

(This interview was substantially edited by the interviewee)

Int This is an interview with Chief Justice Mogoeng Mogoeng, of the Constitutional Court and it's the 2nd February, 2012. Chief Justice Mogoeng, thank you so much for agreeing to participate in the Constitutional Court Oral History Project, we really appreciate the generosity of your time.

MM It is my pleasure.

Int I wondered if we could start at the very beginning, if you could talk about early childhood memories, where you were born, and a bit about your family background, and what were some of the formative influences in terms of growing up in South Africa under apartheid?

MM Well, 51 years ago, I was born in a small village northeast of a small town known as Zeerust, in the North West Province, South Africa. And the name of the village is Koffiekraal. My father's highest standard of education is, I think sub standard B, and my mother's sub standard A, as they were then known. So they were semi-literate people. They were unskilled labourers for the better part of their lives. My father worked in the mines; my mother worked in the farms, but eventually worked as a domestic helper in Johannesburg. Two experiences stood with me, in relation to the impact of apartheid on South African blacks. I was with my maternal grandfather herding cattle, and also looking after the few sheep that he co-owned with my father in the portion of our village designated for livestock farming, next to the road, when he was approached by members of the South African police, who demanded his identity document, notoriously known as the *dompas*. He told them that it was at home, some seven, ten kilometres from where we were and pleaded with them to take him home so that he could produce it. In total disregard of his guardianship over me as a young boy then, they took him to the nearest police cells, and I was left crying there, not knowing what to make of the helplessness of my mentor. I went home, informed my grandmother and my aunts, and a day or two thereafter, he was brought back home. But I also had occasion to visit my mother somewhere in Florida, Johannesburg. She worked for the Stofbergs, and they had a son my age known as Gordon. I admired what Gordon had, and my mother and father kept on reminding me, that at some stage I said, I want to be just like Gordon. They say when they asked me, "what do you mean by that. I said to them, no, no, no, I don't want his colour, I'm happy with my colour, but I want to reach the same station in life that rivals Gordon's and that of his parents'. I want to be educated, and will do whatever it takes to get to this level". I was later reminded by my parents and my aunts that when I was born, and was a day or so old, my mother spoke

into my ear and said; this one is going to be a medical doctor. I embraced that prophetic utterance. The suffering that I've had to endure as a young boy growing under apartheid, and the brutality perpetrated by our compatriots in the neighbouring farms and small towns drove me to want to make something out of my life. I kept on saying and my father also kept on saying to me, "my son, if you want to make it in life, just make sure that you pursue education with everything within you. I am poor but I've made it my business to make some savings so that any one of my children who wants to make it in life can pursue their studies to the highest possible level so that they don't suffer as their mother and I have had to suffer".

Int It's interesting, because it seems to me your parents didn't have the education but they aspired for their children to have education...

MM They did.

Int I also wondered in terms of actually understanding the racial disparity, besides Gordon, in terms of where you were growing up in the rural area, how did you understand the differences in how the community worked and how people lived?

MM Well, we were not really exposed at that level until I went to high school and interacted with fellow students who came from different areas, townships, some of whose parents were highly placed in society. One of the people who were more exposed, that I was at high school with, is the younger brother of Deputy Chief Justice Dikgang Moseneke; Tiego Moseneke. And he came from a highly politicised family. And our interaction with the likes of Tiego (Moseneke) and Pascal Moloi, the former Manager of the City of Johannesburg, opened up my eyes to the reality of the South African political landscape even more. It got to the point where the limited exposure that I had, moved me, I think it was in 1980, to organise the student body at Hebron College of Education, to observe June the 16th. And I asked them all in a meeting; to remember our fallen heroes, fellow students; by not wearing our uniforms on the 16th, but all black, as a sign of mourning. It led to my dismissal and seven other students' dismissal from the college. The government of Bophuthatswana, which was a homeland in South Africa then, in response to the class boycotts by the student body, went there, called us names and tried to encourage students to go back to classes and forget about the campaign for our re-admission. I was moved by the solidarity that was demonstrated by the student body, which forced the government of the time to bring us back to school. But the real exposure came when I was at the university. Because there you would occasionally have political leaders come to address students. We had access to political literature, even the literature that was banned. I was inspired by the writings of the Black Consciousness Movement leader, Steve Biko. I was moved by Mandela's book, *Long Walk to Freedom*. I was moved by the writings on Pan-Africanism by Robert Sobukwe.

My eyes were then opened and I got involved in student politics, especially when I moved to the University of Natal to do my Bachelor of Laws degree.

Int Right. In terms of political conscientisation, given your parents' aspirations for your education improvement, how did they react or respond to your burgeoning interest in political life in South Africa?

MM My father and my mother consistently said to me, the white establishment is just too strong for any black man to overturn. Don't be misled by politicians, look at what happened to (Nelson) Mandela! He's rotting in jail. Many people have died. Please focus on your future, and that is your education. They said to me "you see, you were dismissed from school not so long ago. Don't do anything that could result in the same thing repeating itself, because you may either be imprisoned indefinitely, be killed, or lose the opportunity to further your studies permanently."

Int You also mentioned that you really became politically active at the University of Natal, and that was during the 80s, and it was the height of repression. I wondered whether you could talk about those experiences and memories of living through the 80s?

MM It was difficult. At the University of Natal I worked with structures linked to the African National Congress, but I really was an activist within the Black Consciousness Movement. I was the regional leader of both Azasm, which was the student version of Azapo, but also involved in the Azapo activities at a higher level. It was very difficult because the truth be told what was a challenge was the role of a certain anti-ANC organisation. Any political activity supportive of either the ANC, the PAC, and the Black Consciousness Movement, was strongly resisted by that organisation. I remember one day, at three am in the morning, I was awoken by a loud bang on the door of my room. I angrily woke up to find a student there who said to me, you are going to a town in KZN known as Hammarsdale tomorrow. I said, "How do you know? Are you a spy?" He said, "well, I happened to be there, I had gone to pick up my girlfriend, and there was a roadblock at the entrance of Hammarsdale. Those manning the roadblock could tell that my command of isiZulu was very poor. They looked through the list and said, are you Mogoeng Mogoeng?" And he said, "No, I'm not". He said they were armed to the teeth. He said, "so I've come to warn you, don't go there because you may lose your life." So quite often, I remember we were also raided by the South African Defence Force officials at our student residence. So, it was very difficult but we were driven by our hunger to attain the freedom that we have now tasted.

Int I'm very curious, given the apartheid structure, and that it was legally structured, why did you choose law as your career pathway?

MM The humiliation that I saw my grandfather, who was my mentor, subjected to in my presence; the many detentions without trial that I got to know about while I was at high school; my dismissal and the dismissal of my fellow students at high school, which left us with no recourse to the courts through which to challenge the decision because we did not have the resources to pay a lawyer to represent us. The fact that Nelson Mandela and Oliver Tambo were lawyers and my reading of ZK Matthews' book, all inspired me to want to have something to do with changing the legal system of South Africa. I saw myself representing those who did not have the financial resources to access legal representation, which had already begun to be expensive back then. And I was looking forward to the day when I would have a more meaningful role to play in building a democratic South Africa, because from where I stood, I could see freedom being ushered into South Africa in my lifetime. So, I believed that the area in which I could possibly be more effective was legal practice. I knew that in order for the systems that underpin apartheid to be in place, a lawyer had to be more meaningfully involved and it would have taken a lawyer to change those systems. It also inspired me that some of the senior leaders of the apartheid regime, like former Prime Minister John Vorster were advocates. So I saw myself bringing about a lot of difference in this country, and shaping the future of South Africa, as a lawyer.

Int In terms of your law studies, both at the University of Zululand, and at the University of Natal, what was the nature of it? What were the courses that you really enjoyed? Were there public interest dimensions that you felt were important?

MM Well, starting with the University of Zululand, I really didn't enjoy my law studies there, because Bantu Education was followed to the letter. We were not allowed to think, we were only permitted to memorise. And any student who would think things through, analyse them and give a well-considered answer to a question would fail. I remember my colleague who was quite a deep thinker, Jerome Ngwenya, often failed because he didn't believe in reproducing the textbook. He believed in analysing issues. And those of us who realised much sooner that you're not permitted to think, you're not being trained to think, you were being trained to be a robot, often passed well. It was different though when I got to the University of Natal, because we had fellow white students there who could not possibly be taught in a manner that prevented them from thinking. It was quite rewarding. My focus there was more on labour law and private international law. I didn't quite do constitutional law to the best of my recollection then, but law in general was fascinating. Debate...or moot court rather, was one of those areas that appealed to me the most. I must just indicate that from the time I was doing standard five, I was in the public space already. I was involved in radio programs in which I competed with other students at my level. When I went to secondary school I was in the debating team. I remember coming to Johannesburg back then, and we were not exposed to newspapers and reading books. I was competing with people who were exposed, and I was not

even part of the original team that was supposed to be involved in the debate. I was brought in when one of us missed the bus and I was not even prepared and yet I got position number two. The principal of that Jo'burg school was so impressed. He said, "you come from the rural area, and yet you did so well. Expose yourself, read some newspapers, read some books, I see a lawyer emerging out of you." And I committed that to memory and that informed my choice of law as a career. And I remember also at high school there were some career guidance experts who came when we were doing Grade 11. They sort of gave us some questionnaires and the feedback I got was, "you must either be a lawyer, a diplomat, or a politician. That's where you belong". And that informed my decision to want to follow law.

Int Interesting. After your studies, I know you went on to do an LLM, but in terms of your legal career, what did you go on to do after the LLB?

MM I went to prosecute, which was looked down upon at the time, because it was prosecutors who prosecuted even political activists. The reason why I had to go and prosecute was that, by reason of my poor background, my parents did not have the resources, the financial resources required to take me through university. Based on my academic performance, the then government of Bophuthatswana, made bursaries available to us. I didn't even have to apply; all I had to do was complete the forms that they would have sent to you, so that you could further your studies, on the understanding that upon completion, you either return their money immediately, or you serve in that government for the same period over which you would have been financed. So I didn't have the resources to pay them back, neither did my parents, so I had to serve for the period of five years, over which that government sponsored my studies. And I never did any political case. My boss who is now my wife's boss, Advocate Johan Smit SC, knew where I stood politically. I made my position very clear. I said to him, "however dangerous it may be to say what I'm about to tell you now, I can never handle any political trial. I'll confine myself to murder trials, to rape cases, because somebody has got to prosecute criminal suspects in our society."

Int Interesting. And then from the prosecution, you did that for five years, where did you move to after that?

MM I served articles at the Johannesburg Bar, practised for about two years at the Johannesburg Bar...one and a half years actually...and then went to the Mafikeng Bar Association to practise there. And I was appointed a Judge of the High Court for the North West High Court. At the Bar I was involved in leadership. Apart from being the Deputy Chairperson for quite a long time, I was the Chairperson of Lawyers for Human Rights, the Bophuthatswana chapter at the time. I also was a part-time senior lecturer at the now University of North-West, the Mafikeng campus.

Int In terms of wanting to go the route of doing pupillage and then going to the Bar...what prompted that?

MM Well, I think...my position was, I had learnt just about all I could learn as a prosecutor. The scope was rather too narrow. You only had to do criminal cases, and the vision that I had for my life required more exposure, more practical experience beyond the prosecution. So, I wanted to be in a position to do that which drove me to pursue law in the first place, which was to represent the under privileged. To get to represent people involved in political cases, to get to do some of the labour law; help the workers who often had difficulties with their employers. And I must confess, part of the reason was that we were severely underpaid. I remember at the time I left, I was earning some R1 500 per month, but my white compatriot who was my junior, was earning far more, and it didn't make sense to me. And I made it very clear that apart from wanting to grow, I was also unhappy with the pay disparities that were based on colour.

Int In 1990, what are your memories of transition, because you indicated to me earlier in the interview that you felt that change would happen in your lifetime? When change came in 1990, did you expect it then?

MM No. It took me by surprise. I was shocked, I cried, I couldn't believe it! I wasn't expecting or ready for that change in my life. My attitude at the time was, much as I foresaw the possibility of Judges being appointed even from the ranks of junior advocates, I didn't want to be appointed. The desire of my heart was to be a senior counsel before I could be appointed. So 1997, when I was approached by friends and colleagues to make myself available for judicial office, I said, "no, I think you're pushing affirmative action too far. I think I need to gain more experience and actually become senior counsel before I can make myself available for the Bench." Well, I lost the argument. To cut a long story short, I eventually made myself available, and in 1997, I was appointed to the High Court Bench in Mafikeng.

Int As someone of the legal profession, you'd been at the Bar, when the Constitution negotiations were underway, what were your observations of that process?

MM My observations were that it was a very difficult process. I sometimes had doubts whether it would usher in the democratic South Africa that we're now enjoying. I thought that the divisions between black and white South Africans, were just too deep to allow the kind of transition that eventually came into being. I thought South Africans were unrealistic in believing that negotiations could result in a democratic South Africa. So when the AWB activists and other members of the right wing formations stormed the venue where the

negotiations were taking place, and when that unpleasant incident took place between former President FW de Klerk and former President Mandela, I said that's it, we're just too divided to focus on the bigger picture and make sure that something good comes out of attempts to bridge our divided past. It got worse when Chris Hani died. I said, "we can't have elections. We're going to be even more divided." I lost hope. So it came as a pleasant surprise when eventually we had the 1993 Constitution and a democratic government was formed. South Africans across the political divide, joined hands in to co-govern our country. It was a miracle.

Int In '94, you were part of the Electoral Commission...

MM I was.

Int I wondered whether you could talk about that?

MM It was actually an honour to have been approached to serve in the legal advisory team of the Independent Electoral Commission in the North West province. I was practising as an advocate at the time, and there were a number of challenges. We often received complaints from different political parties, lodging complaints against one another. We had to work until very late to smoothen the path towards the elections. We had endless meetings. But you know, it was quite a rewarding experience and I'm glad to say most of the incidents that were referred to us were settled much easier than we had anticipated. We were able to bring people together before they could even go to a formalised court system to have their complaints dealt with there. I think part of what helped us was to have regular briefing sessions where all political parties would be in attendance and we would apprise them of the rules of the game, the do's and don'ts and plead with them that for the sake of the democracy that we have waited so long for, they would do well to make sure that they abide by the rules.

Int In 1997 when you were appointed, and you alluded to... you spoke about your reluctance initially, when you were eventually appointed, what were your experiences of serving on the Bench, particularly from a transformational point of view?

MM I think my appointment in our division and the appointment of my colleague, the late Judge Jack Chulu shocked colleagues on the Bench of our Division. There was so much tension you could actually touch it. And I know that our Judge President at the time preferred, understandably so...colleagues who were senior counsel at the time, to be appointed over me. He was opposed to the appointment of the late Judge Chulu and I. The result is, there was very little support. Very little mentoring of Judge Chulu and I by our more experienced colleagues. I remember I didn't even know which court book to

use for what. But with time they got used to the fact that we were appointed. The attitude became very positive and they began to help us.

Int You also had the opportunity to work with Pius Langa, you were one member of a five-member team, to investigate discrimination, race and gender in the Judiciary, and I wondered whether you could talk about that process?

MM Yes. Well briefly, how I came to be on that team was, I was already the Judge President of the North West High Court – in America you say Chief Judge...no, it's a Chief Justice of the State. There is a forum of the Heads of Courts comprising the Chief Justice, the President of the Supreme Court of Appeal and all Judges President. I was approached by my colleagues in that forum, to form part of this team that was charged with the responsibility to investigate gender and racial discrimination (in the Judiciary). The investigation was really prompted by a report that was generated by my colleague, Judge President John Hlophe, alleging that there was racial discrimination within the Judiciary. We investigated all these allegations, produced a report with recommendations designed to make sure that wherever incidents of racial or gender discrimination emerged, structures would be in place to deal with those incidents decisively.

Int In terms of the report, it sounds like you took it very seriously, but did you get a sense that these were real incidences of racial and gender discrimination?

MM Well, I got a sense that they were, and I don't think any of our colleagues were surprised. One of the things that concerned me the most about South Africa is that we come from a deeply divided past. And I think healing our divisions is not something that we can leave to chance. There has got to be a structure in place dedicated to reconciling South Africans. And because that had not been done, it was not surprising that here and there incidents of gender and racial discrimination emerged. Then, and even so in the future under my watch, we started some sensitivity training programmes, which I think we need to continue with in all earnest, under the auspices of the South African Judicial Education Institute. A lot of work still needs to be done, because there are some gender, and racial biases, across the divide.

Int Interesting. You've been part of the South African Judicial Education Institute (SAJEI), and I wondered whether you could talk about the Judicial Education Institute.

MM Well, as you probably know, the Act was passed in 2008, and the Council of the Institute was inaugurated in May 2009. At the time I was a member of the Institute representing the South African Judiciary as a Judge President. When I was elevated to the Constitutional Court, I ceased to be a member of the Institute. When I took office as Chief Justice on the 8th of September, 2011, for

at least two and a half years, the Institute had not been able to conduct training programmes. The result was Judges who were appointed ever since the SAJEI Council was inaugurated, Regional Court Magistrates and District Court Magistrates, never received the training that is critical to their ability to deliver quality justice to South Africans. So one of the priorities...and I made it clear even in my interview...was to make sure that everything possible is done to have Judges and Magistrates trained before the end of the 2011/2012 financial year. We had a meeting on the 10th of November 2011. I asked the Council of the South African Judicial Education Institute to give me the authority and they passed resolutions in terms of which they gave me all the powers in relation to making sure that judicial education took place. I said to them; "many people think that I'm incompetent, so I'm putting my head on the block: I'm assuring you that if you give me the mandate that I'm asking for, in January (2012), all Judicial Officers who are available to be trained, and have not yet had training, would be trained." They did pass the resolution, and from the 16th of January, 2012, to the end of that week, Judges who had never received training, got the training. From the 18th of January, 2012, District Court Magistrates who had not received training, received the training for five days beginning from the 18th. From the 23rd of January, 2012, Regional Court Magistrates who had not received any training, received training for five days beginning from the 23rd. Very successful programmes, organised within a short space of time were run. Colleagues from all over South Africa, even retired colleagues came to assist in the training of Judicial Officers. We've got programmes lined up now. We had a meeting of the Council of the South African Judicial Education Institute on the 27th of January 2012, where they were given progress reports and the plans that we were developing in relation to continuing judicial education for Judges who have been in the field for some time, continuing where we left off with Judicial Officers who were recently trained, extending our training to traditional leaders to the extent that they do perform some adjudicative roles, and also making sure that something that the South African Judiciary has had very little contact with, is done. And that is leadership training for all judicial leaders who occupy leadership positions. Unlike other leaders in the three arms of the state; Judicial Officers, who are leaders of courts; only went through one training session on leadership over a two-day period many years ago. And I believe that the underperformance of courts have got something to do with the fact that, one; the leaders of courts have not been given the kind of leadership training that is necessary for them to lead effectively and efficiently. More importantly; Judicial Officers, especially those who were appointed on the basis of affirmative action with limited practical exposure or experience, need to be trained so that they can discharge their functions as well as they are expected to.

Int I also wondered, at what point did your nomination come up for the Chief Justice position of the Constitutional Court, and did it come as a surprise to you?

MM Well, it didn't come as a surprise to me, because those who were following the development in the media would recall, that for a period of at least two weeks before the actual nomination, the media was abuzz with speculation that, of the people who are likely to be nominated, I was one. And I believe it had everything to do with the contribution that I had made until then; underscored by the Access to Justice Conference that I was privileged to lead in July 2011. So, the media and the academics, and other legal commentators themselves, kept on saying, Mogoeng is conservative, we think that he doesn't quite like gay people because he's a pastor, but he's likely to be nominated for the position of Chief Justice. So I wasn't surprised for this and other reasons. So eventually I was nominated and that's when the criticism of my nomination became even more intense. It took another turn. It was almost as if the media itself and other commentators did not foresee the possibility of Mogoeng being nominated for the position of Chief Justice.

Int I'm curious, how have you managed these criticisms?

MM You know, I...I'm a devout Christian, I believe in supernatural intervention. I pray a lot. But quite apart from that, from a very tender age, as a small boy, I was subjected to a lot of criticism. With very little support. At school, somebody would just spread a rumour about me, and it would catch fire. I remember when I was at primary school, performing well, and some student just said, no, this boy is doing well because he's using traditional medicine! They mentioned some traditional healer in KwaZulu-Natal called, Nomalanga. They said, this boy is using the medicines from Nomalanga to pass well. So to cut a long story short, I have, from a very tender age, all the way through to adulthood, been criticised by my relatives; my aunts did not support me, and my grandparents did not support me for reasons I do not know. When my father and mother were still employed and we were looked after by my grandparents, even when the meals were dished out, my brother and I's rations would be so meagre for reasons that we couldn't and still don't understand. I got to understand much later, especially when the criticism around my nomination was building up, that my life had never been that of a person who was readily supported by people. I've been criticised throughout, and now I know that it was in preparation for challenges that were to follow, such as my nomination as Chief Justice. Those who were following the developments, even at the time of my short-listing for appointment for the position of Justice of the Constitutional Court would recall that, I was singled out for very severe criticism. Initially the media coverage was very positive about me. But when I became one of the four identified by the President to fill the four vacancies, the intensity of the criticism gained momentum. That also helped me a lot because it helped to insulate me from crashing under severe criticism. But the other advantage of course is, as the media likes to refer to me, the advantage of being little known. You're not used to fame; you're not looking forward to any kind of fame. You're not used to people praising you, and I didn't really look forward to being praised. I looked forward to discharging my mandate to the best of my ability. So when all these things

happened, I already had the in-built capacity to withstand the severest of criticism. I wasn't affected at all. Anybody who observed my interview would have realised, that after five weeks of intense criticism from all angles, in circumstances where you would expect a person to crumble, I was rock solid. I was not shaken. That's me.

Int I'm curious, criticism can have a constructive impact, does it make you angry, or does it drive you, or is it both?

MM It drives me. I flourish under criticism. And I believe that it is criticism that challenges my capacity to deliver more. It drove me to work hard to the point where the South African Judicial Education Institute, that was not able to deliver any training programme for two and a half years, was operational. When I took, leadership reigns of that Council, the first meeting being on the 10th of November 2011, the next day on the 11th of November I started charging people with the responsibility to make sure that at the latest, by the 16th of January 2012, we had training programmes running. And it happened. More is happening. We are building the new national Department known as the Office of the Chief Justice into a force and a delivery machine to be reckoned with. A lot of progress has been made there. And I believe that we are going to surprise South Africans considering the pace at which we have already begun to deliver. And I say it with all sense of humility.

Int I wondered, when you were a Judge on the High Court, and when you became Judge President, I wondered whether you could talk about your observations of the Constitutional Court from its inception, in terms of its judgments, in terms of the fact that it was a new court, and how did you as a member of the Bench, respond to the new Court?

MM We responded with a lot of scepticism, because constitutional litigation, under the auspices of a Constitutional Court was a concept, which was altogether foreign to the South African legal system. So, a few innovations that the Constitutional Court infused into the South African jurisprudence and legal system surprised me. I remember that some fellow High Court Judges and I, and even some members of the Supreme Court of Appeal Bench, would say, "but these people don't do things according to the law as we understand it". With time we got to understand that most of the Judges, particularly at a High Court level, need more exposure to apply the Constitution. I'll give you an example. When litigants come before the High Court, and none of them raise a constitutional point, even in circumstances where there are indications everywhere on the papers that certain provisions of the Constitution are implicated; a High Court Judge, unlike a Constitutional Court Judge, would not immediately see it as his or her duty to draw it to the attention of the litigants and afford them the opportunity to address him or her on those issues. So my High Court experience, coupled with my Constitutional Court experience, has led me to believe that it's of critical importance to factor into our training

programmes orientation by Constitutional Court Judges, High Court Judges and even Magistrates on how to apply in High Court setting, and at a Magistrate's Court level also; the Constitutional law principles. I think there is a disjuncture there and there is a lot that needs to be done to bridge that gap. The expertise that lie at the Constitutional Court level are not as effectively cascaded down to the lower courts as they ought to.

Int In terms of the judgments, in terms of before your nomination, in the first 15 years, how have you received the judgments, were there cases that in particular stood out for you?

MM My cases?

Int No, at the Constitutional Court, the judgments of the Constitutional Court, were there any particular cases that really stood out for you that you observed closely when you were at the Bench?

MM Well, *Makwanyane (S v Makwanyane and Another)* was one of them. My view as a prosecutor was initially that there was nothing wrong with the death penalty. I then enrolled for a Masters programme with Unisa (the University of South Africa), and one of the courses I did had a lot to do with the death penalty and cruel and unusual punishment drawing strongly from the American jurisprudence. My eyes got opened up to the effectiveness or otherwise of the death penalty. I remember I even had some radio interview, a debate between my former boss and I - because then I was in practice - about the death penalty and whether it should be retained or abolished. So when *Makwanyane (S v Makwanyane and Another)* was delivered, I reacted to it with great excitement, because I had learnt that the abolition of the death penalty was something that South Africa desperately needed because there were instances, not only in South Africa but in other countries, where it was discovered some years after a person had been executed already; that he or she was in fact innocent of the crime for which he or she was executed. So it really had a profound impact on me. The access to court judgment of *Lesapo (Lesapo v North West Agricultural Bank and Another)*, really impacted me tremendously because access to court is something that has been and continues to be a serious challenge for many South Africans. I remember those as the outstanding cases.

Int Thank you for that. In terms of cases that you think may have hit the fine line between the Executive and the Judiciary, were there any cases that you felt in terms of judgments that were really quite close to that line?

MM Then or now?

- Int Then.
- MM No, I don't remember. There may well be but there is none that stands out that I remember.
- Int Thank you. There's been some criticism from academics, and the NGO sector in particular, in South Africa about socio-economic rights and that the Constitutional Court may not have satisfied these effectively. What is your sense of that?
- MM Well...we as Judges of the Constitutional Court look at issues in a broader sense. When we deal with socio-economic rights we always bear in mind that whatever the outcome, it must accommodate sufficiently the reality that South Africa does not have the resources necessary to effectively address all the socio-economic challenges that exist. You see, the critics of our judgments in relation to socio-economic rights, would really want us to go all the way. And I don't think the reality of the South African economy permits at the moment, given the many challenges that are vying for the budget of South Africa as a state. I don't think they permit of the kind of jurisprudence that academics and other legal commentators are crying out for in relation to socio-economic rights. The demand continues to grow, and I think if we did not exercise the sort of constraints that we have exercised so far, we would arrive at a situation where most of the resources at our disposal are channelled in one direction in disregard of other equally important issues that require money.
- Int In terms of the transition to democracy and the role of the Constitutional Court, what were the challenges then when the court started, do you think, and what are the challenges that remain?
- MM Well...as you know, I wasn't a member of the Court then...
- Int Sure, but in terms of your observations...
- MM I think one of the many observations at the time was the Makwanyane (*S v Makwanyane and Another*) judgment. I think it was a very bold move by the Constitutional Court to decide that the death penalty, although the Constitution doesn't say so explicitly, is unconstitutional. It was known then that the majority of South Africans supported the retention of the death penalty. Crime, especially violent crime, was already high as at the time when the Makwanyane (*S v Makwanyane and Another*) judgment was delivered. And it took unusual boldness on the part of the Constitutional Court Judges to depart from the view of the majority, which was possibly the view that was espoused by the other arms of the state, and decide that the death penalty was unconstitutional. It must have been extremely difficult from where I stood, for

the Constitutional Court under the able leadership of my colleague Arthur Chaskalson, to launch something that was hitherto unknown. No rules, no precedent to refer to, I believe that it was or must have been even frustrating at the time. But they did an excellent job. They laid a solid foundation and got us where we are now. As you would recall, even the politicians from that time until recently, hardly ever had any serious criticism to level against the Constitutional Court in relation to the manner in which it did its job. The international community did nothing but celebrate the excellent job that the Constitutional Court was doing. Academics and other courts elsewhere refer regularly to the decisions that were handed down by the Constitutional Court at the time. So they did well. Looking in from the outside, it was a smooth and miraculous transition.

Int In your estimation what are the challenges of adjudication cases as a Constitutional Court Judge?

MM The challenge of adjudicating cases is, I think, the conflicting expectations from members of society, especially the litigants. You see, when people approach the Constitutional Court, the attitude is, we've gone through the High Court, the Supreme Court of Appeal and the Constitutional Court is our last hope. And everybody going there, or almost everybody, approaches the Constitutional Court expecting to win. And quite often, the cases that we handle are highly sensitive. At times the stakes are very high and emotions are highly charged around the issues that are brought before us. We sometimes make decisions that are critical, of the legislative arm of the state; or the executive arm of the state; business people and special interest groups that have a lot to lose in the event of the decision not being in their favour. So, people then have a tendency to express themselves strongly as a result of the disappointment or frustration that they suffer, flowing from our decisions that are not in their favour. So that's a very, challenging aspect of our assignment.

Int What do you think of the criticism that part of the reason that socio-economic rights haven't really been effected is the lack of direct access to the courts?

MM Well, I think it's a valid criticism because as you probably are aware, litigation in South Africa, as in other countries, is prohibitively expensive. Added to that there are far too many stages to go through before you can reach the Constitutional Court. So one, there are people who cannot even approach a court because they don't know how to, they don't have the resources to enlist the services of competent counsel to take them through the different levels of the courts, up to the Constitutional Court. And, there are those whose resources can only take them up to the level of a Full Court, of the High Court, at most the Supreme Court of Appeal. So very few people really ever get to benefit from the services of the Constitutional Court. The majority of South Africans, who need to access the Constitutional Court, are just not able to do so for the purpose of enforcing their socio-economic rights more meaningfully.

Int I was also wondering, in your estimation, what to date do you think have been some of the limitations of the Constitutional Court, and what have been some of its great achievements?

MM Well, let me begin with the achievements. I think the Constitutional Court has really played a critical role in stabilising South Africa. Challenges that were launched in relation to the constitutional validity of our Constitutions, certain sections of our Constitutions, by even some of the political parties that were either involved or not involved in the Constitution making process. I think those challenges did not result in chaos, precisely because of the mature and able manner in which the Constitutional Court disposed of the matters, delivering well-reasoned judgments, which every litigant, succeeding or losing, could relate to. The jurisprudence generally that speaks to the aspirations of all South Africans across the colour bar. The fair-mindedness of the Justices of the court from the beginning have also gone a long way towards contributing towards the stability that was so desperately needed for sustaining a democratic South Africa that comes from a troubled past. I think the manner as well in which the Constitutional Court Judges conducted themselves, handled the cases, interacted with society, explained their judgments at conferences, went a long way towards satisfying the nation that it serves, that this is a vessel that has executed its mandate as well as it was expected to. The challenges...I can't think of any serious challenges. I think the Justices of the Court did well to make sure that they have even a meaningful role to play from the word go in the administrative affairs of the Court. And you also had a very significant support from the likes of the Constitutional Court Trust. You know, to make sure that the Judges also have the additional research capacity that they require in order to produce the judgments that I've alluded to earlier on; because I believe that without the benefit of a strong administrative support, a strong research capacity, the jurisprudence that we are now all proud of, could not have come into being. Part of the limitations of the majority of our colleagues is that they don't have the kind of support that the Constitutional Court Justices have. So the challenges, I think, are limited. There are some challenges, but I don't think it's really anything to write home about.

Int I wondered what your vision is for your role as Chief justice of the Constitutional Court?

MM Well, my role...my vision, I beg your pardon...is to make sure that without compromising on quality, we deliver justice as speedily as we should, to the South African populace. And this becomes critical at this time because we've just received a report based on statistics, from the Ministry of Justice and Constitutional Development, demonstrating that most of the courts have underperformed. And you see, the only way in which the Judiciary accounts to the broader public is through the judgments that we deliver. We've had

unpleasant experiences of Judges reserving judgments for inordinately long periods, ranging from one year to even six years; people waiting for judgments to be delivered. We've had challenges of somewhat questionable quality of judgments delivered by some of our colleagues. And I've had to reflect and wonder what informs this undesirable state of affairs. I think we would do well, and this is my vision, to use the South African Judicial Education Institute to strengthen the capacity of all South African Judicial Officers to manage trials well, to write well-reasoned judgments, and not have to wait for years to do so because they really don't know how to go about writing judgments and delivering them on time. I think it's training that we must lay emphasis on. It is also important that we strengthen the new Department that I alluded to earlier on, the Office of the Chief Justice. To strengthen the institutional independence of the South African Judiciary, because to date, to a large extent, all our affairs are in the hands...the administrative functions of the Judiciary are in the hands of the Executive. And that's undesirable. So we are at the stage where functions...to borrow from the Justice Department terminology..."have been seconded to the Office of the Chief Justice," so that whenever we need support of any kind we don't have to seek permission from the Minister of Justice and Constitutional Development. We will be able, with the resources at our command, to do whatever is necessary to improve our performance, to acquire whatever equipment we require, in order to deliver justice more speedily, and as I said, without compromising on quality. So, it is also important to change the manner in which we have been managing our cases. There is a case management model, which was adopted in the 1970s by the American Judiciary. It has worked well. Botswana has adopted that case management model, known as judicial case management. And incidentally, it has been part of the South African case management. Because whenever we have complex cases, long trials, or cases that have attracted a lot of media attention, we have always resorted to that model, in terms of which, at the earliest stage possible, to identify a Judge who is going to handle a particular case. And that Judge will then be working, from the word go, with legal teams involved in a matter, to ripen the matter for trial, so that there are no unnecessary postponements, you don't have anybody coming to trial ill-prepared, and more importantly, you will also then reinforce the authority of judicial officers to dictate the pace of litigation. South Africans have been complaining over the years about the long period that it takes to have a case disposed of. And it's one of the major challenges that they are confronting at the moment. And we've already started to develop rules and practise directions that will enable us, this year already, to implement this model as a pilot project in identified courts, so that we can see what challenges we're likely to experience before we implement it countrywide. But we begin this year already.

Int One final question, as a Constitutional Court Judge, how do you grapple with the issue of power?

MM You know, I draw strength from my Christian principles. I believe in the leadership that focuses more on servant-hood than on lording it over people. I've been in a privileged position from a very young age in my role as a political activist to be in a leadership position. As an advocate I was not only the deputy chair of the Bar that I was a member of, but I was also the chairperson of several board of directors of parastatal bodies. So already I tasted power at that level and realised that it can actually be more intoxicating than an alcoholic drink with the highest alcohol content. I was privileged to become a Judge President, tasted power, and fortunately had the opportunity to be humbled and be moved from the position of being a Head of a Court, to being an ordinary Judge serving under former Chief Justice Sandile Ngcobo. It went a long way towards sobering me up to the reality that leadership is about making a difference. Leadership is about doing whatever you can to empower others. It is not about showing off with the power that you are privileged to have. You lead people in the direction that will ensure that the services that you are paid to deliver, are actually delivered to those who need them the most. So, I think I can say, that I have learnt to live with power, and I have learnt to manage power. I know the dangers of the intoxicating effect of power. So it is not a problem.

Int Chief Justice Mogoeng, I've asked you a range of questions, which you've answered so generously. I wondered whether there's something I've neglected to ask you, which you would like included in your oral history?

MM No.

Int Thank you so much for your time

MM Thank you.

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