluctance given there was this issue of judicial transformation?

Yes. Well, basically I think from the beginning I didnâ\200\231t think that I was ready for

being a judge in the first place. I thought I needed to gain more experience before I could consider making myself available. But one got pushed because of the circumstances. There were fewer black judges and therefore you wouldnâ\200\231t spend the time that you would ideally have wanted to spend at one level before you consider going to the next level. So basically that was the reason. But when it came to the Constitutional Court, that inhibition wasnâ\200\231t really there. I had thought then itâ\200\231s the court where I would enjoy working most. The Supreme Court of Appeal it sort of when we came there we found judges who had been appointed earlier, judges who had been groomed in the model of the common law, who were not quite keen to embrace jurisprudence, that is enthused by the Constitution, for various reasons. One of them being, that I got to know later, they didnâ\200\231t want to decide cases on constitutional matters, because in the structure of our Constitution you have the Supreme Court of Appeal and the Constitutional Court at the same level. In regard to non constitutional matters thatâ\200\231s the highest court, the Supreme Court of Appeal. In respect of constitutional matters, the Constitutional Court is higher. Now they didnâ\200\231t want appeals to lie from their court to the Constitutional Court, because they end up being overturned. And I think that was not a nice feeling to them because they used to be the last court. Their word used to be the final word. So they wouldn't. So I really didnâ\200\231t enjoy much at the Supreme Court of Appeal, even though one was exposed to a wide spectrum of work covering all fields, but for that reason I didnâ\200\231t enjoy much of the work at the Supreme Court of Appeals. So when the opening came from the Constitutional Court, I jumped for it. Thatâ\200\231s the only court where I was willing (/augh) to come to there and then, yes.

And when you were, if Iâ\200\231m not mistaken, in 1994, what had been your observations of when the court started, the Constitutional Court, the idea was mooted and started, I wondered from afar in your observations, what were some of the things that youâ\200\231d observed, the way in which the Court was structured, the cases that came through, what was your understanding of the Court?

Well, it was a new Court. Some of us had high expectations that it will bring about changes in the first place, taking the lead in construing the Constitution and leading us in understanding this new system, because remember we were used...we Started practising under the old system, which for most of us was not a happy field. So we expected the Constitutional Court to take the lead in shaping the new legal system. And which it did. It did. I think they did a

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good job. In fact, | think one of their best cases was the first judgment, the Makwanyane (S v Makwanyane and Another) judgment, even though almost every judge of the Constitutional Court wrote, but we felt that they were announcing their arrival in a big way and taking the lead as to which direction the jurisprudence of the country should take. So one was sort of proud of what was happening and we expected more to come and | guess in oneâ\200\231s ambition that one day one would go to the same court.

Subsequent to Makwanyane (S v Makwanyane and Another), do you think that the Court in its first fifteen years...well, the first few years, do you think it actually met some of the expectations you and others had?

Yes, yes, indeed, indeed. It did, it did. It was bold in the area of equality in advancing the rights of gays and lesbians, it was quite bold. | remember at one stage | had a conversation with my father, who appeared to be confused after the...Iâ\200\231m not sure which case was it...which gave the indication that, yo  
u  
know, gay men or lesbians could marry.

The same sex marriages?

It was before the same sex marriage cases (Minister of Home Affairs v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others) themselves. And my father was saying to me, well, look, | donâ\200\231t understand, tell me how can a man marry another man? Or a woman marry another woman? We had a debate, a long debate about that, and ultimately | had to say, well, look, you know, this is what the Constitution says, you people, you had representatives in Parliament, representing the whole country, they thrashed out this Constitution, that is what it says. It might be against your religious convictions, but itâ\200\231s the supreme document by which everybody has to live. And | ended up saying to him, well, look, itâ\200\231s not the court that Iâ\200\231m sitting in that has made this decision, donâ\200\231t be hard on me  
(laughter). Shortly thereafter, the same sex marriage case came to the Supreme Court of Appeal, and the Supreme Court of Appeal said, well, people of the same sex can marry. Now he said, what do you say now? (/laughter) | tried to say, no, | wasnâ\200\231t part of the panel. He said, no, no, you are in the court, the same court, itâ\200\231s your court. So, we had those debates at times, and unfortunately my father passed on in May 2006. So | must say, ja, generally the Constitutional Court has met our expectations, and thatâ\200\231s the reason why | was keen to come to the Constitutional Court and perhaps make my small contribution as an individual.

| wondered if you could talk about your acting experience? Was this during the time of Pius Langa, as Chief Justice?

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| wondered if you could talk about how different the experience of working here may have been, if at all, from the Supreme Court of Appeals, and your previous Bench experience?

It was quite different. Well, in the first place, | must say, when we arrived at the Supreme Court of Appeal, the environment was not so welcoming. It was still at the stage where white judges did not have confidence in black judges. And | think the majority of them thought we were there only on the basis of the colour of our skin. That we didn't qualify to be there. So it wasn't welcoming. It

took a while for one to establish oneself to be respected at an intellectual level. But when | came here it was different. It was quite welcoming. Everybody was friendly. But the difference was you're sitting in a big panel, which has its own challenges. At the Supreme Court of Appeal, you would sit in three or five court panels, and if you write a judgement you need just to take into consideration the views of four other colleagues. When | came here, for example, when you're dealing with petitions at the Supreme Court of Appeal, it would be two judges that would decide a petition, whether the matter should come to the Supreme Court of Appeal or it should be refused. But here, you sit all of you, consider everything, make a decision collectively, and | found it a bit...at times... still find it a bit tedious, but the challenge was when it came to writing judgments, because you'd have people with different views as individuals. So it becomes quite a challenge to write a judgment that would be accepted and agreed to by everybody. And the process, the whole process, of writing a judgment from the hearing up to the final stage of delivering the judgment, | find it more taxing than it was at the SCA (Supreme Court of Appeal). The other thing is that, you know, two courts operate on different working methods. At the SCA (Supreme Court of Appeal), for example, one would have to apply for leave to appeal, and you granted leave, before you're filing your record, you're filing your written argument, getting a date. So by the

end of the time each judge have his or her reading material. So you plan during recess, you plan according to the workload that you have. You would be able to say to family, okay, we can take two weeks off, and then thereafter | have to get back to reading. So it's easier to plan there. And when you come at the beginning of the term, you'd have read, finished reading the whole material in every case, and you are much more prepared for the hearing than here. Because here the problem is, you get a petition, you decide that the matter is worth hearing, you set down the petition, together with the appeal. You don't know how big the record is at that stage and you give the parties dates, timelines within which to do certain things, and by the end of the term, you don't have ready material for reading. Some of the material will be coming during recess. As for example now, we don't have the full material ready for one to take home with. So it's a challenge. It becomes a challenge in even planning your private life. But | think it's an issue that is going to be addressed

soon because | think the sooner it is addressed the better, and if one is fully prepared for the hearing it will be easier and it will take a shorter time for one to produce a judgment, rather than at the present moment that our judgments

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take longer to come out. Whereas at the Supreme Court of Appeal, at the end of the term, about eighty percent of the judgments or matters heard during the term, are handed down. So youâ\200\231d have quite a few of them, very complex ones, which would carry to the next term. And then at the beginning of the next term they would be handed down.

Certainly thatâ\200\231s a key criticism of the Constitutional Court, hearings take too long,...judgments take too long...?

Oh, yes.

| wondered though, you mentioned earlier that the actual work-shopping of the conferencing is a bit tedious and from the experience of interviewing members of the first Bench, they found it a very productive and rewarding experience, and | wondered what may have changed for you in the interim, do you think?

Well, itâ\200\231s...my attitude or view would be influenced in the main by the experience that | had in the Supreme Court of Appeal, for example. Yes, in a complex matter, really you'll find the purpose of having a bigger panel, because you would have views, differently expressed, which ultimately after the debates you have to work them through in producing one document which would reflect all the views. And | think, you know, the drafters of the Constitution, had in mind a situation where decisions of this court would be encompassing the views widely held in the country, and therefore each one of us was expected to be carrying the views of a particular part of the country, bring them to bear in having decisions of the court. That is a rather positive side of it. But in the technical process, it takes longer and at times you donâ\200\231t reach unanimity. And in my personal view itâ\200\231s not good for the highest court to be split in matters of great public importance. But at times itâ\200\231s unavoidable, we have to have splits, because those represent truly the views which we believe are representative of the various sections of the population.

Essentially what youâ\200\231re saying is that dissent is not exactly a very good thing for the Court?

Generally itâ\200\231s not. | wouldnâ\200\231t encourage it, unless it is absolutely necessary. Because at times a view which is expressed as a dissent at the present, might be a view that will carry favour with the majority in future. And dissent in most instances help to sharpen the reasoning of the majority judgment. But generally speaking | would rather do without dissent, unless you canâ\200\231t avoid it .

Right. | wondered though also, coming from the Supreme Court of Appeals, which has had a tradition of structure, and a very hierarchical structure, coming to this court where the robes are different, where the types of

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formalities are different, | wondered if you could talk about that, as your adjustment period?

Well, it was a pleasant surprise, | may put it that way. Because with the background of the Supreme Court of Appeals, which as you said, itâ\200\231s a hierarchical structure, you got used to that situation where remember, when we came there, even at the tea room, people will sit in accordance to seniority, particular chairs would be set aside to certain people, you canâ\200\231t sit anywhere where you like, even if you had a conversation with a colleague walking to the tea room, you might find that once you are there you are split because theyâ\200\231re sitting far away from you. But we changed that. We pushed that it should change, and it did. So here itâ\200\231s quite different. It unlocks oneâ\200\231s potential to be treated at the same level with everybody else when it comes to judicial decision making. You donâ\200\231t feel the inhibition that you canâ\200\231t express a view against the Chief Justice, if he has taken a particular view you have to respect that. So itâ\200\231s an environment that helps one to achieve the utmost of oneâ\200\231s potential.

| also wondered, when you are acting, what were some of the cases that came forward and that you were involved in at that time?

CJ There were a couple of cases, but those which caught the eye of the public would have been an appeal by Mr Schabir Shaik (S v Shaik and Others), which ultimately was dismissed . And a challenge to the validity of warrants by President Zuma (National Director of Public Prosecutions and Others v Zuma and Another). Which had, you know, a sad story about it, which | wouldnâ\200\231t like really to go into detail. Yes. | think those were the main cases that one could say were of much public importance.

And then in terms of judgment writing, was that particularly different for you as an experience?

It was different in the sense that at the SCA (Supreme Court of Appeal) the approach is that you should write as short a judgment as possible, state the principle in clear language, and end there. And when | came here it was the opposite. You had to write longer judgments, and | found it, at times, not being user friendly to the readers. Even the advocates would say, well, you know, you donâ\200\231t have time to go through the entire judgment of the Constitutional Court and understand what they are really saying. | think itâ\200\231s a criticism that we should consider seriously. | think we should write short judgments in simple language for them to be accessible to the wider public, and not only to lawyers. But | think itâ\200\231s something that we are working on as well.

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During your time as an acting judge on the Constitutional Court, were you at all involved in the committees, the various sub committees that are here, the media committee, the library committee, were you involved in any of that?

No, no, no.

And did your appointment come as a surprise to you, and again were you reluctant to accept the Constitutional Court appointment?

(laughs) No, I wanted to come. I wanted to come. Did it come as a surprise? Yes. I think with the background that relates to Mr Zuma's National Director of Public Prosecutions and Others v Zuma and Another case, yes, and the disciplinary inquiry against the Judge President of the Western Cape, and his counter complaint against the judges of this Court, it came as a surprise. In fact, I was reluctant to making myself available for that very reason because I thought the very person whose case was the genesis of the complaint, is now going to decide who to appoint, and I don't think I would be considered favourably. But I got support from various colleagues here who thought I could stand a good chance to come in, and I got support from colleagues at the SCA (Supreme Court of Appeal) who thought, as well, that I could make a contribution. I think some of them thought that I would be able to bring in their views of how the court operates and, you know, try to mitigate the sort of tension that exists between the two courts, if one understands the background and how they do things at the SCA (Supreme Court of Appeal). So it came as a shock, the actual appointment came as a shock. Was I surprised when I got shortlisted by the JSC? I don't think so. I think the interview went well, so I suspected that I would be shortlisted, at least to make the seven names, which had to be submitted to the President.

The one thing I was curious about, you have criticisms about the way in which the Constitutional Court works, its methods, writing judgments, judgments, etc, when you were acting and then when you accepted, was that not a factor, a consideration for you, and a concern?

Well, it was, but the hope was that things might change. That there's room for things to change because through my interaction with the permanent members of the court then, most of them were also wanting change. So I thought, well, one could come in and if things are changed...the work itself is quite enjoyable so to be able to fix up a few things here and there and then you would really be happy.

This may not be a fair question because you're still serving your term, but I wondered given your experience on other Benches, if you had to write your memoir, where would your experience of being a Constitutional Court judge rate in terms of experiences of the Bench?

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Ooh, the question, itâ\200\231s unfair, and in the main, one is still new here. But | t  
hink  
in terms of the importance of oneâ\200\231s role as a judge, | think the Constitutional  
Court rates higher than the other courts. Which brings with it much  
responsibility and pressure on one, because whatever you do in terms of  
deciding cases you know that you are the last stop. If you make mistakes  
nobodyâ\200\231s going to correct those mistakes. And so it brings added pressure.  
But | think, to some extent, that is cushioned by the number of people youâ\200\231re  
sitting with, which sort of reduces instances where mistakes could happen.

Chris, Iâ\200\231ve asked you a range of questions, and youâ\200\231ve been very tolera  
nt. |  
wondered whether Iâ\200\231ve neglected to ask you anything that you feel will be  
important to be included in the oral history interview that youâ\200\231re doing up to  
the  
period 2009?

Not really, | think youâ\200\231ve covered the whole field (/augh).

| wondered whether we could end the interview, if you could talk about  
relationships that youâ\200\231ve developed at the time when you started as an acting  
judge, with other judges...much has been said about the collegiality of the  
Court.

Yes.

And | wondered whether you could talk a little bit about the strength of the  
Court in terms of its collegiality?

Oh yes, thatâ\200\231s one other thing that stands out when you compare the  
Constitutional Court with the other courts. That you get a situation where there  
are genuine collegial relations with your colleagues, as opposed to, you know,  
some other courts where you believe that the relations are superficial. You  
sort of develop strong bonds with certain people. | have people to whom Iâ\200\231m  
linked, strongly | believe, one of them is Judge (Bess) Nkabinde, she is a  
close friend of mine. The others as well, even the Chief Justice, the present  
Chief Justice, Iâ\200\231m quite close to him. The Deputy Chief Justice, as well. And  
Judge (Edwin) Cameron, we knew each other from the SCA (Supreme Court  
of Appeal), and we were friends as well. So you get to a situation where you  
build relations, which might be stronger than even your private individual  
family relations because these are the people with whom you spend more  
time, these are the people with whom you discuss difficult matters affecting  
the country. So it is quite rewarding in that sense because you know that you  
are in the company of people who genuinely give you an advice or a  
suggestion on an issue, with which you would be comfortable.



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Chris, thank you so much for your time, and | really enjoyed this interview,  
thanks a lot.

Thank you.

And | look forward to part two (/aughter).

Alright, thank you very much. How long did it take?

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