

**Franny Rabkin    Constitutional Court Oral History Project    13<sup>th</sup> January 2012**

Int      This is an interview with Franny Rabkin, and it's the 13<sup>th</sup> of January 2012. Franny, thank you so much for agreeing to participate in the Constitutional Court Oral History Project.

FR It's my pleasure.

Int      I wondered whether we could start by talking about early childhood memories, where you were born...family background, and also some of the experiences that may have given you a sense of social justice and led you to a legal trajectory?

FR Okay, well, it's quite dramatic. I was actually born in prison. My parents were in the underground for the South African Communist Party and the ANC and they were arrested when my mom was pregnant with me. So I was born in October '76, my mom was in Pollsmoor, and then spent ten days in prison with her until she was deported. Because my mom was actually a British citizen. My dad stayed in prison for...he was sentenced to ten years. He ended up serving seven. So we went to...we were deported to the UK, we were there for a couple of years and then we moved to Mozambique where my mom continued to work for the ANC in exile. And that's where I grew up with my older brother, Joby (Rabkin).

Int      And your dad served seven years, did he join you after that?

FR      He did, he came to Mozambique, but he died two years after he came out of prison. He was in the ANC's training camps in Angola and he died there.

Int      I am sorry....At what point did you become aware of having been different and having a different life from other people in South Africa, other whites in South Africa?

FR      Really only when I came home. I mean, when you grow up in an exiled community, all the kids are really in the same position as you. Everyone had a parent who was in prison, or a parent who had been killed, or whatever the case may be. We were all sort of in the same boat in that sense, so it wasn't considered...I didn't feel like the odd one out at all, I just felt like part of everyone else. When I came home, I was confronted with just the madness that was South African society at the time and that was a very difficult period for me. That's when I had to deal with the reality. Like we'd all been fighting against racism and apartheid, but it wasn't something that I'd actually lived.

And then I was plunged headfirst into this country, in 1990, and I struggled to...because, you know, you're raised to believe it's home when you're in exile. The reason why you're not really part of any other of the societies that you grew up in is because this is home, that's what's sort of taught to you. And then you come back and it doesn't feel like home at all. So that was a tough one. And I was thirteen, so I was also just being a teenager and all the angst of teenage life.

Int So when you came back it was 1990?

FR Ja, September 1990 I came back.

Int I wondered about the idea of home and belonging, growing up in England and then Mozambique, etc...

FR Well, England only two years. I really grew up in Mozambique and Zambia. I was in Mozambique for eight years, and four years in Zambia.

Int Right. And how did your mom explain to you about being South African and why it is that you were in exile? What were the narratives and discourses at home?

FR Well, it wasn't really something that was sort of...we were sort of sat down and explained to. But the basic narrative was, we were fighting injustice, we were...and we were going to go home at some stage. And I was raised in a very political home. I grew up with constant arguments about politics and the political machinery and the military...like all these sort of internal ANC debates. That's what I grew up with, every night, there was always about ten people around our dinner table, comrades from different places: Swaziland, just come out the country, going to Lusaka, it was one of those things. And that's what I grew up listening to. And I felt very, even as a child, committed to the struggle and part of it. The ANC was my family, I knew nothing else. I still feel that way. It's like there's a particular culture, an exile culture, which is, I don't know if it's the South African culture, it's one of our cultures, but it's very different to the sorts of cultures you find inside the country. You can...when you meet another person who grew up in exile like you did, there's a lot that you can identify with, that you can't identify with other South Africans. And we also had...I mean, there was this thing called Pioneers, which was like sort of...I don't know how...I suppose you could describe that as the ANC form of Sunday School (*laughs*). It was where you were taught freedom songs and how to recite the Freedom Charter and the history of South Africa, and what the struggle was all about and all those kind of things. Gumboot dancing, cultural stuff, you know. But it was such a strong identity. I remember in Maputo we went to the International School, and there was a sort of festival thing where we all...all the people from different countries had to put on their

cultural dress and say, I come from Zambia, I come from Nigeria, I come from Finland, or whatever the case may be. And we said “we come from ANC”. Like we didn’t even say we come from South Africa. That’s how strong as a community we were.

Int I’m also curious about race, how did you negotiate race during this period, given that you were not a majority?

FR In exile?

Int Ja.

FR You know, it was...there was...race was only something I really had to deal with when I came home. I had no...I just knew that racism was wrong, I knew that that’s what we were fighting against, but in terms of impacting on me, it really wasn’t...and there was also, post-revolution Mozambique was an incredible place to grow up because Samora Machel and Frelimo had a very different approach to race than what we had with the rainbow nation, whatever. Their approach was, if you’re Mozambican, you’re Mozambican. If you don’t want to be Mozambican, get out. So all the Mozambican white people were rabidly pro the revolution, pro Frelimo, and all the white people I grew up in the ANC, it was people like Joe Slovo, and Ruth First and Ronnie Kasrils and whatever, and all of them were part of the struggle and part of the ANC. So non-racialism was something we lived. And it was forged through struggle. Like I think, you know, probably when I think about it now, people who came out of the country, probably had all those racial issues or hang-ups or whatever it may be, but when you’re in...when your lives are in each other’s hands, as it was the case for the ANC in exile, then those things, you know, they become sort of irrelevant. And that was the culture I grew up in. So when I came home is when I had to deal with being white and what it meant. And I’m still dealing with it. I think it’s something that, as South Africans, we all have to deal with on a daily basis.

Int I’m curious about when change/ transition happened, how did you understand it? Did you think that it would happen in your lifetime?

FR Well, yes, I mean, three years before the ANC was unbanned, my mom said to me, we’re going home in three years. She was guessing, but it was a good guess. We knew that it would happen. I wish that my dad had been around to see it happen. There were a lot of comrades who died, who I wish they’d been around to see it happen. But everyone knew...I mean, in the eighties, it was like, we were close and everyone could feel it.

Int And coming home, I know this was a difficult period for you, in terms of your memories, what are some of the initial memories about coming back to South Africa...coming to South Africa?

FR Well, so we got on a plane, and I always like, at age thirteen, I was like a little Communist. I saw myself as a very militant revolutionary, so in honour of coming home I had my Che Guevara hat with a red star on it and we pitched up at the airport. And we flew on the plane and my mom...I'd been here to visit my father in prison. We used to come twice a year to visit my father in prison. But that was very different to coming home. When we'd arrive, we'd go every day to see my dad, and we'd come...and all I really remembered of South Africa was the prison, the long trip from Jo'burg to Pretoria, because he was in Pretoria Central, and the mall. I think it was Sandton that my grandmother used to take us to.

Int Oh, so you had been back?

FR I had been back, but it was, ja, as I said, just to visit my father in prison. There wasn't really...we used to sometimes stay with Ilse Fischer and her family, and sometimes in hotels. But yes, I mean, the whole thing was dominated by visiting my dad in prison, I didn't really have much else to do while we were here. So we arrived at the airport and my mom went up to the immigration and said, yes, hello, we're returning exiles. And the expression on the face of the immigration guy was like, phew, this is the last thing I need. So then he took us off, and we had to wait, and there was a whole thing. Because my mother by law wasn't allowed to come back. She'd never been able to visit my dad in prison, or anything like that. So it was her first time back, she was really excited. And then they came, they let us through, it was all very non-eventful, and Jeremy Cronin and Gemma Paine, his wife, came to pick us up. And we were back. We stayed in...our first house was in Yeoville, Hopkins Street. We were staying in...there was a comrade who was studying overseas or something, we stayed in her house. And ja, life in South Africa started.

Int *(laughs)* I like the way you say that.

FR Well, it was, ja...I wasn't expecting...you know a lot of...at the time, if I'd known, a lot of my expectations of this country were completely off. I really had to adapt, and it took me a long time, so...

Int I wondered, in terms of a young person, teenage years, going to school, also a school that probably was majority...

FR Actually I went to Sacred Heart.

Int It was mixed...

FR Was mixed. You know I was so clueless. In my school in Zambia, there had been...obviously kids sort of divide into groups, but in my Zambian school there were the cool kids and like the nerdy kids. And those were the two groups, and I was part of the cool kids. And when I arrived at Sacred Heart I was looking for the cool kids. I was so clueless, I didn't realise...I didn't see race, so I didn't see that there was actually the African kids and the Coloured kids and the Indian kids, and the white kids. And those were actually the groups of how it was divided. And the first group of people who made friends with me were the white girls. And I became friends with them. But I couldn't identify with them at all, I really struggled. I didn't feel part of them. They were all on diet, I'd never even thought about being on diet. I grew up listening...well, in Zambia the cool music was all sort of black American music, Hip Hop, and R&B and stuff. That's the music I liked. It wasn't the music they liked. And it was a very racially divided society, and it took me about a year to realise that, oh, these are the white girls, because I just couldn't see those things at all. By the time I got to matric I had sort of made other friends like, sort of the misfit kind of white kids and then I made friends with also the black kids at school. But by that stage I was also sort of...I still, I was having a bit of an identity crisis but I didn't realise it at the time. But I was just really unhappy. I hated the uniform, I hated the...Sacred Heart was also a weird school because it was sort of, on the one hand, like this lefty progressive kind of place, and on the other hand, this strict Catholic school, and it had a weird sort of schizophrenia in that school, where you didn't quite know where you sat. Although I must say, Brother Neil, and they were all very nice to me and they sort of looked after me and they knew I was having a bit of a tough time. It was also weird...I mean, one of the hardest things was...I guess...I can sum it up in this...we were having a debate in my history class about whether we should still have sanctions or not. This was about in '92, standard nine. And I was fighting that sanctions should carry on, and other people were fighting sanctions should go now because we're on our way to democracy, whatever. And then someone turned around to me and said, well, who are you to say anything, you haven't even been here? And I just literally burst into tears and I could not stop for the whole day and like I was crying about this thing because it felt like a total negation of everything that I'd lived for. And the truth of the matter was, a lot of South African kids didn't see the fact that like everything we'd done and what we'd been through...because exile was not easy, you know, it was tough. People were dying all around us, there were times when we didn't have food, often times we didn't have water. It wasn't like a...I mean, it was a wonderful time as well in a lot of ways, and I had a great childhood, but it was a difficult fraught time, you know. And I sort of had this vision of us sort of coming home on like a big freedom bus with flags waving and a full-on revolution and everyone saying, yay! And it wasn't like that at all. People were actually quite resentful. A lot of kids were actually quite resentful of me and what I...and I wasn't accepted, I wasn't...I was too different as well. You know, one of the things I realised about one of the

effects that sort of all this racial classification had had on South African society is that, people thought in boxes. So everyone belongs in a certain box. And if they can't put you in a box, then you make people uncomfortable. So the big boxes were the race boxes but then inside the race boxes there were other smaller boxes, and in those smaller boxes there were other smaller boxes. And there's a whole lot of assumptions people make just by looking at you, that trying to place you in a box so that they can deal with you. And if they can't put you there, then it's like you're funny. So a lot of my high school and even my first years of university, I was trying to figure out what those boxes are so that I could understand what people were talking about. Because it's all sort of unsaid, you know. So ja, that was it.

Int When the person who told you that, how would you know, you haven't been here, was it a white or a black person?

FR It was a white person. But he apparently said to me afterwards, because I went to confront him about it, he said that, this is what all the black kids in the class were saying, but they didn't want to say it out loud, and he was just voicing what everyone else was saying. So that also felt quite crap.

Int Do you believe that?

FR I did at the time. I mean, also the thing...like private schools...I once said to my mom, I wish you'd just put me in a township school. Because private schools were also, the kind of black kids that went to private schools were, sort of the elite and not necessarily political. Business people's children and they had also sort of...they, you know, they were just ordinary kids, they weren't necessarily politically active. And I was expecting to join COSAS (Congress of South African Students), and we'd like...I stood for the SRC (Students Representative Council) and I got onto the SRC (Students Representative Council) and I was like, right, now we're going to join COSAS (Congress of South African Students) and we're going to join all the township schools and their marches, and there was none of that, no-one would accept that. It was all those kind of little things that just sort of were hard lessons for me. But I'm glad that I did it, because like my older brother, he left Zambia to go to live with my grandmother in the UK before we were unbanned, and so he hasn't really come home. I mean, he comes home to visit us but he hasn't really come home. And I was saying to him that even though it was tough I'm glad I did it because now I really feel like a South African. And that's important to me because it's what I am. Even though you have to deal with all these things and like it's not easy being a South African, I'm sure you know, in a lot of ways, but that's what we are, so we have to be that, if you know what I mean.

Int It's interesting...the separation from your brother, how did that affect you?

FR You know, my brother is still my best friend, and we were always best friends, and he used to protect me from everything. He was very unhappy in Zambia, we'd just lost my dad, we were half underground in Lusaka, so we couldn't really have friends come home, we had to lie about how my father had died, we had to lie about my mother being ANC we had to say to friends that she was a teacher. We couldn't say she was in the ANC, it was all that kind of thing. And my brother couldn't cope with it, he was very close to my dad. And I think the loss hit him harder than it hit me, and he just had a really hard time. He didn't make friends at school the way I did and he wanted to go. And I think if my mom had known we were going to be unbanned so soon after he left, she would have said no. But we didn't know for sure what was going to happen, so she said, okay, go. And when we were unbanned he was just about to do his last year of GCSEs, so then it was like, well, he's finishing school, let him finish. And then it was like, well, you've done GCSEs, it doesn't quite match with matric, so do your A levels. So then he did his A levels. And then he got into Oxford. So it just kind of carried on, so he never came home. But I've never...my mom is very strict about making sure that we always see each other, so that we spend...we see each other at least twice a year, for long periods. So it didn't affect...but I think if he had been around it might have been easier for me.

Int I also wonder in '94, what your memories are of change?

FR '94 was a great year. It was my first year of university.

Int Where did you go?

FR I went to UCT (University of Cape Town). And it was finally my moment, I was eighteen now, so I could...actually I was only seventeen, because I didn't vote in the first election. But I was...I joined...first go I joined the ANC Youth League, I joined the Young Communist League, I joined the Women's League. It was like, now I can be active because I'm old enough and I'm at university. And I was very involved in those things and it was just a really exciting year. It was just...ja, we knew it was coming...it was a bit lousy to be in Cape Town because it was the one province that like the ANC didn't win. Despite all our campaigning and I was involved in all that sort of thing. I also, during my school holidays, I worked...there was a campaign called the People's Forum Campaign that the ANC did where the leaders would travel around the country and just listen to what people wanted to say, but there was also ads taken out in newspapers, like what do you want your new government to do? And my first job ever was sorting through those things and compiling a database of what people wanted and stuff. So I was in the office during, I think, it was...I think it was the school holiday before I started at university. And ja, I mean, it was great. And then on inauguration day, I got really pissed (*laughs*). I was so

excited, you know. And in fact it was...but also I was really sad as well, because I really wished that my dad had been around and I really wished there were so many comrades who, you know, gave their life for this day and they weren't there. So every big event like that there's always this element of sadness on our part of people who should be here to see it, who are not here to see it. But at the same time it was also a wonderful day. And I walked into...it was quite funny, I hadn't really made any friends...well, a few friends from school and stuff, but I walked into the TV room at my res, Tugwell, and opened the door and said, "Isn't it wonderful? We're free, we're free!" And that's how I made my first friends because all these people were looking at me, like, who's this white girl going crazy over the inauguration of (Nelson) Mandela? So ja that was that day. I mean, I remember just at a given drop of a hat, people would start singing, like anywhere. I was once waiting for a Greyhound bus in '94 to come home to Jo'burg. And we were all standing and waiting with our bags, whatever, and someone just started singing a freedom song and everyone just joined in; it was like such a great year in that sense. So ja...

Int Did you immediately decide that you wanted to do law?

FR I...ja, I mean, my reasons for becoming a lawyer were sort of a bit vague. Partially it was because (Oliver) Tambo had been a lawyer, and being a lawyer and being an activist seemed to go together. Partially it was because during my first three years at university I finally found my space in this country and I was really enjoying myself, I made really good friends, and we were all at university, and I finally felt sort of at home and I was really enjoying that, so I wanted to stay at university for longer. Partly it was because, you know, I was interested in it, especially with the Constitution and everything like that, and how as a lawyer you could actually combine your work with doing something for the new country. So those were the reasons.

Int So in terms of studying law at UCT (University of Cape Town), what were your experiences? Did you find it progressive? Did you find that aspect of the law hadn't been taken aspects of South African reality into account?

FR UCT, it was liberal. I wouldn't call it progressive, at least not in my sense of progressive. It was very Cape Town. It was sort of...we had...I mean, we had, I think when I studied constitutional law it was the first...I started my law degree in '97, so I think the new Constitution had only been around for like a year, so it was like an exciting time to study it and there were a lot of questions that hadn't been answered yet in terms of...like there had been no jurisprudence on certain things yet. But, I mean, there was also...there was the constitutional law, admin law, labour law, customary law, and then there was like commercial law, insurance law, persons, succession, and they were kind of quite separate. Although there was a lot of work being done by the academics as to how they would impact on each other. So, ja, I wouldn't say it



was rabidly progressive, but I...we had...I was in the Black Law Students' Forum and there was a lot of tension in my class because it was when law firms were trying to...well affirming people. So there was a lot of tension between the white students and the black students about who was going to get articles, and there were some incidents, which were very ugly.

Int Such as?

FR There was one incident after we had a law school Ball, you know, the final year ball, whatever. And after the ball pictures were put up...you know, it's like a matric dance, everyone's picture with their date and whatever, and they were put up in the foyer. And these two white boys were overheard saying, calling one of the African girls in our class, oh, she looks like a monkey. And that caused a whole furor. And these two white guys...because there was a whole debate about whether the dean, he was Professor (Hugh) Corder at the time, had taken it seriously enough, or too seriously. At first he hauled them into his office and he gave them hell and whatever, but I think at the end it was...there were only three people there, so it was two people's word against one person, and nothing could really have happened. But they were quite scared at the beginning of the thing and they came to me, saying "Franny, you know, we're not racist and this thing is wrong, and please intervene". Because I was sort of the only white person who was really friends with the black kids in the class. It was also very divided, and it carried on into articles. Only at the Constitutional Court was there a different kind of environment. And I just said to them, "look, I'm not defending you". Because I knew that...I mean, I thought they had probably said that, because I knew those guys, you know. But there was also like, I mean, just in general at the university in those days, there was a minority of black students, especially African students, so there were a lot of issues, broadly speaking, that we were sort of addressing: exclusions, admission criteria. I mean, that's still going on today. I read about it in the paper that UCT (University of Cape Town) is embroiled...like their admissions policy has always been criticised, so it's an ongoing thing, but ja, it was divided.

Int I wonder, you mentioned Hugh Corder, he was involved in the Bill of Rights, I'm wondering how much of that filtered down to you in the class?

FR Well, he came in, there had been...I can't remember what incident prompted it, but he walked into one of our lectures and we were in final year, and he said, I will not tolerate any racism in this school. And he was extremely strong about it. And we felt really proud of him. But then when this monkey incident happened, there was a feeling amongst some people that he had let down the black students. And that when push came to shove he ended up sitting on the fence. I don't know if it was fair. I wasn't in the workings of it, so I don't know if it was a fair criticism, but there was that feeling among some black students certainly. He was a great admin law lecturer. He lectured me in admin law. We

had Professor (Hugh) Corder as our admin law lecturer. We had Halton Cheadle for labour law. We had Dennis Davis for advanced constitutional litigation, which was great. We had Saras Jagwanth for constitutional law, she was also very good. I don't know where she is now but she was a good lecturer. So we had...I mean, those courses, we had nice teachers.

Int I'm also curious, in terms of your choice of coming into the Constitutional Court, at what point did that transpire?

FR Well, you know, I mean, I didn't get like firsts all the way, so when applied, I had always wanted to but I thought, I wouldn't get a chance to come because, you know, it was for the top achievers who came to the Constitutional Court, and I didn't want to do articles, I wasn't quite sure what to do with myself afterwards. So I just sort of came home and got a job at South African History online, doing research into South African history. And then I think it was Albie (Sachs) who...you know, I grew up in Mozambique and I knew Albie (Sachs) all my life, and he encouraged me, he said, just apply. It was a bit of a funny story because what Albie (Sachs) didn't know...so I sent him my application, and what Albie (Sachs) didn't know is that I had just started going out with his son (Michael Sachs). But we didn't want to tell him because I didn't want...I thought it would prejudice me because Albie (Sachs) would feel like he can't, you know, have me, because it would look wrong, or maybe he was biased in my favour or something like that. So I made Michael (Sachs) promise not to tell him until I'd been accepted or rejected at the Constitutional Court. It was only a few weeks, because I put in my application and then so ja...so then...so I was surprised. I got interviewed by Justice (Pius) Langa, Justice (Albie) Sachs, Justice (Laurie) Ackermann and Justice (Kate) O'Regan. So it wasn't...and that felt really good because I thought...I didn't also want Albie (Sachs) to take me just because I was like his ANC child or whatever (*laughs*). Because there is that, in the ANC, all parents are your parents, and that's the way we grew up, so...so ja, I came and had my interviews and I was happy because I wanted to go with Judge (Pius) Langa and that's who I got.

Int Tell me about your interview with Judge (Pius) Langa, and the others?

FR Judge Langa's interview, you know, on first impression he's quite scary. He scared me. He's very dignified and slightly aloof, and the first thing he asked me was whether I was related to Hilary Rabkin, who is my aunt, and she worked for IDAF (International Defence and Aid Fund for Southern Africa) in London. So IDAF (International Defence and Aid Fund for Southern Africa) had a lot to do with NADEL (National Association for Democratic Lawyers). And I was surprised because, you know, my parents...people say, are you related to Sue Rabkin, are you related to David Rabkin? But no one had ever asked me before whether I was related to Hilary Rabkin, so I was quite charmed by that, I was like, yes, she's my auntie. And he said, "How is she?", and blah blah blah. And then...what else did he ask me...he asked me about

why I want to work at the Constitutional Court, how I feel about the Constitution? More like personal kind of questions. He didn't ask me, you know sort of...he didn't test me or anything like that. Which judgments I really liked? Which judgments I didn't support? You know, those kind of things, the previous judgments of the Constitutional Court. Judge (Kate) O'Regan's interview, she also terrified me. But she was really sweet. Judge (Laurie) Ackermann's was bad because he...you know, he'd written the big judgment on substantive equality, but I was so nervous when I got into his chambers, that I started telling him what substantive equality was. And afterwards I walked out and I thought, how can I be telling Judge (Laurie) Ackermann what substantive equality is when he's the one who wrote the judgment. Like I was saying, no, no, substantive equality is this, that, that and the other. I didn't think he was going to choose me at all (*laughs*). And Judge (Albie) Sachs, obviously, was a very nice interview as well. But I was really happy when Judge (Pius) Langa chose me because that's where I wanted to go.

Int Really? Why is that?

FR I just...he was always someone I admired and, I don't know, I actually...I wonder why, I just liked him. We had an immediate sort of...even though he scared me, but I...

Int Rapport.

FR Ja, there was something that I just thought, this will...and since then he's become almost like a father figure to me. From the first time I met him, so...

Int Tell me about being at the Constitutional Court? What was your experience?

FR Well, I mean, I still look back at that time as the best job I've ever had. It was a really...it was a really sort of positive environment. Everyone caring. And after I left the Constitutional Court, just to show you what I'm saying, and I went to do my articles at a big corporate law firm, it was a huge culture shock, because it's a very corporate environment, like I couldn't cope with the idea of law as a business. Like what we were doing at the Constitutional Court was not about law as a business. It was about building a new society. And that whole sort of culture infused everything we did, everyone was extremely respectful to each other, from the cleaning lady to Justice (Arthur) Chaskalson, it was very democratic. We all kind of...it was a very idealistic kind of environment and I really enjoyed it.

Int And the year was?

- FR 2001. The second half of 2001, and 2002. I was here for a year and a half.
- Int And I wondered, you were in Braampark, what are your experiences and memories of being in Braampark?
- FR I liked it there. I mean, it wasn't as beautiful and everything as it is here, but there was still the art. Back then, we as clerks had to do the art tours. They didn't have like trained professionals. And Judge (Albie) Sachs used to give us like lessons on how to do it; what this painting means, and what that painting means, and then we had to like repeat it to all the visitors from America and Holland and India, and wherever. I don't know, I suppose as a building it didn't have the kind of gravitas that a Constitutional Court should have, but it didn't need it because the gravitas really came from the judges and from the Constitution and from what the Constitutional Court was doing at the time. So, I've never worked here, so I don't know what it's like to work here, but I didn't...ja, it was fine.
- Int In terms of your chambers and working for Justice Langa, can you talk a little bit about that, what the chambers was like, what was the work ethic...?
- FR Ja, the work ethic, ja. Judge (Pius) Langa, he was a slave driver, hey. Okay, so, in Braampark we were in the one corner. It was Judge Langa's chambers and then Annette (Vosloo) sat outside and then the senior clerk was next door to him and the junior clerk was all the way down the corridor because there wasn't enough space for everyone. So when I started I was on the corridor and then when Likhentso (Jankie), who was my first co-clerk, left, I moved into her nice office, and the new clerk was in the one down the corridor. Ja, so that's how it was structured. I remember there was a one Saturday night, I was sitting there, and I think it was about half past eleven at night, doing changes to a judgment, thinking, gosh, I'm such a grown-up now. Like Saturday night before I would have been out at a party, I could never have believed that I'd be sitting working, half past eleven on a Saturday. Judge (Pius) Langa worked very hard and he expected nothing less from his clerks. He told me once...he said, "How are you?" I said, "I'm a bit tired, judge". He said, "There's no such thing as tired in these chambers". And that was that. And we never had tired ever again (*laughs*), no matter how tired I was, there was nothing like that. But Judge (Pius) Langa also worked at night and I'm at my best in the mornings, so it was hard. I used to come in early in the mornings and work, and then I'd have to stay and work with him. And with Likhentso (Jankie) or Mox, whoever was the other clerk, till quite late at night. And weekends and all the time.
- Int What were the key judgments that you felt were very important?
- FR When I was there?

Int Yes.

FR Well, there was the TAC case (*Minister of Health and Other v Treatment Action Campaign and Others*) that was huge. And it was a tense time because it was like...it was (Thabo) Mbeki's thing. And for me it was hard because it was the first time the government of the ANC, that I'd grown up with, had done something that I just couldn't justify at all. And I kept looking for their case. And there wasn't one (*laughs*). So that was a big one. And it was...ja, it was...and then there was for me, there was Islamic Unity Convention (*Islamic Unity Convention v Independent Broadcasting Authority and Others*), and that was our case, it was Judge (Pius) Langa's case, and that was, I think, the first Constitutional Court case that dealt with the hate speech, like the relationship between what's carved out of the constitutional right to freedom of expression and what's kept in. And we had to look at that, how that works. So I really, that was a big case for me in terms of my little contribution to the jurisprudence. There was also the Jordan ((*S v Jordan and Others Sex Workers Education and Advocacy Task Force and Others as Amici Curiae*)) case, which I hated the judgment that came out.

Int Why is that?

FR I thought it was a terrible judgment. The majority judgment was bad enough. Even the minority judgment, I didn't really like. I don't know, I thought that that...I thought it was overly executive minded.

Int Did you get a sense that the morality issues were at play?

FR No. To be fair, I don't think that was what it is. I think it was more to do with the separation of powers, with the majority decision that this is a policy choice. We can't make policy. It was a kind of along those lines. But I didn't agree with it. I thought we were leaving people who are really vulnerable on a ledge.

Int I wondered, Franny, in terms of your Chambers, what reputation did it have amongst the other law clerks and their Chambers?

FR Ja, there was a lot of that, hey. You mean us as clerks, or my judge?

Int No, as clerks?

FR I had a reputation for being like...well, not in the first...there was a very different...it was funny, the first six months there was a very different atmosphere amongst the clerks than in the second year that I was there, and

it was really about personalities. So in the first year I was much more at home. there were some...it was a great...it was a really dynamic group of clerks in my first year...

Int 2001?

FR 2001. So there was like, there was Tembeka Ngcukaitobi who was clerk to Justice Chaskalson, who was brilliant, and he used to sort of lead in clerk's meetings. There was Sibongile Ndashe who was another like great one and Maryanne Angumuthoo, Sello Chiloane, my co-clerk Likhensto Jankie. There were some really dynamic, interesting people, and who you couldn't...ja...how do I describe it? They weren't so caught up in the...I don't know how to put it...maybe just open-minded. The next year was different. The next year there was some tension amongst the clerks, there was some racial tension amongst the clerks, and I was seen by some people as being like sort of this ANC hack, which I was quite annoyed about.

Int What were the racial tensions? What were the issues?

FR I can't remember, it wasn't very serious, but, you know, it happens all the time in South African society, like, white people no matter how committed they are to equality, still have been raised as white people, and they tend to be a lot more confident, a lot more articulate, a lot more outspoken. It doesn't mean they're cleverer at all. But we had some...those kind of people who dominated and it caused some resentment because they dominated so much. And to be fair to those people, who are my friends now even though there was tension at the time, I don't think they had any intention of doing it, or whatever, but it is what happens in this society, like when you've gone to the best schools and your parents are big lawyers and you've gone to the best university, you have more confidence in yourself and you're more outspoken. Whereas the year before people like Tembeka Ngcukaitobi and Sibongile Ndashe were very outspoken and they were very confident, so it didn't have that sort of racial aspect to the whole thing. I don't know, ja, it was weird. You know most of the judges would have like a...well, there would be two clerks usually and one of them...different judges had different sort of tastes in who they chose, but often you'd see like one white clerk and one black clerk. Not all the time, but often. And then it would also be about...there was a lot of like, who's closer to their judge, and all these weird kind of things, and who has more influence over their judge. And like people who came here, they're top achievers all of them and they were all very ambitious and they all wanted to make their little mark on the jurisprudence of the Court, and you know we were also all very young. And not as mature as we would be now and, you know, so there was...but I wouldn't have taken them...they were there but they weren't the dominant memory that I have. The dominant memory I have is a really good one, where...I mean, compared to what we experienced when we went into corporate law, when it comes to things like race, this was like a walk in the

park. Like once you get to big law firms and the way that people are treated in those firms, especially black people, the Constitutional Court was like dream world. But of course we were all just out of varsity, and ja, we were very young.

Int I also wondered, there's always this idea that certain Chambers work harder, certain judges make certain law clerks work harder, did you get a sense of that each Chamber had a different reputation?

FR Well, I mean, the Chief Justice's chambers had a whole extra load, and the Deputy Chief Justice had...because there were certain things that the Chief Justice and the Deputy Chief Justice did on top of their normal work. So for example, I had to...there were a number of letters that used to come to the Constitutional Court from people who were saying...they weren't in the form of an appeal or a case, but Judge (Pius) Langa insisted that each one of those letters get treated properly and a follow-up and a response and that was one of my jobs. I had to record them, I had to draft, like this is, okay, you should actually be at the Human Rights Commission, or this is what can be done for you, or referring them to the Legal Resources Centre, whatever the case may be, like whoever is the right person to help. So that was...but, ja, I mean, I personally, I don't know if other people thought that other chambers worked harder or less hard, but everyone at that Court worked very hard. There were different, in terms of reputation, like, Justice (Laurie) Ackermann always had a German...he was very interested in the German Constitution so he often had a German intern, and they were always researching sort of that law. Justice Goldstone was very interested in international criminal law and a lot of his clerks have gone on into sort of that area; that was their reputation. Justice (Sandile) Ngcobo was a slave driver. His clerks suffered. You had to have a very strong constitution to be Justice (Sandile) Ngcobo's clerk. Judge (Albie) Sachs's clerks like worshipped the ground he walked on, all of them. And Judge (Tholie) Madala's clerks...I mean, Judge (Tholie) Madala was the sweetest, loveliest person. Everyone loved him. But everyone worked hard. I don't think there was...maybe other people think so but I don't remember that at all.

Int ...There's been some criticism that the fact that the judges all had a certain sort of political outlook, did you find that an issue? Did you think that was a concern? To have a Bench that where people had been anti-apartheid...not all, but the majority had had an anti-apartheid and very progressive...?

FR I didn't see it that way at all. I mean, Judge (Johann) Kriegler, Judge (Laurie) Ackermann and Judge (Richard) Goldstone had been apartheid era judges. They may have been the best of the apartheid era judges, but they had been apartheid era judges. I didn't see them as progressive in the way that Judge (Albie) Sachs or Judge (Pius) Langa were. Not that I didn't respect them, and, you know...but I didn't see...I actually saw...what I liked though was that

every...there was no...it wasn't like the American court where sort of political allegiances affected how judgments went. And there was very much a...sometimes these judges would concur and sometimes those judges would dissent...you couldn't actually discern a pattern as to...in fact, I'd like to go back and read all those judgments and see whether looking back, it's one of my things that I want to do at some point in my life as a journalist, is to see whether you can, now that you look back, to see if there's a pattern. But I didn't see it at the time and...but I didn't think that all the judges were as progressive or as left wing as each other.

Int Interesting. When you left what were your ambitions, what did you decide to do?

FR I didn't really know, I mean, I was very...I actually, I was thinking about it the other day, I took some...you know, everyone...after the ConCourt, some people went straight to the Bar, some people went to do their articles, some people went to NGOs, some people went on scholarships and became academics. I was advised to do my articles and to try...

Int By who?

FR By a lot of different people. like my aunt who also had been a lawyer, by...I can't even remember, but a bunch of different people had said to me, do your articles. And they said, do your articles at the best firm you can find. So I applied to all the big firms and I went to a big firm with a very good reputation. But I think that that was actually a bad move on my part because I hated it. Maybe if I'd gone to the Legal Resources Centre or if I'd gone to the Bar or something like that, I would have been happier. But even then, to make it at the Bar, you need a lot of confidence, and I never had that con...I don't think I would have been okay in that environment. So I went and I did my articles and I became quite a good commercial lawyer, but I hated it. So I left and I became a journalist. So now it's like I write about it but I didn't practise anymore.

Int Did you do articles for the two years?

FR Two years, and then I practised for another two years.

Int And it was at the Bar?

FR No, I was at the attorney's firm. I've never been to the Bar.

Int And then after those two years, do you immediately become a journalist?



FR Well, I had decided I was going to change. I wanted to be a journalist. I tried to apply for internships at the Mail & Guardian and Avusa, and they all told me I was...what did I want to be...like, they couldn't understand what I was trying to do and they said, these internships are for journalism graduates. So I realised that I would have to go back to university and study journalism. So I started saving, and I saved for about a year, and then there was a scholarship advertised, the Ismail Mahomed scholarship for lawyers who wanted to be journalists, because I think they'd realised that there was a problem with the way law was being reported in South Africa, and they wanted to change that. So I applied for that scholarship and I got it, and I went to Wits for a year and I studied journalism, and then got a job at Business Day and that's where I am now.

Int You also have been given an award, I wondered whether you could talk about that?

FR Two.

Int Great...

FR Ja, I mean, it's funny, when we...it's true that the way courts are reported is really bad, and the way legal issues are reported is really bad, and the way judicial politics is reported is really bad. And I think that was what that scholarship was all about. And there were three of us who got that scholarship. It was me, Kim Hawkey and Sello Alcock. And all three of us were in the same year. And when we left journalism, Sello went to the Mail & Guardian, Kim went to the Sunday Times, and I went to Business Day. And it was a great year because both of them were really good, and we had...so we kept each other on our toes, in a way, right, and we were always stressing about who was scooping each other because scooping is a big thing in journalism. And there was this generation of legal reporters who sort of, the ones who were seen as really good, like Carmel Rickard and Jonny Steinberg, they'd all stopped and there was a kind of...there was a real gap, and we jumped in there and we were friends together but we were also in competition with each other and it was a great year. Then Sello (Alcock) decided he wanted to finish his law degree, so he went back to varsity, and Kim (Hawkey) went to become the editor of De Rebus. And I was kind of like, it was just me now. So it wasn't...I mean, I don't want to take away from myself for winning the awards but it wasn't a hard thing in a sense because there really wasn't that many people I was up against. The stuff that I write about, there aren't that many people who actually write about what I write about.

Int What do you write about?

FR Well, I write about...okay, so my particular niche, I write more broadly than that, but my particular niche is where law and politics intersects. So I write about the judiciary. I write about the legal profession. I write about court cases where the separation of powers and issues like that are. And I have written about Judge (John) Hlophe till I was nauseous. Like that happened, that whole scandal with Judge (John) Hlophe and the Constitutional Court judges happened, I think, in my second month at Business Day...

Int 2008?

FR Ja. And I've been reporting it since it broke, like the ins and outs of it.

Int How do you think that was handled by the Constitutional Court?

FR I think the Court made some mistakes, hey. I think that they could have waited a few hours before they publicly announced; like just to give Judge (John) Hlophe a bit of time to collect himself.

Int Why was that necessary?

FR Just out of...to be courteous. I mean, he was...he got the facts from Justice (Pius) Langa, and I think like, four minutes later, every journalist in the country was phoning him. So I think they could have done that.

Int Why do you think that it was handled the way it was?

FR Well, I mean, from the evidence that Justice (Yvonne) Mokgoro gave during the enquiry, they'd never had to deal with anything like this before. They were all in a total state about it. Can you imagine the country's future dependent on these judgments that are sitting in front of your Court? The pressure already must have been intense with those judgments. I don't know if objectively the corruption case against President (Jacob) Zuma actually depended on those judgments, but there was a perception that if the Court found one way that would clear his path, and if the Court found another way, that would be the end of him, and that must have been a difficult thing for the judges to deal with. And then to have...I mean, you know, when Judge (Bess) Nkabinde gave evidence at that enquiry, the implication of what she said, which we just can't run away from, is that Judge (John) Hlophe was sent there by the Executive, or someone in intelligence, or whatever it was called. And that is a heavy, heavy thing for the judges to have to take on. So I think they might have been in a bit of a flat spin about it. But overall I think they handled it properly, they did the right thing. I think they did...like they just...here and there, but not, in general, I'm not of that school that we should have sorted

this out internally. There are people who think that like them going to the JSC and making this public announcement was completely the wrong thing to do. I don't agree with that. I think that they did exactly the right thing. If you have a Constitution, which says that complaints should go to the Judicial Service Commission, how can the Constitutional Court do anything else except take the complaint to the Judicial Service Commission. So overall, the ConCourt judges did the right thing, but I did feel for Judge (John) Hlophe in that, like...with that sort of, just...I mean, I'm a journalist, I know what it's like to have to hound someone down and get them to answer difficult questions, and, you know, if he'd had like an hour or two just to steel himself up, it might have been better for him. I don't know.

Int Do you think the politics of the country are relevant or irrelevant to the decision making within the Constitutional Court?

FR It depends on what you mean by politics. I think the broader politics and the sense that we are moving from an unjust society to a just society, we have huge problems that we have to deal with, we have poverty, we have unemployment, we have inequality in education and housing. Those issues are rightfully part of the Constitutional Court's jurisprudence, and I think that's right. The narrow politics as in whether (Jacob) Zuma is going to be the next President or what the battles are inside the ANC, should have nothing to do with the Constitutional Court. And I don't think they do. The only case which I would be slightly...I'm sure, I still haven't made up my mind about is *Glenister* (*Glenister v President of the Republic of South Africa and Others*)

Int Tell me about that...

FR Well, I have only read the *Glenister* (*Glenister v President of the Republic of South Africa and Others*) judgment once and I'm told that I should read it again. But my first impression of the *Glenister* judgment (*Glenister v President of the Republic of South Africa and Others*) is that...it's what Justice (Kate) O'Regan gave a speech recently where she referred to something called...

Int The *Helen Suzman Lecture*?

FR Yes. Where she referred to something called the 'jurisprudence of exasperation'. Where judges like sort of step where they shouldn't step because government is not doing what it should be doing. And I felt that the majority judgment in *Glenister* (*Glenister v President of the Republic of South Africa and Others*) was something like that, because there was an assumption made. Well, let me put it this way, the way I saw it was that firstly it was reading...implying rights into the Bill of Rights which jurisprudentially I wasn't

sure is right. Like a right against corruption, which isn't actually there, and which they're saying is implied. And I thought, once you imply rights into the Bill of Rights there's also a right against poverty surely then, and a right...do you know what I'm saying? So I wasn't sure about that, and it felt forced to me, that they were trying...and it felt like it was sort of...they were trying to fight corruption, which is not actually the Constitutional Court's job. But having said that, I've been discussing this judgment with people for a long time and I do actually want to go back and re-read it, because people who I really respect were saying, you know what, you just need to read it twice, because the first time that is the impression you get. They also got that impression. But when you read it again you realise that the reasoning is sound and it's not actually what I've just said. So I am going to do that. But also then, if that is the case, then that's bad, because you shouldn't have to read a judgment more than once to understand what it means. But that's another criticism.

Int I'm also curious how you think media reporting should be...because early on there was a concerted effort to get the media on board, there was a media committee that one of the judges would be part of, and then there were press summaries. Do you think as a journalist, that that has all helped towards getting it right?

FR I don't find the press summaries helpful whatsoever.

Int Interesting.

FR You've got to read a judgment. It just doesn't work. I know other journalists do find the press summaries helpful and you can see, because their reports are based on the press summary, and it's not good enough. You have to read the judgment. What press summaries do help with, is from the Supreme Court of Appeal, for example, where twenty-five judgments are released in one day and you have to sift through them to decide which one you're going to read and cover. That helps. But with the Constitutional Court we know...and then what summaries do help with as well is researching. Like if you want to find out other, like from looking back, which judgments dealt with the rule of law, or whatever, then the summaries help in that respect. But in terms of reporting on a daily basis...what does help is, what I like about the Constitutional Court is just how open it is in terms of accessing court papers. Because if you phone the registrar's office and you say, can I have the heads of argument, or this application for leave to appeal, it's completely open and transparent. They'll give it to anyone. Which is really important. Because if you read all that stuff when you come to the hearing, you write a better story. Whereas in the High Court, you have to go there, you have to stand in a queue for three hours, you'll ask for the file, the file won't be there, it will be in the judge's chambers; there's no automatic right of access to court papers the way there is at the Constitutional Court. And that's, I think, unfortunate. Because then you have to be phoning lawyers and counsel and please can you give me the

papers, blah, blah, and it's...especially government, I don't understand why government doesn't provide court papers. Because it's their side, like they're only doing themselves good by giving you court papers, because then you can accurately sort of represent their side. But there's some sort of policy decision that they won't give you papers. So then you have to like get sources and do all kinds of back-route things whereas at the Constitutional Court anything you need, they just give you, that's the rule and every journalist gets treated the same way and I think it's a great thing.

Int When you were here as a law clerk, Arthur Chaskalson was Chief Justice, I wondered whether you could talk about his leadership style and how you think that atmosphere was created?

FR Judge (Arthur) Chaskalson, he was great, hey. He was such a humble guy and he set the tone for everyone else. And he always sort of emanated the idea that nothing else matters except getting the Constitution right. So any ego, or any politics, or any whatever, it's not important. Like what's important is this work that we're doing. And, I mean, later I heard about...when I started reporting the judiciary, like how Justice (Arthur) Chaskalson kind of instated a kind of democratic ethos amongst the judges. We didn't know...I mean, clerks didn't go to conference, we didn't...and I didn't have very much to do with Justice (Arthur) Chaskalson when I was a clerk. I just...

Int But what did you hear later as a journalist?

FR Well, I mean, you know, in the culture amongst the judiciary is a very...it's the same as it is in the legal profession...it's quite hierarchical. So the most senior judge walks into the court first and presides and it's all those kind of things. And Justice (Arthur) Chaskalson changed all of that when they got here and said, we're a collective. Every term, the names, where the judges sat, like, was shifted around and it was completely random. And he was, you know, every judge had their strength. Some were intellects of another level. Some had deep compassion, and that was their strength. But Judge (Arthur) Chaskalson kind of combined those two things, I think in quite a unique way. So I think having him as the first Chief Justice made a huge difference to the Constitutional Court at the time.

Int In terms of your reporting, has there been a sense that, because of different Chief Justices, that has impacted on the style and leadership of the Court and the ethos?

FR Well...I can tell you what, like, because I've researched these kind of things in my capacity as a journalist. So I can tell you what that research has shown and then I can tell you what I experienced as a clerk, which is a bit different, right. There was, certainly as a reporter, a difference in between when Justice

(Sandile) Ngcobo was Chief Justice and when Justice (Pius) Langa was Chief Justice. In terms of a leadership style and the sort of atmosphere at the Court. I think the transition between Justice (Arthur) Chaskalson and Justice (Pius) Langa was quite seamless. I think...ja, I think that was quite a seamless one and certainly...you know, people have criticised both Justice (Arthur) Chaskalson and Justice (Pius) Langa for not being strong enough as leaders since then and were admiring of Justice (Sandile) Ngcobo because he was a very sort of strong Chief Justice and looked like he had gotten a lot done. I think that that's unfair criticism. A lot of what Justice (Sandile) Ngcobo got done, he was finalising what had been started way back with Justice (Arthur) Chaskalson and Justice (Pius) Langa. So, ja...so that impression that was sort of in the public I'm not sure about. Maybe I'm biased because Judge (Pius) Langa is my judge and I think he was the best Chief Justice, but I've got no objectivity on that at all. And, I mean, there...under Judge (Pius) Langa there were a lot of challenges. I think also a lot depended on who the Minister of Justice was. From what I hear Brigitte Mabandla was almost like an absentee Justice Minister. And when Jeff Radebe came in, whatever you may say about him, he's quite hands-on and quite like, let's do stuff and let's get things done you know. So that also makes a difference as to what you can achieve. Ja, I don't know, does that answer your question?

Int Sure, sure. There's been criticism that the Court hasn't satisfied or done enough with respect to socio-economic rights, I'm wondering what your take on that is?

FR I don't agree with that, hey. You know, some human rights lawyers think that the world's problems can be solved by court cases, and they just can't. And I'm always fighting with people who I clerked with who are my friends about these things. It's like there are certain battles that...you know, there's only so much a court can do, that's the point that I'm always trying to make. And I don't think...I think that the approach...and I know a lot of people want minimum core...to introduce minimum core into the jurisprudence of the Court. I'm still persuaded by the approach that the court has taken in terms of using reasonableness, and I think it is the right balance between letting the executive and the legislative do what it's supposed to do and the courts doing what they're supposed to do.

Int Do you think that the TAC (*Minister of Health and Other v Treatment Action Campaign and Others*) judgment or the Grootboom (*Government of the Republic of South Africa and Others v Grootboom and Others*) judgment, or any of the other judgments may have somehow overstepped the mark in terms of telling the Executive what to do?

FR No. I think that they were right. The Phiri (*Mazibuko and Others v City of Johannesburg and Others*) judgment is an interesting one in that, I haven't made up my mind about whether that...

Int The water...?

FR Ja. I don't know whether that judgment was overly deferential to the Executive. I'm still thinking about it. But I certainly...with Grootboom ((*Government of the Republic of South Africa and Others v Grootboom and Others*) I think the problem was implementation. And that raises exactly what I'm talking about, about what the courts can really do. The TAC (*Minister of Health and Other v Treatment Action Campaign and Others*) judgment was the right judgment and it needed to happen. And then there was Soobramoney (*Soobramoney v Minister of Health (Kwa-Zulu-Natal)*), which I think was also right, and which other socio-economic rights...I think those were the main ones, so overall I think the Court's approach has been right.

Int What about a case like Joe Slovo (*Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*)?

FR Oh, there's Joe Slovo. I don't know enough about that case. I didn't follow that case, I don't know whether it was right or not. I haven't actually even read that judgment, so I can't answer that. You're right, I should read that judgment. Is that what people are saying that the problem is with Joe Slovo (*Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*)?

Int I'm just curious about what you think. I'm also wondering, in terms of the challenges in terms of transition to democracy and the role of the Constitutional Court, what do you think are the challenges that were then and what are the challenges that remain now?

FR I think there's some really big challenges. And I think the biggest...one of the...gosh, where do I start? One of the challenges is just this country and where we are. It's the inequality, the poverty, like all the...I think that's one of the biggest challenges to...because the thing that we must remember is that it's not only the judiciary's job to create a constitutional society. Every arm of government and every individual, it's all of our jobs to do it. And it's a difficult thing to do in our context because of where we're coming from, and I think that's the first and biggest primary challenge that we're facing. I think there's also a...there's a sense that's growing now that South Africa is being run by a bunch of judges.

Int Where does that come from?

FR It comes from...it comes from a few places. It comes from a few people in government. It comes from a lack of understanding about what the separation of powers is. It comes from a perception amongst ordinary South Africans that

the judiciary is an untransformed institution, and that is a real perception, whatever anyone may say. And the fact that the legal profession hasn't really got behind the transformation project as it should, is adding to that perception. It comes from the media. What I'm seeing now, which I find distressing, is this idea that the courts are where opposition politics happen, or where they're the only sort of harness on this untrammelled power of a corrupt executive. That kind of discourse that is being sort of fanned by the DA (Democratic Alliance) and by white media, is a problem. Because it creates a sort of dichotomy that doesn't actually exist. And ja, I think it's a dangerous kind of discourse. I don't like the fact that the judiciary is seen as somehow in opposition to the democratic mandate of the South African people. It's not. But it's got its job to do, and I think what would really help us in South Africa is, all of us, including, like in terms of institutions, like the media and the judiciary and political parties, everyone...the Constitution gives us all jobs to do, and sometimes that means you're going to clash. But that doesn't mean that you must not do your job. And it doesn't mean that when you do your job you're some kind of like imperialist whatever, you know? And I think there's a kind of lack of understanding that you know, democracy means people...there's going to be clashes between different institutions and stuff. It's like with the press. I think that a lot of the criticism of the press is valid, but it doesn't mean...but that, you know, doesn't mean that we should not be allowed to do our job. Do you know what I'm saying?

Int Sure.

FR So I think that is a challenge for the Constitution. I also think that, you know, this idea that the Constitution is a perfect document is also problematic. Like somehow we are told that to amend the Constitution is a betrayal of our settlement. That's nonsense. And I think there are things that need to be amended in the Constitution.

Int Such as?

FR Well, okay...that whole thing about national legislation extending the time of office of the Chief Justice that should go.

Int You think that's a mistake?

FR I think that that...ja, I think it's wrong. I think it was an amendment that was rushed through Parliament at the last minute and people hadn't thought about it carefully enough. And I think that they need to relook at that.

Int Is that in light of current events?



FR Well, now because of current events, we've had to go back and look at that section, but even at the time when that section was enacted, it was highly controversial. And it was a compromise because they were desperate to sort it out before Justice (Arthur) Chaskalson would have had to have left, and you shouldn't make constitutional amendments in a hurry. It's not a good idea. So I think that needs to go. I think the appeal route in labour law, the fact that you go from the Labour Appeal Court, to the Supreme Court of Appeal, to the Constitutional Court, that needs to change. Because actually I don't think the drafters wanted it like that, I think I was a mistake, a drafting error. I think we need to take the army out of...like I don't think they should have unions. And so that needs to change.

Int The army should have unions...

FR Ja, I mean, you can't have an army with like, protesting outside the union buildings. It doesn't...I think that rights needs to be...I think the army should be carved out of the labour relations, it should have its own thing. Not that I don't want soldiers to have rights or anything, but they're a different kind of species of worker in our society and they need to have their own parallel system of labour rights. I also...I don't know, provincial government, do we really need it? It's just an added expense and there's just corruption there, and I don't even know if we have the...that was one of the...that whole federal structure was one of the compromises made during negotiations. I don't see why we should have to stick with it just because we did it.

Int Do you ever have fears for the future of the Constitution and the Constitutional Court in South Africa?

FR I do.

Int What are they?

FR I fear...what do I fear? I want the Constitutional Court to continue to produce the quality of judgments that it sort of started with. There have been some times where they've even contradicted...two judgments of the Constitutional Court have contradicted themselves and they had to write a third judgment to sort out the contradictions.

Int When was this?

FR It was to do with...I can't remember the names of the judgments, I think it was, *Chirwa (Chirwa v Transnet Limited and Others)* was one of them. It was to do with the jurisdiction of the Labour Court versus the High and those kind of

questions, and literally, if we're honest, I mean, I wouldn't write it in a news article, but if we're honest, those judgments contradicted each other and they were both judgments of the Constitutional Court, and they were very difficult to understand. Like, if you're a litigant, the Constitutional Court judgments should be absolutely clear. Any person should be able to pick up a Constitutional Court judgment and read it and understand it. And I think that...ja, clarity is an important thing. I don't know if we're seeing as much of that as we used to. I have to read and report Constitutional Court judgments in like three hours. So a clear judgment is something that is like a gift. And it's hard when you have a judgment that you can't really like understand what it is that the judgment is saying. But I don't think that...I don't know whether it's fair to say that judgments are becoming less clear, but I think we need to keep that in our heads when we move forward that there's a...apart from being understanding what the Constitution is about and caring about the Constitution and believing in the Constitution, etc, you've got to be able to write a really good judgment because that's what the Constitutional Court does at the end of the day, and that's what's important. Because we all ordinary people have to understand that judgment. So that's one of the challenges that I think we shouldn't forget about in all this. And I do think...I mean, you know there's some people who are saying that there's a clash coming, a huge clash, between the executive and the judiciary, over the Constitution and the separation of powers. I don't know...I think there's tension, there always has been, there always will be. We'll see. But I do worry about it, I worry about it, because I don't want that to happen. And I think that from a lawyer's point of view, if the legal fraternity doesn't properly get behind the transformation project of the Constitution broadly and the representivity issue more narrowly, it's going to contribute to that clash coming if it does come.

Int And you think judicial transformation hasn't happened?

FR It has happened, but it also depends how you define judicial transformation. What I find...what really bothers me about the whole transformation debate, is that the legal establishment – let me call them that that – resents representivity and hasn't got behind it. And it criticises the JSC (Judicial Service Commission) for making bad choices, when the JSC (Judicial Service Commission) has this job to do in terms of the Constitution. And the fact of the matter is, if we don't get a representative judiciary, the judiciary is going to lose credibility amongst South Africans. And we need to have a legitimate judiciary, it's fundamental. So I don't know why we're all not desperately trying...if we want to build the Court and we want to build the independence of the judiciary, we should all be fighting for this transformation in terms of representivity. And I also don't like the way the representivity debate has been framed: that achieving representivity means, by necessity, appointing weak candidates. Those debates need to be separated. Appointing weak candidates does not equate to appointing black candidates. And that's another racist thing that you see happening around you in the legal fraternity, are the black candidates who are appointed in terms of transformation are not

good, they're not experienced, blah, blah, blah. It's not true, in my experience. So, you know, those are kind of what I worry about.

Int ...there's been some suggestion that the first Bench of the Constitutional Court is regarded as the 'glory Bench' and that all subsequent would not compare. Do you get that sense? Is that something's that in the media?

FR I've heard that. I don't know, I don't think so. There isn't...I mean, Justice (Ismail) Mahomed was part of the first Bench, and he was gone even by the time...I don't know who the first Bench is. If you mean like, so it's Justice (Arthur) Chaskalson, Justice (Pius) Langa, Justice (Yvonne) Mokgoro, Justice (Kate) O'Regan, Justice (Laurie) Ackermann, Justice (Richard) Goldstone, and Justice (Johann) Kriegler, Justice (Tholie) Madala. Because (Sandile) Ngcobo even came a bit later, right? So I don't know who the first Bench is, because even whilst I was there, Justice (Johann) Kriegler left, Justice (Laurie) Ackermann left. It's a bit of a funny thing. And I don't think that's necessarily right. I think some of the best judgments that have come out of this Court have come from Justice (Dikgang) Moseneke, who wasn't on the first Bench, from Justice (Sandile) Ngcobo who wasn't on the first Bench. Justice (Edwin) Cameron has written some really good judgments. Who else has come lately? I don't know, I don't think that's fair or right. But it was a great time to work at the Court though, for the so-called first Bench. I don't know if the atmosphere...someone told me that it's not such a cool place to work anymore as it used to be.

Int Why is that?

FR I don't know. I don't know. We, with my friends who were former clerks, we look on that period of our lives as like a sun-filled, pink tinged, really happy kind of stage. Where, you know, we...ja, it was a really...an opportunity and an experience that I can't praise highly enough in some ways. So I don't know whether clerks nowadays feel the same way but all the clerks that I worked with, we all feel that way. We all were like, oh, the ConCourt, remember when we were at the ConCourt. And we've stayed friends, you know, for years and years later. And like, there's people here, like Godfrey for example, who've been here since then, and what amazes me is how many clerks come and go but they all remember me. I walk into the general office and it will be like, hey, hey, Franny, oh, wow! And it's like more than ten years ago. And it's like, oh, we're reading your articles and how's blah, blah, and you know. It was a really sort of caring environment where everyone valued each other, and I think that's quite rare actually, in a working environment. I don't know if you...

Int Franny, I wondered what you think are the greatest failings of the Court and what are the greatest achievements?

FR God, I don't know. The greatest failings and the greatest achievements? Gosh...okay, failings. I wish maybe that the Court heard more cases. But then again, if it did, then it might not have enough time to really concentrate and get it right, so I'm not sure. I can't think of sort of a jurisprudential direction that I really, really have a problem with. I mean, there are some judgments that I don't agree with, that I think were wrong. But there's not one that I think has sold out the Constitution or something like that. ja, I can't actually...I'd have to think about that. Achievements, I mean, I think the Constitutional Court has achieved great things in terms of setting...I mean, the Constitution sets the parameters for how our democracy and our society works. And the Constitutional Court has developed its jurisprudence in a way that I think really respects where we're going and where we come from. Our quality jurisprudence is a good example. I know, like socio-economic rights, there's criticism and I don't actually agree with it. I just hope...you know, there's this fear that like the Court is getting more executive minded, and I haven't seen it yet, but I worry about that. I don't want...I want our Court to be strong and to stand up for what the Constitution is all about.

Int Final question. Can you be an activist and a judge?

FR I think you can under apartheid. Because...it's an undemocratic elected government. I think you've got to be more careful when you're in a democracy. I think that a lot of human rights activists and lawyers don't respect the fact that this government was voted by a vast majority of South Africans, election after election. And the South Africans are not stupid. They're voting for a reason and we need to respect that. So when the government passes legislation that's reflecting a certain choice, unless it's unconstitutional, at which point you must fearlessly strike it down, then you don't mess with it. But at the same time, what I also don't want, is people to say, oh well, because the government is democratically elected we're going to interpret the Constitution to favour it. That's also...it's a balance. So I don't know...I'm not even a hundred percent sure what activist judge means. I've always wondered. I know what it means in an unjust society, where you're like, this is nonsense, this isn't justice, etc. But, for example, I don't know if you've read Judge (Colin) Lamont's judgment (*Afri-Forum and Another v Malema and Others*) on the freedom song, *Ayesaba Amagwala*, and hate speech? To me that's an activist judge going the wrong way. He decided things that were not put before him, he made an order that was not asked for, he made findings on the probabilities when evidence was not put before him on that. That's sort of judicial activism but in a way that like, you know, means that freedom songs can't be sung anymore. So that's the danger of activism is that it doesn't necessarily mean progressive activism, it could mean reactionary activism as well. And ja, I don't know...maybe, I don't know if I sound a bit like conservative, but I don't mean to be. I mean, I think that the Constitution empowers the judiciary to be very radical. But that's not activism because that's what the Constitution mandates you to do. It's your job.

Int     Interesting. Franny, I've asked you a range of questions, is there something I've neglected to ask you, which you'd like included in your oral history?

FR     Oh, gosh. I don't know, like I know when I leave here, I'm going to be thinking about the achievements and the challenges and whatever, and something is going to come to me, but I don't have it now.

Int     You'll have to put it on your zoom and send it to me.

FR     Okay. What else do I want to say? No, I can't think of anything for now.

Int     Thank you so much.

FR     Thank you.

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