

Int

TN

Int

TN

Int

TN

This is an interview with Tembeka Ngcukaitobi. I butchered that! Thank you very much, Tembeka, for agreeing to be part of this LRC Oral History Project. We really appreciate your taking the time.

No, itâ\200\231s actually an honour and a privilege for me to be part of it.

Great. Thank you. I wondered whether we could start the interview by talking about your formative experiences growing up in South Africa under apartheid, and what were the formative influences, if any, that led you to join in the legal profession?

(Laughs.) Where does one start? I mean, perhaps to place the matters in context, because I was born in the mid-seventies, actually in 1976, which as everybody knows, was a very turbulent period in our history. And maybe if one must locate my own formative experiences, one must look at my parents, who they were, where they came from.

Sure, absolutely.

My father was a migrant labourer, migrant worker. He worked in the mines in Johannesburg, and we were born in the Transkei, which is one of the Bantustans, one of the Bantustans under apartheid. In fact, it was the first Bantustan under apartheid, and if anyone knows anything about the history of South Africa, heâ\200\231ll recall that one of the things that the apartheid government started doing when it realized that it was at a point of no return, was essentially to segregate the country into four Bantustans, and to isolate all black people to belong to one of the Bantustans. Now, the Transkei was the first Bantustan established in 1976, and my parents at the time were in Cape Town, and the policy of apartheid was that all blacks, especially Xhosa speaking blacks, should belong to a Bantustan, and the Bantustan allocated for Xhosa speaking blacks was the Transkei. And my mother tells me that at the time, I think in 1975, 1976, 1977, they were then removed from Sea Point in Cape Town, where they used to live, and they were displaced to the Transkei, which is where they had to find somewhere to stay. Shortly thereafter, my father then moved to Johannesburg, looking for employment. He got a job in Carletonville as a mineworker. He died some years later. So when we grew up as young kids, what we knew was we belonged into, whatever, an independent country called the Transkei, but because my parents still resented the fact that they had been removed from the Republic of South Africa, kept reminding us about what it used to be living in Cape Town, and the life comparatively speaking to the life of the Transkei, because basically it was another native reserve. And we grew up in a small village called Cala, and basically the land was barren, and the only thing we had were a few sheep, a couple of goats, and I think two or three cattle that we looked after. And I remember, I remember, I think my earlier memories, probably when I was five or six, [mean, our main task as young boys was to look after the domestic animals: the cattle, the sheep and the goats, and thatâ\200\231s what we would do every morning and every afternoon, and we had to look after them. But you

Int

TN

Int

TN

see, Kaiser Matanzima was the Prime Minister of the Transkei, one of the few strong men of the apartheid government, and his policy, he had a very aggressive policy on getting all children to school...in a way, it's an irony isn't it, because whilst on the other hand the apartheid government had established Transkei because it is particularly important for them to have blacks living in the same area, they also invested in the education of those blacks because they wanted to show the world that the blacks can live alone, and the blacks can govern themselves and they don't need to live with us, you know. So in a way, the irony was that there was a lot of funding available for education, and Kaiser Matanzima made it compulsory that all children growing up in the Transkei must go to school. So we grew up in an environment where it was compulsory to go to school, and my mother, also belonged to the Methodist Church, and herself coming from a, coming from a sort of a well-educated family, in the sense that almost everyone in her family had a JC qualification, which is equivalent with a standard nine, at the time which was very rare, actually it was very rare to get anyone with even a standard six at that time, so she insisted we all go to...school, and it was, I had two siblings: my elder brother and my younger sister, so we all attended school, and at the time it was fully subsidised, and we didn't have to pay school fees. But, you see, you ask me about my formative years, and what made me join the legal profession. I mean, I understood that at the time my father died, he himself had started studying law through UNISA, the University of South Africa, which was the only university at the time that could take black people, and in a way, in a personal sense, I always aspired to achieve something that he himself couldn't achieve, and, I mean, my mother kept telling me that: Look, when your father died, he thought of being a lawyer, so I wanted to achieve a goal for him, so there was an element of personal vindication, I wanted to be what he couldn't be, because of other circumstances. But also, I mean, you see, you've got to have been there to just see the brutality of the Matanzima administration, particularly around the area of Cala. I'll show you a book about the history of Cala, the town itself, because it is one of the few districts, because the Transkei was made of twenty-eight districts, but it is one of the few districts that actually refused to accept Matanzima's rule and the consequence was that there was a lot of political activity in the Transkei area, so when we grew up as young kids, we were highly, highly politicised, I mean, I'm not exaggerating when I'm saying at the age of ten, eleven, we were already attending marches and school boycotts...

Really?

...and involved in demonstrations etc.

Right.

And in fact my first experience with the curfew was when I was ten, I think at the time I was doing standard five or standard six, and I was ten when I first came across a curfew regulation, because at the time, they told us we have to be at home at six, and we were out playing, and the cops caught us at about seven, and they told us that (laughs) we will have to sleep at the police station, at the holding cells, and we can only come home the following day, and even there, our parents had to go and release us, and we had to explain what we were doing in the evening during the curfew

Int

TN

Int

TN

Int

period. So at the time there was a sense in which we knew that...and my parents didnâ\200\231t come actually, in the following day. In fact, they sent a lawyer; there was a lawyer that came to release us. And at the time I knew that there was some element of injustice, even though you canâ\200\231t figure it out because you are young, and most of it is actually confusing and all of it just upsets you as a kid. So you want to study law because you want to address the injustice, and you sit there, as a ten-year old, and you can see a lawyer talking to a magistrate, and what happens next is that the lawyer secures your release, and you think, perhaps if I can be that person, there are many other people that I can assist as well, in either securing their release from the injustice that I can see, or in helping them in other ways. So those were the sort of two sources of inspiration: the one hand, achieving what my father couldnâ\200\231t achieve, but on the other hand, which grew with me even stronger as I became a teenager and grew older, itâ\200\231s the idea of reversing the injustices that we saw, through the use of law, because use itâ\200\231s more organised, but itâ\200\231s a very powerful instrument. So those were the kind of influences that I had, and those were the kind of things that drove me ultimately. Firstly, to want to study, because thatâ\200\231s another factor, is that many of my friends, people that I grew up with, actually didnâ\200\231t finish Matric, some of them because they didnâ\200\231t have money, some of them because it was simply worthless, there was no point in going to school, some of them because their parents insisted that they must go and work, but for a number of reasons, I mean, education was very inaccessible. It still is, but at the time, it was even more inaccessible, because there were institutional barriers, there were racial barriers, and there were financial considerations. I mean, now things have changed, the system has opened up and itâ\200\231s really up to an individual whether or not you make it. Although of course, there are still old institutional difficulties. So at the same time, I mean, those were the kind of influences that drove me to want to study. And I mean, in my family, I was the first one to have a university degree, and then my brother subsequently had a university degree, and then my sister also had a university degree. But in my immediate family and my extended family, and I think in my village, there are probably less than five people with university qualifications, and my family is one of the few that have managed to take children towards university. So, but I mean, you then realize later on, when you leave the Transkei and you go to the Republic of South Africa, that this is a, this country is big and rich, and there are so many things that can be done, you know...why...but anyway, that was the illogicality of apartheid.

You said that you started political activism from an early age, by around the age of ten, eleven. Iâ\200\231m wondering, what were the influences that led you to become so conscientised?

Well, I mean, I donâ\200\231t think we had a choice as young children.

Right.

Because the townships and the villages themselves, were highly conscientised.

Really?

TN

Int

TN

I mean, Cala was a political hotbed of the late eighties, and I think it was also the brutality of the apartheid government, particularly the Transkei administration. I mean it was probably amongst the worst. I mean, Kaiser Matanzima's foot soldiers were probably amongst the most brutal in the country, so when they come and they visited the township, I mean, you've got to notice that they are around, so it is the circumstances surrounding you, I mean, you can't avoid it. Of course, at the time, the choice could be that you either side with them or you are with the people, but I mean we knew who sided with them, I mean, who sided with the administration at the time. So I would say, I mean, firstly the level of consciousness was quite high in the Transkei, and the, as you will recall, when Bantubonke Holomisa overthrew, I think it was at the time, Tutor Ndamase, he was the first to release political prisoners.

Right. Because this was around 1990's?

That was later in the nineties, when Bantubonke Holomisa started releasing political prisoners. I think in fact he did it in 19...in the Transkei, he did it first in the Transkei, before it was done in South Africa. Because in the Transkei, he said he was going to release political prisoners, and that he was going to allow the ANC and the PAC to operate, and that was the same time when the apartheid government then sent, what was his name, to overthrow (Bantubonke) Holomisa himself, you know. So that was towards, it was immediately after the State of Emergency of 1987, 1988, yes. Then after that (Bantubonke) Holomisa in the Transkei took over, and the first thing he did was to unban political parties and said: Here there will be free political activity. And some people say to me: Actually he had no choice himself, you know, because the situation was such that he could, but I mean, the Transkei as a...it was not a country, but as a political area, has always been highly conscientised politically. Cala, where I come from, I mean, the dominant political party there was the PAC, the Pan Africanist Congress. Clarence Makwetu at the time, who was the President of the PAC, actually went door to door. I remember him coming to my house, making the example, because at the time, we were, I mean, very young, I think I must have been eleven to twelve, when he came to speak to my mother. In fact, my mother fought with him, because my mother was very upset that he was trying to feed us politics, when we should be at school. So he comes over there, he says: No, he thinks that the ANC is selling out, because the ANC has started negotiating with the National Party, so he comes the other day...and the PAC had a very effective strategy, the door-to-door campaign, so he comes the other day to my house, and he starts saying: well, he thinks that the ANC is selling out. So then my mother says: Why? And then he says: Well, because if you are fighting with an enemy, and that enemy overpowers you, and is on top of you, and is essentially trying to kill you, throttle you, you know, to death, you don't say to the enemy, no, stop, let's negotiate first. You first fight the enemy and when you are on equal grounds, you can then say to them, let's start talking. And he was saying at the time, the ANC is selling out because it's starting to negotiate when it is in a weaker position, and he said it should be fighting them, but I mean, as I understand, he was chased out of the house by my mother at the time. But I understood his message, because he brought it down, you know, clearly. It was clear what he was saying, and I mean, as young children, you are impressionable, you know, you want to go out now and you want to do something immediately, because you think, if I do it, irregardless of how irrational it is, if I do it something's going to happen. You know, so, but having said all of that, I think, I mean, my mother played a

Int

TN

Int

TN

Int

TN

lot of influence in me because as...a lot of my colleagues actually went to...my peers at the time actually went to join APLA, which was the Azanian Peoples Liberation Army. They went to join APLA in the late eighties, and at the time, we were not aware what was going on outside in exile, that people were in fact coming back to the country. Some people actually went out at the same time, you know, to join APLA, etc. I didnâ\200\231t go to join APLA. I went as far as Port St Johnâ\200\231s, and then I went back home, because my mother wouldnâ\200\231t countenance it. She said: Look, I want you at school, you know, you can deal with your liberation story later. I want you back at school. But that also meant that we had to take all the political activism from the township to the school, you know, so (laughs), because the message at the time from Chris Hani who had just come back to the country, was that we must make the thing ungovernable.

This is the nineties, isnâ\200\231t it?

Ja, exactly, itâ\200\231s the nineties. And it was at the time effectively ungovernable. I mean, the Transkei was burning until â\200\23194.

Right.

From 1990 until *94, there was nothing happening. In fact, this explains even now, I go home to my village every December, and I go there, I find that the schools are dysfunctional, completely dysfunctional. I find that the gates of the school cannot be locked, there are no windows, there are no...and those are the things, some of them that were destroyed at the time, and they havenâ\200\231t been replaced and what has happened instead, there has been a massive exodus, is that those people who have been lucky enough to have access to money etc. and resources, have simply left the village and have gone to the towns and the cities and thatâ\200\231s where they can, and of course, have access to education for their kids. But I mean all of this can be explained now. At the time, there was an element of irrationality. We were, you know, influenced, and I mean, it was perhaps right at the time to make things ungovernable, because you remember, in â\200\23192 there was the CODESA negotiations, but there was uncertainty about whether the National Party was genuine about negotiating or not. So on the other hand, they established what were called the self-defence units...

The SDUâ\200\231s?

The SDUâ\200\231s. So, and the purpose of the SDUâ\200\231s was to keep the community on the alert, in case the National Party begs out of the negotiations, so we can keep the pressure going. I mean, certainly that was the message given to us at the time, so one understood all of those things, and...but you see, the balance, I mean, I sometimes do not know how we kept it. Because on the one hand, you see, you had to be at school between eight and two, and then from there you had to attend your community activities, and then in the evenings, sometimes you would be at meetings of the SDUâ\200\231s and then you would be at meetings of the ANC, you would be at meetings of the PAC, you were trying to understand what is going on, trying to make sense of

Int

TN

what's happening around you, you know. Of course, later on, I mean the whole struggle changed from its political character to a socio-economic...

Would you say that happened post-94?

Well, it happened post...you know, I mean, I suppose we say sometimes from political to economic struggle...there is no clear distinction between the two, because as you know, the nature of apartheid was to oppress people because they are black, but also black people became poor because they were oppressed. So part of the struggle to emancipate blacks as blacks, was also to emancipate them as poor people, and with women it was even worse, because they were oppressed also by black men, you know, so they had to liberate themselves from black men and then from the system of apartheid, and then from poverty. So I think after '94, certainly the character of the struggle, I think, changed to a more socio-economic focus, because people say we now have the right to vote, because that was the whole issue is we want to choose our government, one man one vote, one person one vote, we now have the vote but the conditions that we live under haven't changed. We still live in the shacks in the townships, in the villages, and we want that to change. And how can we do it? Earlier, you'll see, I mean, our history, because you'll see earlier from 94 there was euphoria, everyone is excited, we're free, and there's Nelson Mandela, everybody loves him, you know, and he goes around hugging babies and kissing adults etc. which is wonderful, you know, (laughter) all of it...so which is wonderful, but five years later, you know, the euphoria ends, and people start saying, asking themselves, ok, what has this been about? Has it been worth, you know, the fight? Then they start asking themselves difficult questions, you know, about the nature of the society that we have and the nature of the society that we want to build. So, and the law itself is important in that kind of, situation because, because part of the problem with apartheid is that people had to rely on institutions outside the law, because the law didn't help them, the law was, in fact, or perhaps, especially the law at the magistrates' court was probably the worst. In the High Court, there was still an element of decency even though most of the apartheid judges, I mean, were...well, the perception certainly, was that they collaborated with the system and then going all the way up to the Appellate Division. But then, later you now get a situation where the judges haven't changed, because judges are appointed for life, so it is still the same apartheid judges but they now have to adjudicate a constitutional system that they are unfamiliar with. Some of them, they mean well, but they just don't know what to do. Some of them are openly opposed to the idea of constitutionalism. You know, you get comments from time to time that some judge said that they wish the death penalty hadn't been abolished, you know, and that they blame the Constitutional Court for abolishing the death penalty and they make these comments brazenly in court. And the newspapers leap on this thing and they report, you know, and then the judge doesn't care because he's appointed for life and he's independent. But you see that, that's a long-term project. We're not going to solve it now. We can hope those judges are going to die and that we'll appoint other people after their death, but you see, the challenge is, you need the courts because the rule of law says ultimately the court is the upper guardian of the Constitution, the court is...well, courts are important because they ultimately tell us what the Constitution means etc., etc. But you see, the courts are not going to deliver the houses, the houses will be delivered by government, and the constant message we get from government is lack of resources,

Int

TN

Int

TN

lack of resources, and then the following thing is you get the Minister of Justice declaring...the Minister of Finance declaring a surplus at the end of the year, saying: Look, I have a surplus, but the houses are not being built, the roads are not being built etc. So you have, it's a, I mean, a complex environment, yes, post-apartheid, we've...the

focus of the struggle has moved, has shifted considerably from political to more socio-economic...of course, there's still a lot of political work that must be done. I

spoke about the relations, in relation to gender, and the institutional racism that continues to exist in organisations outside law. I mean, in the legal profession for instance, you again still experience this, sometimes overt, sometimes more implied forms of racism, but those are things you can only know when you see, you know, because they are not written down on policy, you experience them, so whereas in broad terms we've shifted, but there is still a lot of political work that must be done to

change mind sets. And I mean, I don't know what we will do to change those mindsets but we struggle every day to change them and we, what keeps us going is because we know they will change, because at some stage we were all told that apartheid was here to stay forever, and we didn't think it would change. It changed.

And so even racism post-apartheid is going to change but it will change because we make it change. I mean, it's...this is our generation, this is our country, I mean, the

future belongs to us. You know, we've got to make it what we want to be for my children, you know, etc. So I'm saying...so one can't say it's shifted completely from

political to economic, there are still a lot of political aspects to it. I mean, I mentioned

racism, and I mentioned sexism, you know, that still exists in corporate South Africa.

Now, my personal experiences of course have been in the legal profession where I see these instances daily, and where I have to deal with them daily, and where my colleagues also have to deal with them daily, but we have to talk about them openly, because that's the first way towards healing them. And we must struggle against them. But the other, I'm mentioning all the problems to you.

That's good...

There are wonderful things that have happened in this country. (Laughs). You know, so...

Tell me about those?

Well, the starting point: the Constitution itself. It's a wonderful, inspirational document. You need to have a Constitution that binds everyone. The fact that we are all equal before the law and that the law doesn't think I'm black, you're white, you're

woman etc. It all thinks we are the same, so that helps us, you know, it keeps all of us together. And, you know, if you go to the villages now, and you start doing wrong things to people, they say to you: I'm going to take you to court, even if they have no

money. They just say: I will sue you or take you to court. And the fact that they are able to do that, to say, I'll take you to court, is of fundamental importance, because it

shows their belief in the legal system, that they believe in the Constitution, it shows that they are not prepared to resolve their dispute outside the legal framework, and that's the critical importance of the rule of law. So that's important. And the fact that

people are free, you know, the idea of being free, being able to wake up and walk and go wherever you want, with no restrictions, you know, I mean, it's very, very

Int

TN

important. I mean, people sometimes, they take these things for granted. I mean the idea that no one's going to tell you that at six o'clock you must be back at your house, you know, and you can walk at six o'clock and at seven o'clock and whatever time it will be. So those things are important: the right to freedom of movement and residence, the fact that you can live anywhere in the country. If you can afford to live in Houghton, and you can buy a house there, you can live, you know. You can go to any school in the country, you can go to any...you can work anywhere as a matter of law. So those things are very, very important, and South Africans appreciate those things. You know, so that...I mean, on its own...the idea of freedom has been very, very crucial, and at a socio-economic front the government is trying to do what it can. I don't know what the constraints that side are, but it does appear that there are some constraints. There are many good things happening. We hosted the Rugby World Cup in 95, 1996 we hosted the Africa Cup of Nations. We had all the countries of the world coming to see how we play etc. We are now going...we hosted the Cricket World Cup as well, so we are now going to host the soccer World Cup. So we can see we are a, a country with possibilities, I mean, that's what Thabo Mbeki tells us all the time, so there are things happening in the country that are exciting. There are jobs that are opened up in many sectors; particularly for black people like me who have been lucky enough to get a university education, we actually can work anywhere. You know, we are upwardly mobile etc. so those are all good things. And there's a new emergent black middle class, that's...although I mean there are fault lines with the idea of a middle class. I don't understand fully how a middle class works myself. But I support the idea of a professional class, but this what...you know, business terms a middle class and it's there, it exists is the idea of BEE, that there must be empowerment of previously disadvantaged individuals, so you can see at an economic front, those things are happening. At the bottom rung, however, I mean, we hear the statistics that actually what's happened is that the levels of poverty, of extreme poverty, have doubled over the past ten years. So whereas we have all of this, I mean, I suppose it's, the euphoria of economic development, of economic boom amongst the black middle class, at the bottom rung you have an extreme situation where things in fact, are reversing, and it's going to take time to actually bridge the gap between the extremely poor and the extremely rich. So, so what's happening is that those who can make it are making it a big a and those who can't make it really, really cannot make it. And I don't know what's going to happen, but I personally keep hoping and struggling within the things I can personally do, that, you know, I, I don't advocate a communist system where everyone is equal, but I certainly advocate a system in which we gradually move towards closing the gap between the poorest and the richest. Now, the law is going to help us, but the law has got its own limitations. These are solutions that, that probably should be found outside the law. I mean, I wrote an article recently, in the Industrial Law Journal and one of the points I made about this, actually it's a conservative writer from America who made the point, about the hollow hope. I think it was Gerald Rosenberg who makes the point in the book called 'The Hollow Hope: Can Courts Bring About Social Change?'

Can Courts Bring About Social Change?

Yes, that's the title of the book. It's...and he concludes that courts are important; no doubt about it, and courts can, you know, impact on policy decisions and socio-economic decisions but ultimately, it's the State that is responsible, you know, for the

Int

TN

Int

TN

Int

TN

actual delivery of services, and whereas courts can nudge the government towards...and in fact that's why you need an independent judiciary and one of the problems I have these days is whether in fact, the judiciary is independent enough to tell the government when it is not complying with the Constitution...and the jury's still out on that one. It's probably too early at this stage, I mean we still have to nurture democracy etc. but nurturing democracy means you need to have a very vigilant and independent judiciary that keeps the government on its toes, because the government ultimately must account to the people, to the poor who elect them.

Sure.

If it doesn't, I suppose the answer is that the poor must replace it with another government, but again, you have a system of a dominant political party here, the ANC is very dominant. It's good to have the ANC that's a dominant party, there's no problem with that, but I think there has to be enough engagement with the ANC, inside and outside the ANC, because complacency creeps in, people say: No, I don't want to do this, and then you have another problem of corruption, public sector corruption. I mean, my work is largely public law and I represent mainly the State, (laughs), it's inaudible not the State, public institutions. I mean the things I come across every day are just beyond belief. I mean, I'm doing a case at the moment, you know, there's a sense in which, I think people think they are entitled to help themselves to public resources and public assets. They think they are theirs, you know. It's like: it's our turn, let's take. So I don't understand this mentality that's consumed our government, and some officials. So at the top you get Thabo Mbeki talking on national television and making these grand pronouncements: We're going to tackle corruption, we're going to do this, we're going to do this etc. but when you go deep, deeper into this thing and you actually realize the rot that sometimes...it sometimes defies belief. But the good thing I suppose is at the top you've got commitment to uproot it and the explanation I sometimes get from people that I ask, they say, no the civil service that we still have was inherited from apartheid, and it came with all the practices from apartheid. But sometimes what they can't explain is that I see some of my comrades here, who were not part of the apartheid administration, who are just greedy, they want resources, resources all the time. But then I say, you know, you need an independent judiciary and a vigilant civil society to keep the government in check and to expose acts of corruption, and you need an independent prosecutorial arm of government, and I don't know if you've been following the events around the suspension of the National Director of Prosecutions, the Attorney General.

Is that Jackie Selebi?

No, no, the other one: (Vusumzi Vusi) Pikoli.

Ok.

(Jackie) Selebi is the National Commissioner of Police.

Int

TN

Int

TN

Int

TN

Int

TN

Int

TN

Int

TN

Int

10

Right.

Well, there are problems around him as well. I actually act for the South African Police Service, that's one of my clients. (Laughs)

Gosh.

So, but that's why you need all these independent institutions so that they can look at the issues of corruption, and where government is corrupt, they can prosecute independently, and they can also look at issues of good governance, and so that when the government is not doing what it should be doing under the Constitution, they can tell them that they should be doing x, y, z. So, so as I say, I mean I keep coming back to the wrong things, you know, (laughs)...

I really want to talk more about this, but I want to take you right back.

Ja.

You grew up in the Transkei, you went to school there. At what point did you come to South Africa and where did you actually end up, why did you end up doing law? (Laughs)

Well, let me...ja...what happened is, I grew up in the Transkei and then there was a university there for the Transkeians. And then after Matric, I was the best student - I don't know how that happened...

Right. Congratulations!

...but anyway I got to be the best student in my Matric year, and I got a bursary through the government of the Republic of Transkei...

Sure...

In fact at the time, I had a choice of either going to the University of Natal or going to University of Transkei. But I didn't have a bursary to go to University of Natal; I didn't have money, so I won a full bursary to go to Transkei, so I enrolled there for my undergraduate LLB studies.

This is... must have been in the mid-nineties?

TN

Int

TN

Int

TN

Int

TN

Int

TN

Int

TN

Int

TN

Int

TN

Int

TN

11

Ja, thatâ\200\231s the beginning of nineties and until *96, â\200\23197. And then from â\200\23197 I went to Grahamstown to study at... 98 rather, to study at Rhodes University.

For your LLB?

No, for my post-graduate LLM.

Right, ok. So you finished your LLB at Transkei and then you went to do an LLM?

And then I went to Rhodes, yes. And then when I was in Grahamstown, I then came across Clive Plasket...actually the first person I met was Mark Euijen.

Who?

Mark Euijen.

Euijen.

Right, ok.

Clive Plasket was the Director of the Grahamstown office?

Right.

And then Mark Euijen...was Mark the Director or Plasket was not...I canâ\200\231t remember who the Director was but they were both at the LRC in Grahamstown, as well as Johan Roos who was the third advocate there. So I then got appointed as a Fellow...

This was while you were doing your LL.M or after?

While I was doing my LLM.

Right, ok.

In fact, I did my first year and then later I got appointed to the LRC, as a Fellow at the Grahamstown office of the LRC, which, I mean, was a wonderful experience. The step I forgot to mention is...

Int

TN

Int

TN

12

Sure...

After I did my LLB at Transkei, that's the year that's missing, I worked for Legal Aid Clinic in Umtata, that's where I was doing my articles.

Right, so you've had a taste of public interest law.

Yes, I worked for a Legal Aid Clinic, which was a criminal law practice, which was very good at a foundational level, because there I got to represent indigent people, who otherwise could not afford legal fees, and as you know, the test, I mean it was not the importance of the case or anything, it was simply whether or not you can afford legal fees. And I got to represent many of people, I chose...a number of offences, small offences like theft, robbery, assault, attempted murder, rape, those kinds of offences, so I got my practical experience there at the Legal Aid Clinic. And then I wanted to move and then I went to Grahamstown. I went to the LRC, which I must say is probably the best decision that I ever made is to go and work for the Legal Resources Centre. I mean, I had heard about the LRC, I'd heard about legendary people who had worked there: (George) Bizos, and Edwin (Cameron), no, not Edwin (Cameron), Wim Trengove, at the time I think he was the National Director, or he was then the Director of the Constitutional Litigation Unit, ya. And (George) Bizos, I mean everybody knows George Bizos, and I'd sort of known that Arthur Chaskalson had also worked at the LRC, and I'd also heard of Geoff Budlender, so I wanted to be associated with this wonderful institution. So I got lucky I got in there, and they fortunately at the time had a position of a fellow that was available, so I got interviewed, then I got appointed. I worked with Mark Euijen, (Clive) Plasket, and Johan Roos, and at the time the focus of the Grahamstown office was on the welfare cases, because we mainly litigated welfare cases. There was a bit of land and housing, but it was mainly about welfare. And as you would remember, one of the main cases that was litigated in that era went to the Supreme Court of Appeal, about whether or not the government was entitled to terminate disability grants without giving notice. And I think what the administration of the Eastern Cape had done, was basically to cancel about a hundred thousand disability benefits that had been extended to poor people. I mean, ja, it's something that I still cannot understand fully, you know, on what basis did they think they could just terminate those grants? In fact, I sometimes hear now, almost ten years later, that the struggle for these welfare grants is still on, and there still hasn't been a proper resolution to the problem that was litigated a ges ago. So those were mainly the cases that we dealt with at the time, it was largely welfare and was some land. And I got to meet (Clive) Plasket, I got to meet (Mark) Euijen, I got to meet...I mean I met Geoff Budlender for the first time when I was at the LRC, and I also met Wim Trengove for the first time when I was there at the LRC. Just to look at how they did things, and one of the things that impressed me about the LRC was its style of litigation, what they called social impact. Because before you litigate a case, you first assess, you know, what the impact of the case will be on the law, as well as on social policy of government, and the broader public impact that a case will have, and you follow it up carefully, and there's a system of using test cases to test particular points, and you select, I mean, the most deserving case, and you take that case to court, and you assess the response of the judges before you bring other cases similar to it, and that is exactly what happened in a class action case that was

Int

TN

Int

TN

Int

TN

Int

TN

13

brought there, the inaudible case. There had been an earlier judgement which had gone in favour of the LRC and then later on we strategized, largely based on the first case that had been successful, and the government simply couldn't respond because they had filed papers in the first case where they put their position, and at the time they didn't know that a flood of cases was coming. So the whole idea of litigating strategically, and thinking carefully about the cases, I just found fascinating. I mean of course now, I work here, it's a rat race basically, it's all about fees, you know so,

(laughs) and not about strategy and not about impact. So sorry, yes, to go back to your question. So that's what happened between the Transkei and...so Grahamstown was the RSA, former RSA. In fact, there are still vestiges even now, I mean, I still refer to it as the Transkei, not because I hanker for the good old days (laughs), but because it's just known as such, I mean...

What is it called now, the Transkei?

Well, it's now called Eastern Cape, it's part of the Eastern Cape. I mean, but ja, it's still, you can still see the division, Transkei, Ciskei, and the Republic of South Africa.

Right. Tell me more about your year; you spent a year there?

Yes.

Right. I was wondering, you know, you said it was the best decision that you made in retrospect. Tell me a bit about that. What made it...such a good decision?

Ja, I think quite a combination of things, actually. I mean, it's the people that I met, because you then see later or not, the nature of the...I mean I don't want to call them social networks because that's too bourgeois, but (laughs) that's the people that I met.

[mean, you meet lawyers who are genuinely committed to the cause of the poor, and they have no reason other than the fact that they are South Africans and they think that something must be done about the depressing levels of poverty, and they dedicate their lives to fighting the cause of the poor. I mean, that to me, still inspires me to date. In fact, when I left the LRC, I remember they gave me a gift, they gave me a blazer, which I still have at home, I wear it sometimes. And I said to them: I was coming back, you know. Well, I still think I'm coming back. (Laughter)

That's wonderful.

Notwithstanding the passage of time. I think it's the, first it's the lawyers I mean, who were genuinely committed to the cause of the poor, secondly, the commitment to the Constitution. You know, the problem with apartheid, the idea that you can just do anything regardless of what the law says, and the commitment, I mean, to the Constitution was something that I learnt. Well, maybe I had known about it earlier but it started changing my own perception about the law. And frankly, the fact that I

could actually see that, you know, what I have always had in mind, that the law can be

Int

TN

14

used to fight injustice, I could actually see it in practice. I mean I remember the four cases we ran, the four inaudible cases, I mean one of the guys that we represented basically had had his fingers cut in a mine accident and was also epileptic, and couldnâ\200\231t work. I mean it was the worst imaginable example.

Sure.

You know, and he was living in a small shack, and was receiving this disability grant for about ten years before the government arbitrarily suspended it. And I remember the day we won his case and the day the government paid him. It was not a lot of money, it was fourteen thousand rands, so itâ\200\231s, I mean itâ\200\231s a small sum of money, but he came to the office...I still remember I think he actually hugged every lawyer who was there, and he was in tears, Mr Ngxuzo, you know. So I mean, you sit there, and youâ\200\231re like, ok, you can see that it is your seniors who played the main role here but you were responsible, I mean in some consultations you offered some assistance and you were part of the team that ultimately...and that really is inspirational because you can see that, you know, people have, you know...Iâ\200\231ve told you many things about the law but I can see it in action, I can see how it has changed this individualâ\200\231s life , you know. It may not change all of us, you know, but I can see how itâ\200\231s worked in relation to this and thatâ\200\231s what Iâ\200\231ve always aspired to do as a young kid, you know, itâ\200\231s to see something that Iâ\200\231m doing actually changing somebodyâ\200\231s life. So I mean, all of those experiences, I mean, itâ\200\231s things even now, when I look at them, I think that probably was my, you know, best year as a lawyer, even more than the period I spent at the Constitutional Court, it was the time I was at the LRC, where I really felt it was life changing. And of course, the idea of lawyering. I mean, the LRC is a special place. People do not just litigate for the sake of it, they donâ\200\231t litigate because thereâ\200\231s money to be made out of it, like we do, you know. And that teaches you a lot of discipline, you know. It teaches you patience because you donâ\200\231t go to court unless you know there are prospects that you will win, and unless the case that you litigate will bring the results that you desire for the broader public, or it will change the law. And that means you must think carefully before you rush off to court, whereas in ordinary commercial activity, someone comes to you, they say: I want to go to court, and you say: how much have you got, you know, and they deposit money in your trust account, the following day you are in court. So whereas at the LRC we thought carefully about the cases, so that idea of strategic lawyering, I mean, is something that even now as a lawyer, and in fact, I think, perhaps as long as I practise law, Iâ\200\231ll continue having in my own mind. So all of those things have shaped me and my thinking as a lawyer. I mean, I still say even to the candidate attorneys that I work with in this firm, that, you know, I wish they could spend even six months working for the LRC, you know, to see how the law can be used in various ways, and to also see, you know, how it must be practised, you know, to achieve the impact. And these skills I learnt can be used anywhere regardless of who you represent, you know, if you just keep them in mind, and you find that they actually work, because the idea of conceptualising a case before you bring it, and of drafting the papers properly, and identifying the true legal issue, and identifying the true impact before you go to court, I mean I just find those cases that you bring having thought through them properly, are unanswerable most of the time, because through thinking, you pick up where you have prospects and you pick up where you canâ\200\231t win. And those that you canâ\200\231t win, you donâ\200\231t litigate, so itâ\200\231s those experiences at the LRC that I still think , I mean, I think

Int

TN

Int

TN

Int

TN

Int

TN

Int

TN

Int

TN

Int

TN

Int

TN

15

it certainly was the best decision I took in my life was to work for the LRC. I mean the other things that have happened subsequently are all important and...

Of course. Tell me about those? So you worked there sort of, this was late 1999 right? â\200\23198, â\200\23199?

No, I was there for...I initially did my...

LLM?

My Masters, yes, and then I worked there in *99, 2000.

Right, â\200\23199, 2000. And then did you go back and finish your Masters, or you had already finished it? What did...

I finished it whilst I was in Joâ\200\231burg.

Right, ok.

Because I was doing a thesis, so I just finished it when I was in Johannesburg.

So how did you leave, and what were the reasons...clearly you really enjoyed the LRC, what made you then move etc?

Well, I got offered by Arthur Chaskalson to be his clerk.

Youâ\200\231re very lucky...

I think I was lucky, ja. Thatâ\200\231s when I moved to Johannesburg.

So this was 2001?

2001, yes. Then I moved to Johannesburg to work with him as his clerk. That was his last year as President, and when he got appointed as Chief Justice...so then I spent a year with him.

Tell me about that experience, at the Constitutional Court, and working with Arthur Chaskalson?

No, that was wonderful, absolutely, absolutely wonderful. I mean, you know, Arthur Chaskalson as a person, I mean, heâ\200\231s a real human being. Heâ\200\231s really amazing because

Int

TN

Int

TN

16

when you sit, say as a university student, or even as a candidate attorney at the LRC, you actually admire Arthur Chaskalson, you know, because everyone knows him and everyone talks about him, so you idolize him effectively, until you meet him, you know, and you realize how humble...in fact, I suppose the idolisation continues long after youâ\200\231ve met him, because he was very, very humble. And I canâ\200\231t remember one day where he actually raised his voice when talking to me, whereas I always raise my voice, all the time, when talking to, talking to anyone...and he actually respected my views. You know, when you are young and inexperienced, etc. you always fear, is this person going to take my views seriously or is he going to think Iâ\200\231m talking bullshit, you know? But he always viewed, I mean, took the views that were put to him seriously, not only in conversations with him, but even later when formulating his own judgements, you would see, ok, this is what I thought, itâ\200\231s there, so it means I matter, you know, Iâ\200\231m someone whoâ\200\231s important. So he had this ability to make you feel important and to make you feel that the contribution that youâ\200\231re making was valuable, but he was also incredibly humble. But still for someone that humble, and sometimes to the point where I thought that sometimes heâ\200\231ll be self-deprecating, and yet he was such a smart lawyer, probably amongst...I donâ\200\231t know, maybe the best lawyer that one has come across in this country. I would sit there sometimes and watch him counsel inaudible cases and Arthur Chaskalson would take the debate from here to here, and then youâ\200\231ll just find that ok, heâ\200\231s now talking alone, because no one, you know, can reach the level of debate, so youâ\200\231ve got a rare combination because lawyers generally are arrogant people, (laughter) very, very arrogant, especially advocates and judges, because they think they know everything and now you get someone at the Constitutional Court as clever as he is, and yet very humble and approachable. I mean, I just found him incredible as a person, and also his ability to mentor us, to teach us, to show us how the Constitution works and how it must be applied, and beyond the Constitution, to teach us how we should be human beings, you know, outside the law...

Right.

...I just...I suppose in a way he filled a void, you know, in my own personal life, because I was raised by women, which was a good thing in a way, I never had a father figure because my father died when I was still very young. I was about five, or...I was six actually at the time he died...

Gosh, right...

...so I mean when I met him...and the other men Iâ\200\231ve always met it was in the course of work, and they would always focus on what has to be done, but when you meet him he comes across actually, as something more than a judge, you know, as something of a father, a grandfather, you know, to put it that way, so...and thatâ\200\231s the combination, I mean, of what made him such a special human being. I mean Iâ\200\231ve maintained contact with him post my days at the Court because I feel sometimes I can ask him my own personal questions and he responds to my emails and he takes seriously the things I say, even though sometimes I think, ok, Iâ\200\231m now troubling him, he should not be helping me with this kind of thing, of course you do it with a measurement of respect, you know.

Int

TN

Int

TN

Int

TN

Int

TN

Int

TN

Int

TN

17

Sure, sure.

But so, I just found that combination amazing to work with him, and I mean, even...there are many things I have learnt from him, and I mean I remember when I left the Court, I had my last interview with him and he said something that many days later drove me to tears, because he called me to his office and he said: There are many things weâ\200\231ve been doing together at court, and he appreciates the work that I have done for him etc. but he wants me to take away one thing from my experience with him, what he himself has found unique about me is my integrity. You know, I mean, no one...

Thatâ\200\231s wonderful.

...no one had ever said something to me like that to me, so I...anyway, to have the Chief Justice of the country say that thing to you, I mean, drives you to tears...

Of course...

...so anyway, I left so...so I found it, I mean the time I spent with him it was awesome, it was very good, very, very good. Itâ\200\231s hard obviously to compare experiences, because experiences bring different things to you as a human being, and all of it is ultimately formative, you grow in yourself, so I...I mean as I say, post my time there, Iâ\200\231ve consciously maintained contact with him.

Tembeka...you spent a year there at the Constitutional Court, if Iâ\200\231m not mistaken?

Yes.

Thereafter, what happened?

Well, you see thatâ\200\231s the problem (Laughs.)

Right...

Because in the middle of the year, I was thinking about what I would do at the end of my tenure at the ConCourt, because I didnâ\200\231t want to stay for another year. I wanted to give other people a chance, because I think everyone must have the same opportunity. And I spoke to Sarah Sephton, who was one of the attorneys in the Grahamstown office. I said to her: Look, Iâ\200\231m thinking about what I should do. I know you guys have told me that I can come back if I want to, but I want to go and get experience elsewhere, you know, and then see what happens, and maybe two or three years,

Int

TN

Int

TN

Int

TN

Int

TN

Int

18

that's what I said. So Sarah (Sephton) then put me in touch with Chris Todd who was one of the partners here...

At Bowman...?

Bowman's, ja. So I phoned Chris (Todd) up and he promptly arranged an interview. So he then offered me to come and work as an associate.

Right.

At the time, I had finished my articles, but I had not been admitted yet. So he offered me to come and work as an associate, which I accepted. Well, I mean, I had other offers, other law firms like Cheadle Thompson, as well as...I can't remember the third firm, so then I came to...

What made you choose Bowman's?

Bowman Gilfillan? I think largely because, well, I mean, again, you always speak to your.... I've got these three firms, what do you think, you know, about them? What I found about Bowman Gilfillan were many different things...money was an issue.

It was?

Yes. No, it was a consideration. But it was not a consideration about whether I go to the LRC...well, probably it was as well, because going back to Grahamstown, at that stage, you know, would probably not have worked for me, because you see, this is something else that sometimes we omit to say. You see, growing up as I did, with a single parent, two siblings, many members of the extended family, with grandparents, and people who have had to struggle to put you through to university, you've got financial pressures that arise as a result of that. We...I mean, I don't want to speak on behalf of black people, because I don't know what positions, what other positions they are in, certainly me and many of the people that I know, who are black and have gone to universities, we've got many responsibilities to take care of...at home. In fact, my mother, I can talk about her, my mother expects me even now, to actually send her money on a regular basis. In fact, on a monthly basis, to send her money. So whereas ideally, I would like to go to university and teach, you know, and write articles etc. and become a professor of law, it's not practical, because I have to balance it with where I come from, and to make sure that, you know, I can't, now that I have, you know, been successful, become a lawyer etc. and forget about that, you see, because my own belief and certainly the belief of many black people that I interact with, is that if we want in the long term to address poverty, we've got to start with our own families...

Sure.

TN

Int

TN

Int

TN

19

. and hopefully that extends, etc. etc. So why choose Bowman Gilfillan? I mean I found the experience that I was going to get at Bowman Gilfillan, it's wonderful, it's a commercial law firm, it gives me access to areas of law that I haven't seen before, you know, because I now have to practise employment law, I have to practise commercial law, I have to practise commercial litigation, I have to...you know, so those are areas of law I had previously not been exposed to, so I find that attractive because professionally I grow, but it also gives me financial security, you know, and it means I don't have to worry about paying my bond, you know, paying my car...

Right.

...and sending money at home, you know, etc. etc. And at the time, in fact, my sister had just finished Matric, and she had to go to university and I mean, my mother was clear about this, I've taken you to university, it's now your turn, you take this one, you know. When she finishes, she takes another one, that's how it works, you know. So that played a role, I mean I don't want to sound hung up about it but it played a role, you know. And of course, you know, once you get to a place like Bowman Gilfillan, you now start to get to relax, I mean I can tell you for instance the difference in salary, just to illustrate the point. At the LRC, I would have earned between R 80 000 to, I think, R150 000 as a first year associate. At Bowman Gilfillan, my starting salary was R250 000. So you can see, I mean, it's comparing apples with bananas, from a financial point of view, you see.

Sure, fair enough.

So what you end up doing as a young professional with all these aspirations that I have, you know, and the, you know, sort of I want to liberate the world kind of thing, so what you end up doing, is having to make, firstly, there's choice. I have to, you know, I have to work at Bowman Gilfillan, it's the responsible thing to do for me, because I've got these other issues I must take care of, but at the same time, I must look at whether or not, when I'm at Bowman Gilfillan, there are ways in which I can advance the things that are of concern to me, you know: issues of transformation, issues of access to the profession, etc. etc. so that you are, I mean, because if you come here only for the money, and you become unhappy, you'll want to leave, I mean there's no doubt, so you've got to make your stay happy by advancing the things you want to advance, and if there's scope to do it, you must do it, because transformation, I mean, is not going to be achieved through one road. We're not all going to join the revolution, you know, (laughs), so in fact maybe we are all going to join the revolution but in different ways, you know. So you decide, well, let me pursue the revolution if I have to pursue it, in this way. Sometimes you decide, well, what other people decide, and I don't think that there's something wrong with that, people decide, what's the point, you know, the country's now free, and part of the freedom is that actually we must enjoy our life, you know, other people will take care of themselves. Some people take that view. I'm not necessarily critical about that, I mean [think it can be understood in a particular context: people say we've been struggling so why should we continue, you know, putting ourselves through that. I

mean, the counter to it is ultimately, unless we deal with the problems of the poverty and the problems of underdevelopment, the revolution itself, you know, will fail. I

Int

TN

20

mean, we are not going to enjoy the fruits of freedom, inaudible because poor people are going to take our cars, and they are going to take our houses, and then they are going to kill us, and the whole thing will be worthless. And that's why in my own conscience, I still think, I think of course the starting point is to always if you can, you know, you must look after the family, I mean, I think there's no doubt there, you must take your siblings to university, I mean, I don't know how many I've taken, my sister eventually passed her degree and she went to Durban, and she said: No, I don't want to have anything to do...that's fine, you see, and my other siblings who went...I mean, there's one now who's at the University of Port Elizabeth, you know, that I'm paying for etc. But I can do all of those things and I can live comfortably, and then I can do politics within the firm, you know, so (laughs), because I've got the clients, the clients pay, and I do not have these pressures, you know, and then I can pursue the things I want to pursue. You know, I mean, I can now afford to go and study if I want, or I can afford to go on holiday if I want, so I can have, not a good life as such, but I can have things that I want to do, I can go to the Kruger National Park and watch the animals there, and relax, because I don't have the pressure about my bond, about my car, etc. because...

(interruption, interview resumes after a short break)

So I mean, that's what I'm saying, that you know, I mean, my life is a lot different to what it used to be and what it could have been, you know, it's I mean, I'm, I won't say I'm content, obviously you can't be, but certainly the financial burden has been lifted off my shoulders, and that enables me to pursue the things I really want to pursue.

I can totally understand...where you're coming from. I'm just wondering, as a counter argument to that, at the LRC the argument is that they haven't been able to attract ... they are unable to attract high quality lawyers, let alone lawyers, but also black, young black lawyers like yourself, because they cannot pay comparable salaries to what you would be getting at Bowman's for example, which is a fact, but then you also have your own reality. How does one then sustain a public interest law organisation like the LRC and maintain a good quality lawyering? What do you think is the solution to that?

Well, the LRC is maintaining an organisation now. I mean, one of the things they have done...I mean, I don't know if there are answers to this because the first point perhaps is, I mean, the LRC is doing something at the moment. I mean, one of the things they have done certainly in respect to advocates, is to enable them to take a certain amount of private briefs so they can get paid, they don't wholly depend on the salary that they get from the, from the organisation itself. Now you're asking me, you see that probably will work for white advocates, because...I don't know...I mean, but again you see, this is another problem, a historical problem is that if you have investments that have been created for you, you probably don't need the salary of the LRC, you can live for another ten, twenty years without a salary, you know. But if you don't have those investments and you have to start making those investments yourself, then something's got to give, you know. But you asked me a practical question: how does the LRC attract black, high quality black lawyers and black

lawyers in general? Firstly I don't think the LRC should be attracting low quality black lawyers at all. In fact, it's never done that. I don't think it should. And it should

Int

TN

Int

TN

Int

TN

Int

TN

21

always focus on the high quality black lawyers. Now, where are these people at the moment? They are probably in government, getting better salaries in government, and some of them are here at the LRC, getting better salaries.

Or they're at Bowman Gilfillan?

Yes, sorry, at Bowman Gilfillan. They're here at Bowman Gilfillan, getting better salaries there being partners in a commercial law firm etc. etc. Now some of those people would, I mean, I keep saying to myself, one day I'll go to the LRC and the time I'm spending here, is actually very important in developing my own skills and sharpening my own expertise and I mean, many poor people will benefit from the talent that I'm getting at the LRC. That's the one thing. But is the challenge of the

LRC to attract black lawyers or is the challenge of the LRC to deliver the service to poor people, perhaps through the use of black lawyers. Now if the question is the second one, which is it's really about delivery of the service, perhaps through black

people, then perhaps the answers will also start shifting from focusing on whether we should compete with Bowman Gilfillan, because I don't think that's realistic because,

and I don't think the LRC should seek to compete with Bowman Gilfillan, but I do think that the LRC should in fact try to utilise the expertise of lawyers that are at Bowman Gilfillan to pursue its own objectives, which is where I come to my next point, which is a different model of how we work. I've said in relation to advocates,

there's a twenty-five, seventy-five percent split, but there is no reason why in principle I should not work in partnership with the LRC, because if the ultimate objective is the people living in Soweto and Alexandra gaining access to proper legal services, there's no reason why that should not be achieved, that should be achieved

exclusively by the LRC. I think the LRC must continue influencing the process and how it is done, and maintaining overall control, but there's no reason why I cannot here at Bowman Gilfillan, I am required here to spend I think about a thousand hours, free pro bono work, you know, to clients. There's no reason why I should not do that with the LRC. There's no reason why I should not spend my thousand hours at the LRC.

But are you...?

Well, you see, then we're coming to another point. I am spending my thousand hours doing pro bono work but not at the LRC...

Right.

...but through other organisations and institutions.

For example?

Well, the...what they call is the ProBono...Probono Org...

Int

TN

Int

TN

Int

TN

Int

TN

Int

TN

Int

TN

Int

22

Yes, Probono dot Org.

Yes, dot Org. As well...in fact we also, I recently did HIV cases...

Treatment Action Campaign?

No, not the TAC. This organisation at Wits...

AIDS Law Project?

ALP, the Aids Law Project. We were doing two cases for them against the Department of Defence.

Right.

And we also run a law clinic here at Alexandra, in the township. And all the, because I have eight lawyers reporting to me as my associates and juniors, all of them every Friday they must go to the clinic and spend, is it two or three hours...go to the clinic and spend two or three hours listening to the problems, giving solutions, and some of those clinics, actually fascinating work that goes on there, because sometimes it's poor people they want to start a business, a small scale business, then they don't have advice on drawing contracts etc. and we've got the expertise here, so we send them there, go and help these people put together a company, or put together a small business, you know. So those things we are doing, so maybe in the short term, whilst we're thinking about how we turn everyone into an LRC lawyer, in the short term the answer is collaboration and partnerships, and as I say, most commercial law firms: us, Webbers, ENS (Edward, Nathan, Sonnenberg) and Deneys, we've got a pro bono policy of some sort. We may not; it may be different in emphasis etc...

Sure, sure.

...but there's a pro bono policy of some sort that requires us to give some of our hours for free...

Right.

... and those are the hours that I think should be used for the LRC. I mean, I briefed Richard Moultrie, who's a friend of mine, I worked with him at the court, he's now at

the Johannesburg office of the LRC, I think he runs the CLU or whatever.

Right.

TN

Int

TN

Int

TN

Int

TN

Int

23

I briefed him the other day in a matter where I acted for the Premier of the North East, but in the course of our conversations is this issue about why don't we establish a sustainable relationship with the LRC? My firm would be more than happy to release me to go and stay there for a month, or whatever, maybe not a month, maybe a week or whatever it is, or even if I don't go to the LRC I spend time here, with the resources here, because it is in fact these resources that must be used to help poor people, you know. A poor person must come to Bowman Gilfillan, I take a statement and I run a case with them. The LRC remains the attorney of record but I do the work here and I use our resources here. It ultimately has no impact, I mean, this firm makes millions of rands every year so it ultimately has no impact on the bottom line, and on our financial books it reflects there that it was pro bono work and that's actually good

for us because this is work we want to do. So that's one practical answer to it. It's not,

it's not getting us to go and work for the LRC because that also is not the answer. It's

also about partnerships with the Bar; the Bar has got some form of a pro bono policy, the Bar of Advocates, but when these people, let's say, assist organisations like the

LRC, especially the black ones, there should be some form of a subsidy in terms of which they get paid a nominal fee...

You mean at the LRC?

No, not by the LRC.

By the Bar?

By the Bar, yes. Because when I work here and I do work for the LRC I get paid by my firm and I get nothing from the LRC, and that I think should happen, and even with the advocates, they should be paid a nominal...the black ones should be paid a nominal fee by the Bar and the LRC, if it can afford it - but I think it must be the duty of the Bar, I mean, inaudible the money we pay advocates every year, I mean I look at the accounts that I have to sign every month and how much goes to advocates as individual practitioners, I mean, it's quite a lot, and that could be split for good use to poor people. The fees we make, the profits we take, those also could be, you know, shared and split, you know, that system I would be more than happy to, you know, engage in. And I think if you took just the top four firms, don't go further, just the top four, and look at the impact, if we consolidate and we work with the LRC, the impact we could make...

Sure.

...it's immense, it's big.

Why has this not happened, do you think?

TN

Int

TN

Int

TN

Int

TN

Int

TN

Int

TN

Int

24

Well, I mean, ja...look, I donâ\200\231t know why it has not happened. You say what do I think is the reason. I remember about four or five years ago, Geoff Budlender had some discussions with some members of the firm...

This firm?

This firm. And I think as a consequence of those discussions there was a case of two that we did etc. One of the problems with that case, I mean firstly, the structure was not the structure I had in mind, it was a case where the LRC takes a case and then refers to us, but we donâ\200\231t work in partnership.

Sure.

And I think when the case came, now I canâ\200\231t remember the facts, there was a problem because the respondent or the person who had to be sued, was somehow related to the firm, so there was a conflict of interest and that we couldnâ\200\231t take, but no one has revived it, so I think if you say to me, why hasnâ\200\231t it worked, I think itâ\200\231s the absence of the energyj, itâ\200\231s the...thereâ\200\231s no driver of that process.

Should that be coming from the LRC side, do you think?

Well, yes, I do think it must be coming from the LRC who must be driving it because the truth is that message is always positively received by people I work with. When you sit down with them and say, but why donâ\200\231t we do this, everyone says: Oh, good idea, letâ\200\231s do it, you know.

But nobody...?

Ja, you know, theyâ\200\231re more than happy to go and send their juniors to go and run the work, and here, as I said, we actually have a policy that says within a year you must spend a thousand hours on pro bono work, so we can extend that, we can look at different models of making it work, so...

...SOITY, g0 On...

No, so Iâ\200\231m saying, | mean, what about me, you know? I mean I donâ\200\231t know about me,

(laughs) but this is one answer to it, and I mean when that comes I will be more than keen, I mean as I was telling you about one case where we acted for an HIV positive woman who is suing the South African Defence Force, because they excluded her on the basis of her HIV status.

Wow...

TN

Int

TN

Int

TN

25

You see, and that came through the AIDS Law Project, you know, so we should be having more and more of those cases, many, many, many similar cases come to us and us litigating them.

Right. Iâ\200\231m just going to piggy back on that...when I walked into the entrance of Bowmanâ\200\231s, on the left hand side of the wall there are these amazing photos of pro bono work that Bowmanâ\200\231s undertakes, such as Ons Plek in Cape Town, and other...the Vuka Project etc.

Yes, in Soweto.

Yes. If thereâ\200\231s all this... public interest law work being undertaken by major commercial law firms in South Africa...as well as the smaller organisations such as the AIDS Law Project at Wits, where is the LRC in all of this? Does it have a future? What is your sense?

Ja, I mean, I think it has a future, perhaps a very bright future, the...I mean I donâ\200\231t think the AIDS Law Project replaces the LRC, and I donâ\200\231t think it intends replacing the LRC, itâ\200\231s a focused area and itâ\200\231s got a niche practice. The LRC has a bigger responsibility that goes beyond what the ALP can possibly hope to achieve. When we started this debate, one of the points we spoke about was whether the struggle has shifted from politics to socio-economic. In this country the levels of poverty are unimaginable. I mean, it is...COSATU says thereâ\200\231s probably thirty-five percent unemployment in South Africa. If you have a country, which is as grossly unequal as South Africa, weâ\200\231ll always need the LRC, because you need an institution that will advocate for poor people, and thatâ\200\231s what the LRC is. And the cause of the LRC, itâ\200\231s not merely about constitutionalism for constitutionalismâ\200\231s sake, itâ\200\231s about constitutionalism because you want to strengthen the State, and you canâ\200\231t strengthen the State unless the citizens themselves are in power, and that is why the LRC will always have a future, you know. And I mean, I think itâ\200\231s going to take us years before the levels of poverty in this country are significantly reduced, and that is why the LRC will always be relevant and it will always be necessary for it to exist. What it should be doing, I mean, Iâ\200\231ve identified a practical solution to it, perhaps not, you know, itâ\200\231s not the be all and end all and maybe itâ\200\231s also about, about...I donâ\200\231t think it should focus more on...I mean, areas where it clearly has no role, I mean, of course it must play a role on HIV/Aids etc. The crucial things that we speak of at the moment...I mean the welfare, thereâ\200\231s still a big issue in many rural provinces: Eastern Cape, KwaZulu etc. Housing: itâ\200\231s now become a major issue of concern, you know, in the rural areas and in the township. Urban squatters who have nowhere else to go, I mean, someone must litigate those cases and we do not have jurisprudence in our courts that sets out what the rules are in relation to what municipalities must do, in relation to poor people who are roaming around the streets and who have nowhere else to go. Someone must litigate that. The next level of struggle is going to be about land reform, because if we want to avoid a Zimbabwe, then weâ\200\231d better do something about it. The Constitutional Court better give us guidelines on what we should do about it. And who is advocating those cases? It is the LRC that must advocate those cases, you know. And then there is the issue of education, I mean, I complained earlier about the education system, which is not what it should be, especially for black

Int

TN

Int

TN

Int

TN

Int

TN

Int

TN

26

people in the townships and in the rural areas. And who is advocating those cases? We need the LRC to advocate those cases. So Iâ\200\231'm saying clearly there is a future for the LRC, as long as the country is as poor as it is.

Right.

And maybe in a hundred years, when we solve the problems of poverty, then we must close down the LRC.

Fair enough. Tembeka, Iâ\200\231'm wondering, if the LRC is so needed, you as a lawyer, if someone telephones you and says look, this is a client I have...or theyâ\200\231ve come to me with a problem, would you know what the LRC deals with, and would you be able to refer?

Personally?

As it stands right now, yes, as a lawyer?

Well, I mean, probably, I mean, I would guess...would I know for sure?

Yes...

Probably not, Iâ\200\231d probably guess, that I think the LRC deals with this kind of thing, but I mean, I donâ\200\231t know why it doesnâ\200\231t have enough visibility that it should have. I mean, [donâ\200\231t know whether itâ\200\231s a problem of marketing or itâ\200\231s a problem of resources, but certainly itâ\200\231s been...in the public eye, itâ\200\231s been overtaken by organisations like the ALP and the Landless Peopleâ\200\231s Movement etc. Those are more, but those are more advocacy groups, you know, they are not lawyers, I mean, lawyers by nature, are not known to like publicity for themselves, you know, so maybe thatâ\200\231s why the LRCâ\200\231s profile is not...well, in the eyes of the public now, itâ\200\231s not as high, and I mean, of course weâ\200\231ve got other problems, is that the legal aid system has been revamped etc. and the government is pumping money that side. You know, so you may have those other issues as well, and I mean, I would guess that this is a case that the LRC should probably deal with, and Iâ\200\231d probably want to â\200\230phone someone there, if thereâ\200\231s someone in the office that I could refer them, you know, tell the client maybe speak to so-and-so at this place...or I would say go to the Legal Aid Clinic, you know, or go to the AIDS Law Project if I think itâ\200\231s a case that falls within th

eir
mandate. ..

Right.

...or go to another organisation.

Int

TN

Int

TN

27

Right. Funding is a huge issue, because during the 1980s, when the LRC started in 1979, it had a core set of American funding and now under transition, South Africa, it's not just the LRC, lots of organisations, have experienced funding issues. The argument is that perhaps the LRC ought not to be relying on external sources of funding and focusing on internal sources of funding, so within the legal fraternity, corporate world, as well as the State. What's your sense of that?

I agree. That fits exactly with my view about how the LRC must pursue its mission. I agree fully with that. I mean, other than a few conflicts, I think the LRC must really draw on resources that exist, particularly amongst the law firms at the Bar, who have massive resources there that are not in fact being used to pursue the objectives of poor people, and I agree fully there, but that doesn't mean, I mean, I'm not arguing for that to the exclusion of external funding...

Sure, sure.

...it doesn't mean there should be no external funding, but I really do think that the LRC should be focusing on using existing resources. I mean, we are here, we are keen, we're more than happy to do the work, but I mean I explained to you that you are unlikely, realistically speaking, to persuade a lot of us en masse to go and work for the LRC, you see, because you are saying funding is also a big issue. No one's going to go there, or not no one, but few people are going to go, if you say to them I'm not sure if your salary will be paid next month or whatever, I mean, it would seem to them to make no sense etc. but if you said to them, stay where you are but we want you to contribute to our cause the following way, then I think the reception is different, you know, so that's why I think we should be thinking about more creative ways of achieving the same objective. Although I do think, I must say this, I think in the next ten, fifteen years, we're probably going to start to see a shift in this, because this we must, I think, understand in the context of the changing dynamics of South Africa, because for the first time you've got black people that are welcome at Bowman Gilfillan, and in the past they were simply unwelcome at Bowman Gilfillan, even those who went to the LRC would probably not have wanted to go to the LRC, they would have wanted to go to Webbers, or to Bowmans instead. So what we've now seen is that there has been an opening up of many opportunities that were initially closed, and of course there's been a problem because there's been a downscaling in the levels of activism and conscientisation, and I think that's likely, I mean it all goes in stages, that's likely to change in about ten, whatever years, once it becomes normal for a black person to work at Bowman Gilfillan, you know, and at that stage you will now see, I think, another layer of lawyers coming through, saying well, although that is so, but we also have other issues to take care of. I mean, Zimbabwe is one example, you know, at some stage you had a lot of people sort of joining the middle classes and then later on you had these people, the very same people saying, but you know, we can't continue with these levels of poverty and you had these institutions of civil society regaining the momentum which they lost at some stage. So even here, I mean, I do think we are likely to see that, maybe not even in ten years, but certainly in the short term I do think we're likely to see a new generation of lawyers who will not have the same financial constraints that we had, you know, but who will say...I mean, my children, whenever, they won't have the

Int

TN

Int

TN

28

same financial constraints that I have, and they will have more choices in life about what they want to do, you know, and it is, I think those people, that generation, will probably, if it is conscientised enough, they will probably be joining those institutions and fighting the cause, you know. But in the interim, weâ\200\231ve got to keep the fires burning, no doubt, you know, so itâ\200\231s about thinking about how we keep the fires burning so that whenever they come, they are able to find a home if they want to pursue things like the LRC.

Sure. In terms of your experience at the Constitutional Court, when you look at the current post-apartheid context, how do you think, in terms of rule of law and a constitutional state, what are the key areas of the Constitution, that will really come into play in the foreseeable future?

Well, I mean, I mentioned the...of course, socio-economic rights I think are still going to dominate our discussions, and in particular, I think weâ\200\231ve now moved from issues of provision of AIDS and AIDS drugs and related...I think issues of housing, particularly urban poor, I think are likely to, you know, dominate the discussions at the, at the Constitutional Court. And I do think that we are likely to see issues around the schooling system, those issues are likely to come...we havenâ\200\231t actually seen many of those cases about childrenâ\200\231s rights to proper education, you know. I think those issues are likely to dominate the thinking at the Constitutional Court. I think youâ\200\231re also likely, beyond socio-economic rights, to see issues about powers of prosecutors, the prosecutorial independence also being challenged, and I mean, the goings on at the moment, they lead me to one conclusion, that ultimately this issue about whether the prosecutors are independent or not, are likely to be challenged at the Constitutional Court. And I think the reason for that is, is one: because of the rising levels of corruption in government, and the fact that government feels uncomfortable with the idea that prosecutors can prosecute members of Cabinet, and I think that issue is ultimately going to be resolved by the Constitutional Court. I also think that, a third issue that probably is going to dominate the thinking at the Constitutional Court, is the exercise of power, intra-governmental exercise of power, because whatâ\200\231s likely to happen now, is that weâ\200\231re going to have a president of the ANC whoâ\200\231s different from the president of the country, if Jacob Zuma wins the election...I think those tensions between the various political actors are likely ultimately to be resolved at the Constitutional Court. And what weâ\200\231ve seen this year, and I think the trend is going to continue, is that weâ\200\231ve had disputes between workers and employers ultimately being resolved at the Constitutional Court: disputes about levels of bargaining. I mean, all of these I think are socio-economic issues, because the disputes about wages etc. previously those disputes were locked in the labour sphere, but now the Constitutional Court has opened them up, so I do think that weâ\200\231re likely to see issues about bargaining, issues about salaries of workers, issues about conditions of work etc.

Labour law issues?

Ja, labour law issues are likely to go...I mean this year weâ\200\231ve had how many, four cases, four labour law cases going to the Constitutional Court and I think in fact weâ\200\231re going to see a rise in that. I know thereâ\200\231s another one at the moment thatâ\200\231s coming, I think itâ\200\231s been to the Supreme Court of Appeal already, and itâ\200\231s probably going to go

Int

TN

Int

TN

29

to the Constitutional Court. So I think those four areas, I mean, socio-economic rights particularly housing and issues of children's rights, of access to education etc., probably in the short...medium to long term. The issues of independence of prosecutors in the short term, those are going to go to the Constitutional Court, exercise of power, the tension that exists between Parliament and the legislature, and sometimes...and Executive, and sometimes intra-executive disputes, those are also likely to be resolved there, and then you have got the labour issues, that I think the ConCourt is also going to be occupied by, for...well, in the immediate term, they are already dealing with those cases, and I think, I mean they will see a rise in those cases because the demand for profit actually means that the conditions of workers constantly are changed by management, and the fight itself, you know, is ultimately referred...I mean, the workers no longer have the same right that they used to have to strike and to demonstrate. I mean, they do have the right in the Constitution, but it's

weak, so they find that the most effective way of channelling their problems is to go to court, and hopefully the court will respond to...to what the demands are. So I think those issues are likely to be resolved at that level.

One of the issues...that's always an issue in lots of organisations, is racial dynamics.

And I'm wondering when you were at the LRC, whether you experienced any sense of a racial dynamic, not necessarily at the Grahamstown office, but generally within the LRC?

Ja...I mean, personally no, although I heard some people saying they had racial dynamics but...issues of racism etc., I mean, the things I heard, but that's all he says, someone saying to you, no, it's this or that, and I mean...the message I got, was that

people felt, especially the black lawyers felt that the...they accused the white liberals, you know, the white liberals think they know what's best for us, type of thing, and that's the kind of thing I heard but I must admit it didn't affect me at all, I...but I

mean when you go to meetings etc. people say, it's white liberals again etc. so you still have that kind of simmering tension, but it never came out in the open as an issue of confrontation etc. I mean I do think at the time, perhaps because the people who were there were senior and well respected throughout the organisation, and in fact Bongani Majola was the National Director, and I don't know what Geoff Budlender was doing at the time, but he was still in the organisation so...I mean Bongani (Majola), it must have been his job to then resolve these issues of race and racism...but I mean this is South Africa, you know, so racism is part of us, so we must firstly acknowledge it exists and deal with it on a day-to-day basis.

Right. What about issues of race in terms of black lawyers within the Bar, Johannesburg Bar?

That's the main issue of debate. Let me tell you what I think about this problem at the

Bar. You see the Bar, I think, is in fact experiencing a taste of its own medicine. You see, this firm, Bowman Gilfillan, took initiatives four, five years ago, to set out a Charter of transformation targets and a plan of action, and then to commit to that and to implement it in terms of recruitment, lateral promo...lateral inaudible, internal promotions etc. so everyone knows where they stand and there's no uncertainty. And the Bar for some reason has always thought that things are just going to happen, you

know, on their own, whereas as a matter of fact, if you went to the Bar now, the briefing patterns...and of course we are to blame for it, but the issue is, when you go to the Bar and you brief a white senior counsel, maybe only one in ten cases will they insist on having a black junior, maybe where the client, you know, is black, or where the client is a state organ or a state institution, that they will insist in bringing on board a black junior to assist in the case. So youâ\200\231ve got all those dynamics at the Bar,

and then the third problem is lack of institution. The Bar is a group of individuals, you know, who sit there and ultimately, maybe itâ\200\231s unfair to say â\200\230ultimatelyâ\200\231 but certainly my perception is ultimately they look after their own interests, individual interests, and within that though, youâ\200\231ve got people who...I mean, of course itâ\200\231s an old problem in South Africa, you know, youâ\200\231ve got people who simply do not believe, they donâ\200\231t think that black people are capable, you know, they donâ\200\231t believe that women are capable, they actually think that women should be at home looking after the kids, and I donâ\200\231t know where they think black people, black men should be...but certainly not at the Bar, so...(laughs)...and let me tell you, I have heard and ok, maybe...directly from black juniors and women juniors who say to me, my first week at the Bar, I was asked by a senior member with a straight face, it was not a joke, and he said to me, what are you doing here, why are you not at home? You know, and you would think advocates must be progressively minded, because they tell us what the Constitution means, you know, but in actual fact, they are very backward minded in many, many respects. You see, the problem of course with what I'm saying to you, is I'm generalising, there are good people there who mean well, and who have been doing many good things, but I think the dominant force is ultimately conservative, and that is why they have not been able to move the institution forward. There is a group of young black juniors that is emerging, but I was told by a senior advocate, because I work with them quite a lot, that the Bar for the past ten years has consisted of no more than six hundred and fifty advocates. Every year, about fifty come through, and every year about fifty leave, so the institution is not growing. And the people who leave, itâ\200\231s not the senior people, itâ\200\231s the juniors that came the previous year, because firstly they donâ\200\231t have the work, and secondly they are tired of the racism and the sexism, so they decide weâ\200\231d rather go and work elsewhere. And thatâ\200\231s largely because the Bar itself fails to recognize that there is a problem of race and racism, and secondly, it fails to recognize that unless it deals with it through an institutional fashion, that problem is going to persist. I mean, we...this year I have tried but you know, Iâ\200\231m a drop, a very small drop in a very big and complex ocean. You try to insist every time, because youâ\200\231re not going to transform the Bar by just appointing black advocates, youâ\200\231re going to transform it in the long term by skills, you know, transfer of skills, so that these advocates who brief have got the confidence that they can take on the work and do it properly, so ultimately itâ\200\231s about exposure, exposure, exposure. Youâ\200\231ve got to give people the work, thatâ\200\231s how they gain the skills, and thatâ\200\231s how they gain the confidence. In fact, most of these white counsels at the Bar themselves learnt that way, thatâ\200\231s how they got to be where they are. So I donâ\200\231t understand how they think, you know, anyone else is going to learn. So...so I mean I always say you start with the major law firms, you say, because weâ\200\231ve got a lot of influence about whatâ\200\231s going on, at some point, though sometimes people deny it and they say, no itâ\200\231s the duty of the client...itâ\200\231s not the duty of the client. The client comes to an attorney and says Iâ\200\231ve got this problem, tell me what I should do about it, and the attorney says to the client, ok I think we must go to a senior counsel, and the client often doesnâ\200\231t even know who the people at the Bar are, and you yourself have to say, ok, I recommend

the following. Nine out of ten the client accepts the attorney's recommendation. So

Int

TN

Int

TN

Int

31

you start with the attorneys, take four law firms, donâ\200\231t go anywhere else, take four, because I mean predominantly we do all the commercial...well, not all but we do most of the commercial work, change the briefing patterns, where you go to see white counsel, most of them have got the skills and the experience and they are undoubtedly amongst the best in the country, no doubt, so continue using them because you donâ\200\231t want to compromise the case, but insist on transfer of skills, pair them with a woman, or pair them with a black person, all the time, and if you did that, within a period of five years, you would see this significantly changing. Why has it not happened over the past thirteen years? You know, it sometimes baffles me, that we somehow think these things are going to change and then we donâ\200\231t do anything to change them. I mean...Iâ\200\231m sorry, the institution of the Bar itself, I think has a lot to answer for transformation, and the fact that I personally think, the fact that...the reason it has not transformed itâ\200\231s because it is not trying to transform. It is not doing anything, I mean, I donâ\200\231t want to accuse it of deliberately frustrating transformation but I seem to think it is not doing it at all. The major reasons why it is not doing it, and [mean I'm sure if it had done it thirteen years later there would have been massive, massive, massive progress at the Bar.

Sure...I wonder what you think about this as a counter argument, the fact that during the 1980â\200\231s and certainly throughout, the Bar has in its own way been very supportive of the work that the LRC has done - public interest law work - and this racial tension in fact might be creating a huge crisis within the Bar. Whatâ\200\231s your sense of that?

Well, I think the racial crisis is necessary, very necessary to ensure the change. I mean, of course, change doesnâ\200\231t mean racial change only. But racial change is crucial, itâ\200\231s important, and I donâ\200\231t think the racial crisis is necessarily logically linked to the support that the Bar provides to the LRC, quite frankly.

Sure...

I think that must continue...you see the problems that they have at the Bar do not relate to whether they should or shouldnâ\200\231t support organisations like the LRC. If you spoke to all of them, the blacks and the whites, they all agree we must support the LRC. And if you gave them a project now, they would do it. The crisis that the Bar currently faces is in relation to commercial work. The feeling of the black advocates is that the commercial work that is distributed by the white law firms goes to the white advocates exclusively. And that is where the problem is, you know. So, and I mean, another thing, even the most senior members of the Bar, I donâ\200\231t think they would say to you, no, no we will stop supporting the LRC because there is racial disharmony...

What I was trying to put forward was the argument that within the Bar there has been some very progressive elements in terms of supporting the LRC in its test case approach, and overturning apartheid legislation during the 1980's...

TN

Int

TN

32

Sure, I mean I don't take that away from the LRC, I mean, from the members of the Bar and their support to the LRC. And in fact, I suppose your point is beyond the LRGC, it's the support to people oppressed by apartheid.

Yes.

No, no, I agree fully with that. I mean, I myself, I mean, I don't think everyone at the Bar is necessarily anti-transformation. I think many people at the Bar actually support transformation, but I really do think that the dominant force, because even at the time of apartheid, and at the time they took all these cases, I think still, you know, at the Pretoria Bar for instance, white people were simply not allowed to practise for a long time, you know, and then, in certain areas...I mean, black people, sorry. Black people were simply not allowed to practise, not allowed to join the Bar, and then when they did join the Bar, they were simply not allowed to the Common Room, and they were simply not allowed to the Tea Room where their other, you know, colleagues are having tea. So you...and that...and you see, the crucial thing is those decisions were majority decisions, it was by a show of hands, people would vote for them. And then you had a few advocates who were committed to change, and I mean, there are...ja, people like Arthur Chaskalson etc. etc. then you had a few people who were genuinely committed to change and who actually did something to change. I mean, of course the history of the Johannesburg Bar Association was different because it was the more progressive Bar Association, and of course, you see, I mean I take it, the weakness with my argument is that we do not have sufficient numbers of black advocates who can join the Bar, but the point I'm making is that even the few that do join the Bar leave within the first year or two, you know, after they've finished their pupillage, and why do they leave, and I mean, even if you had let's say twenty, thirty progressive minded advocates who were willing to take them on, they would never be able to absorb the demand as a whole so that's why you need buy-in from many, many advocates at the Bar, in order to...of course, you can't change the mindsets of everyone at the moment, but you see, I mean, we're saying all the bad things, that's what, unfortunately that's human beings. There are many things the Bar has done, many good things that it has done post-apartheid, and that it continues to do in support of transformation: I know that they've got bursary schemes to train and support black advocates; I know that in some chambers I think you get a discount in your Bar fees when you join, and for a few months thereafter; I know that in some groups they deliver inaudible to match you with law firms and to introduce you to potential clients; and in some groups, you are paired with a senior counsel who's effectively a mentor, who looks after you and makes sure that you succeed. And I mean, and the black advocates who have been there for a long time, they will tell you things were bad when they got there, and things have considerably improved from the, for the juniors that are there at the moment. But then you, I mean as I said, this fight, even though it's projected sometimes as a fight for transformation, it's genuinely a fight about resources, it's a fight about commercial work, is that the black lawyers say give us the commercial work that you guys are doing that you're not giving us, because if you don't give this work to us, we will never gain the expertise, which is necessary when we become judges to resolve disputes, commercial disputes, and secondly, we want the money. So at the heart of it, they're fighting about resources, and I think that fight is a legitimate fight, and we must continue fighting, and we need racial transformation. But you see of course, you can't get racial

Int

TN

Int

TN

33

transformation unless youâ\200\231ve got the skills, you canâ\200\231t get the skills without the education. And here we still have a problem with high school education, university education, secondary education, which needs to be fixed because as a law firm we struggle ourselves to get black graduates, you see, because we have a target and we want to take twenty black students, we donâ\200\231t find them, we go to universities, you canâ\200\231t find them, they are not there. Those that we find in our own assessment within are weak and they require training, so we take them, we put them in training, but you donâ\200\231t want to create the impression that black lawyers perpetually should be trained, you know. So, I mean, and the same challenge I would imagine for the Bar, so even the progressive minded, they will face the same challenge, say, you want me to appoint black lawyers, where are they, are the universities producing them, etc. etc. So I think those are the challenges. But I really, really do think that there is a problem of a lack of commitment, certainly with some members of the Bar, to transformation. Not, I mean, I see your point and I agree fully with your point, itâ\200\231s not the point where white advocates will now help poor people in the townships, you know, by opening up certain things etc. itâ\200\231s the black people that are at the Bar who are saying: treat us as your equals. Because we now sit here with you, you know, they donâ\200\231t say, donâ\200\231t treat us as your clients, you know, that we appreciate, thank you very much, but we now, we want to eat in the same plate with you.

...In terms of public interest law work at the LRC, do you think that if the LRC attracts predominantly white lawyers, do you think that becomes an issue for the organisation?

No, incidentally, I donâ\200\231t think so. In fact, I think, I had this discussion, I canâ\200\231t remember with who, I think...you see because the converse is always put to me, you know, we go to interviews, we interview black people, and then I get a white lawyer saying to a black applicant: What do you think about community development? And not asking the same question to a white applicant. And I get very upset, you see, because, and then I say: What message are you really, really passing? Are you saying that blacks should be in the communities, and that whites should be at the JSC? Because I think transformation also means that black people must be at the JSC and they must be doing the cutting edge work at Bowman Gilfillan, you see, and thatâ\200\231s part of normalisation of society...

Sure.

...that we want, and I donâ\200\231t necessarily think itâ\200\231s a bad thing to have white lawyers working at the LRC, in fact, it must be part of our psyche that transformation is not the job of black people, transformation is the job of everyone, itâ\200\231s the job of white and black lawyers, and if white lawyers are going to go and work in the townships at the LRC, fine, and if black lawyers will be at the JSC doing the complex transactions there, ok, thatâ\200\231s how we will normalise society, I mean weâ\200\231d better get used to that idea, you know. And of course, I mean the problem that we have, at the JSC we donâ\200\231t have enough black lawyers, in the townships we also donâ\200\231t have enough black lawyers. But thatâ\200\231s a historical problem of apartheid, so I personally have no issue with white lawyers being at the LRC, I think we should have many of them there, you see. But itâ\200\231s here where we need the critical mass of black lawyers to normalise

Int

TN

Int

TN

Int

TN

Int

TN

Int

TN

34

things. I mean, you see, one day you must come here when we have...well, youâ\200\231re leaving to New York etc. so you wonâ\200\231t be able...take our brochures and look at the statistics. Itâ\200\231s abnormal! Itâ\200\231s just completely abnormal, you know. And of course, I mean look, I...itâ\200\231s passionately about these things, but I know that youâ\200\231ve got to be rational when you approach them, and youâ\200\231ve got to work progressively towards eradicating them, and you canâ\200\231t shoot from the hip, you see, youâ\200\231ve got to have a plan and work towards that plan, and youâ\200\231ve got to be patient. And then see what happens after, you know, whether the results are met and have not been met. And that ultimately if you want to be respected as a lawyer, you must produce the results, you must make the fees, and you must get the quality work. And then everyone will respect you. After that, you can then talk transformation. If you start with transformation without these things, I mean, people laugh at you, you know.

Well, thatâ\200\231s well put, Tembeka. And youâ\200\231ve certainly been described as a new generation high quality lawyer! Iâ\200\231m wondering...Iâ\200\231ve asked you a range of questions, and Iâ\200\231m wondering whether there are things Iâ\200\231ve neglected to ask you, that youâ\200\231d like to include in this Oral History of the LRC.

I canâ\200\231t think of anything...thanks, I donâ\200\231t know who paid me the compliment but anyway, thanks...

Several people...

...(Laughs) thanks...

The other thing is...there are...what are the stories that remain to be told about the LRC and public interest law work in South Africa?

What are the stories? Ja, there are many stories...

Some of your favourite memories or anecdotes that you can share...?

Ja, I mean Iâ\200\231ve told you the example about the guy with the...

Sure, sure.

...who came to us...in fact, that I think remains to me the...probably the highest watermark of my time at the LRC, and the travelling to all the advice centres around the Grahamstown area. And the first time I went to Alexandria and I saw the grave of Nonggawuse, the woman who caused the killing of many cattle amongst the

amaXhosa in 1856 etc. So those were the times when I was with the LRC. I suppose
one of the things that perhaps hasn't been, probably, said enough about the LRC, is
its
role in the amnesty proceedings.

Int

TN

Int

35

At the TRC?

The TRC proceedings. And I raise this because I mean, I certainly am new generation - high quality we can debate - but my generation certainly does believe there are many things to be said about the TRC and there is unfinished business of the TRC, and of course, thereâ\200\231s...we are now deferring to the current elders, because we defer to them

in relation to how this should be taken forward, but at some stage, weâ\200\231re going to come back to the issue of the unfinished business of the TRC, we will come back to the issue of full accountability for murders, tortures etc. and we will come back to the role of big business in aiding and abetting apartheid. So these issues are all going to come up at some stage, and I think when they do come up, it will be critical, and I mean, the LRC is not praised enough for having opposed many of those amnesty applications. And in cases where people did not apply for those amnesties, you know, there is...itâ\200\231s probably a project, a long-term project, because the NPA was told to

prosecute these people, it has not prosecuted them. Instead it has given one of them amnesty and then it has come with this policy in terms of which you can basically, we can grant another amnesty as the National Prosecuting Authority. So I donâ\200\231t think sometimes we give enough credit to the LRC for insisting that the truth must come out, you know, during the TRC process. We sometimes talk about the phase of the LRC in the â\200\23070â\200\231s and the â\200\23080â\200\231s and then we jump to the next phase, which was the

socio-economic rights era, and the transitional phase in particular during the TRC, is something that some say must come out. And the reason I say that is because I believe in the next ten, twenty years, when the current generation of leaders is gone, this issue is going to come up and we will be forced to confront it, because these questions are not closed, and these investigations are also going to continue. And now thereâ\200\231s a case

in the US about accountability of big business for what happened during apartheid. Our government has taken a view, which really confuses me, that somehow thereâ\200\231s something wrong with people suing Citibank and IBM and all these other companies. That issue is something that must be debated openly, and I mean, and firstly, weâ\200\231ve got to say it was critical for the LRC to play the role that it played, and going forward, it is something that probably will define, but at least certainly, it will be one of the features that define the history of the LRC itself, is when we have to talk about what really happened, because the TRC, with respect, did what it could do and it was important at the time to strengthen the State and to cause all of us to normalise etc. and to move forward, but it didnâ\200\231t do everything that it should have done. I mean, Dumisa Ntsebeza himself in his book, â\200\230The Unfinished Businessâ\200\231, accepts that the

TRC probably did not do, did not go deeper enough, and when are we going to deal with those issues, I donâ\200\231t know. But I do think at some stage, those things must be debated openly, not in an acrimonious way, but in a genuine attempt to close a chapter, to heal the wounds, and to create a strong state. I mean nation building is the term that the president uses. But you canâ\200\231t have nation building unless the truth is

known. So we donâ\200\231t need retributions but we need the truth to come out in order to close those chapters and to heal those wounds, you know, that have been created. Thereâ\200\231s a sense in which some people that I speak to, thereâ\200\231s a sense in which they say, that issue must be dealt with and resolved.

Is there anything else youâ\200\231d like to add?

TN

Int

TN

No, not at this stage (laughs).

Thank you very much, Tembeka, for a really wonderful interview. I appreciate it.

Well, thank you. Thank you for the interview. I also appreciate it.

36

Tembeka Ngcukaitobi -Name Index

Bizos, George, 12
Budlender, Geoff, 12, 24, 29
Cameron, Edwin, 12
Chaskalson, Arthur, 12, 15, 32
Euijen, Mark, 11, 12

Hani, Chris, 5

Holomisa, Bantubonke, 4
Majola, Bongani, 29
Makwetu, Clarence, 4
Mandela, Nelson, 6
Matanzima, Kaiser, 2
Mbeki, Thabo, 8, 9
Mkhabela Sibongile (Bongi),
Moultrie, Richard, 22
Ndamase, Tutor, 4

Ngxuzo, Mr., 14

Ntsebeza, Dumisa, 35

Pikoli, Vusumsi (Vusi), 9
Plasket, Clive, 11, 12

Roos, Johan, 11, 12
Rosenberg, Gerald, 6

Selebi, (Jacob) Jackie Sello, 9
Sephton, Sarah, 17, 18
Todd, Chris, 18

Trengove, Wim, 12

Zuma, Jacob, 28
Nongqawuse, 34

Cases:

Mining accident, 14

Social Welfare- disability grants case, 12

South African Defence Force â\200\224HIV positive exclusion, 24

Legal Resources Centre Oral History Project

PUBLISHER:

Publisher:- Historical Papers, William Cullen Library, University of the Witwatersrand
Location:- Johannesburg

Â©2010

LEGAL NOTICES:

Copyright Notice: All materials on the Historical Papers website are protected by South African copyright law and may not be reproduced, distributed, transmitted, displayed, or otherwise published in any format, without the prior written permission of the copyright owner.

Disclaimer and Terms of Use: Provided that you maintain all copyright and other notices contained therein, you may download material (one machine readable copy and one print copy per page) for your personal and/or educational non-commercial use only.

People using these records relating to the archives of Historical Papers, The Library, University of the Witwatersrand, Johannesburg, are reminded that such records sometimes contain material which is uncorroborated, inaccurate, distorted or untrue. These digital records are digital copies of electronic documents and the information contained herein is obtained from sources believed to be accurate and reliable, Historical Papers, University of the Witwatersrand has not independently verified their content. Consequently, the University is not responsible for any errors or omissions and excludes any and all liability for any errors in or omissions from the information on the website or any related information on third party websites accessible from this website.

DOCUMENT DETAILS:

Document ID:- AG3298-1-135

Document Title:- Tembeka Ngcukaitobi Interview

Author:- Legal Resources Centre South Africa (LRC)

Document Date:- 2007