

# Recalibrator of Axioms: A Tribute to Justice Sandile Ngcobo

## Albie Sachs

Justice of the Constitutional Court 1994–2009

Email: [albie@albiesachs.com](mailto:albie@albiesachs.com)

When I heard whistling outside the gate of my chambers, I knew that my neighbour and colleague Sandile Ngcobo had solved yet another legal problem. Sandile (as I know him and as I will refer him in this piece) had joined the Court a few years after me when we were still in our temporary accommodation at Braam Park. His chambers had been far from mine. I would see him at the workshops we held after hearings in Court, having noticed how quiet-voiced he had been on the Bench. He was clearly a person with a strong interior life, very correct in his conduct and not easy to get to know outside of the main purpose of our work, resolving constitutional issues.

Now in our new building in the heart of the Old Fort Prison where Gandhi, Luthuli and Mandela had been locked up, we found ourselves to be neighbours. The young Durban architects who had won the competition for the Court building had told us that, instead of having sealed-off floors, one on top of the other, we would have galleries with walkways to our chambers. This would give the space an open and friendly character where you would be able to wave to your colleagues on the floors below or above. It also meant that if your colleague was wont to whistle when he walked, you would hear his whistling. Sandile would say afterwards that he had no idea that he'd been whistling, but my memory is quite clear: a loud, melodious and spring-like whistle would be an advance signal that a breakthrough judgment was on its way.

Each judge had the same space and the same basic set of furniture, but we could choose our own colours and some additional furnishings and curtains to our taste. Within no time, each set of chambers turned out to be different. Mine was light, bright and spacious, with gauze curtains to maximise the opportunity to enjoy the view outside. There were books and papers lying open and piled up on my desk and all over the place. Sandile's office, I discovered, was completely enclosed, with rich earthy African colours, every book in its proper position—hermit like, a well-articulated cocoon.

Sandile was extremely methodical. He brought five different coloured pens with him to Court hearings, and would organise his questions and the answers in such a way that he used different colours for different aspects of the case. I just scrawled highlights in my book and asked law clerks to keep a full record of the questions and answers, insisting that they be absolutely complete and accurate, but then hardly ever looking at them afterwards. Sandile kept his own beautifully organised notes of the proceedings. His voice was the softest of all of our voices, sometimes difficult for counsel and his colleagues to hear. It was as if he were concentrating utterly on getting the words exactly right and not using up any emotion for inflection or emphasis. Some of us enjoyed rhetorical flourish. We worried sometimes when Zak Yacoob flung himself back, after asking his final question, that his chair would topple over. Not so with Sandile. His emotions were reined in, whatever he might have felt about the issues or the parties.

On one occasion he rebuked me for overstepping the mark when putting questions to counsel. It was in the case involving Dr Wouter Basson, referred to in the press as ‘Doctor Death’.<sup>1</sup> The issues involved Dr Basson’s alleged participation in using chemical agents to asphyxiate captured South West African People’s Organisation (SWAPO) combatants as well as other forms of chemical involvement against what South African troops considered to be hostile populations. Dr Basson was in Court giving every appearance of enjoyment of the proceedings, striding up and down with a huge smile on his face during the breaks. When my turn came to ask questions of his counsel, I opened with the statement: ‘Dr Basson is a liar. We know he is a liar because he says himself he is a liar.’ This was because his explanation of using army money to buy a hotel and a pleasure resort was that he falsely gave his name as the owner when, in fact, he was buying them for a Soviet agent and an East German agent.

During a tea break, sitting around the conference table, Sandile opened by saying: ‘Albie, you were quite wrong to ask that question in that way.’ It was a stern collegial reproof. I replied: ‘Sandile, you’re quite right. I was wrong to do so.’ It had indeed been unduly aggressive for me as a judge. It had introduced a whole different tone into the proceedings and didn’t display the degree of impartiality that Sandile felt a judge should have displayed. It was a justifiable rebuke intended to discourage me (and other colleagues) from doing something similar in the future. I acknowledged the correctness of what he was saying. But, looking back historically, I didn’t feel sorry, and in fact it appeared to wipe the smirk off Dr Basson’s face, because from then onwards it was noticeable that his posture was less that of someone having fun during his day in court and more befitting of a person in the dock for committing grave war crimes.

Without going into their legal detail, I’d like to pick up on some of the cases in which Sandile played a particularly strong role in the Court to bring out some of his special characteristics. Sandile was very firm. Once he had made up his mind, he rarely changed it. But he didn’t make up his mind quickly or easily. Quite often he would be the last to

---

1 *S v Basson* 2005 (1) SA 171 (CC).

finalise his position. Sometimes when we were eager to deliver our judgment and move on to the next case, he would say, no, he was not ready; he needed another forty-eight hours—and we would have to postpone delivery. And forty-eight hours later he would come back with a beautifully composed and often quite original judgment of his own.

I discovered the same firmness in Sandile when I visited him once when he was in hospital receiving treatment in connection with surgery. It was a strong moment between us as we actually locked our arms together, he perhaps being less of a hugging person than I. Then he told me about the fight he had had with the surgeon. He had felt dissatisfied with aspects of the diagnosis and treatment, and insisted on further procedures. And it turned out that he had been correct. So that same doggedness had followed him into the hospital. I would call it a creative doggedness, not just a stubborn digging in of his heels. And it went with a very brilliant legal mind: independent judge, independent patient, independent person.

When he'd been appointed, there had been quite a lot of opposition in the press, who had favoured another candidate who had happened to be white.<sup>2</sup> I was sitting in a rugby box at Newlands around that time when a white judge who had been a colleague of Sandile's in the Cape High Court had leaned over to say: 'Albie, Sandile is absolutely brilliant.' And this was a judge not easily given to praise, who hadn't been involved in the Struggle. My appointment had also been heavily criticised in the press,<sup>3</sup> so I could understand if Sandile felt disconcerted.

As it turned out, Sandile was to make a huge contribution towards the transformation jurisprudence of our Court. Building on the work done by the first generation of judges, he introduced strong themes of his own. This came out clearly in the *Bato Star* case,<sup>4</sup> which dealt with the allocation of quotas to fishing companies. Many people were puzzled by the fact that two separate judgments were written arriving at virtually the same conclusion, one by Kate O'Regan and one by Sandile. The issue, basically, was to evaluate the extent to which the conservation of fishing reserves should be balanced against affirmative action to open the industry to previously excluded persons. Both Kate O'Regan and Sandile agreed on the proper approach to reviewing the administrative process that had been involved.<sup>5</sup> But Sandile's judgment spelled out in emphatic

---

2 See, for example, Chris McGreal, 'Mbeki under Fire for Veto on Judge' *The Guardian*, 2 June 1999 <<https://www.theguardian.com/world/1999/jun/02/chrismcgreal>> accessed 13 November 2017.

3 See, for example, Paul Taylor, 'Mandela Swears In First Constitutional Court' *The Washington Post*, 15 February 1995, noting that 'there has been mild criticism of Mandela's appointments, it is that too many are too close to Mandela's African National Congress' <[https://www.washingtonpost.com/archive/politics/1995/02/15/mandela-swears-in-first-constitutional-court/3915edf7-0554-4ed2-980e-b12bf2f14a40/?utm\\_term=.df13c2814fae](https://www.washingtonpost.com/archive/politics/1995/02/15/mandela-swears-in-first-constitutional-court/3915edf7-0554-4ed2-980e-b12bf2f14a40/?utm_term=.df13c2814fae)> accessed 13 November 2017.

4 *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism & Others* 2004 (4) SA 490 (CC).

5 See para 69, where Ngcobo J states that he concurs with O'Regan J's main judgment, but 'I write separately to emphasise the importance of transformation in the context of the Marine Living Resources Act [18 of 1998]'.

language the importance of redress in relation to systemic and historic injustice based on race.<sup>6</sup> Same reasoning, same outcome, but themes for future attention flagged in different ways.

Later, in the *Bhe* case,<sup>7</sup> which dealt with primogeniture in African law, all the judges were agreed that the customary-law rule, which privileged the oldest and closest male relative of a deceased person, was inconsistent with the Constitution. The majority felt that we should declare the principle of male inheritance to be unconstitutional and then leave it to parliament to decide the best way of dealing with succession in African families according to customary law. Sandile, however, asked for time off and came up with a different approach. He said that if the law could be developed so as to simply take away the gender dimension, allowing the oldest relative, whether male or female to inherit, then that was the path to be followed—it could be a daughter, it could be a son. This was an important dissent dealing with the appropriate remedy, and it has done much to enrich debate in academic circles about how customary law should evolve to keep in line with the Constitution.

My law clerks, at my request, called me Albie, and when they worked over weekends, I would encourage them to dress comfortably and casually, as if somehow this enabled me to exploit them even more—to work past midnight, buy food for them and send them home in a taxi. The story went around that one of Sandile’s law clerks had come in on a Saturday morning dressed in casual gear, and Sandile had told him that if he’d wanted to employ a gardener he would have done so. I’m not sure if he had sent him home or said ‘next time don’t dress that way again’.

Yet, behind this stern demeanour there could be quite an impish sense of humour. We were about to enter Court to deliver judgment in the *Treatment Action Campaign* case,<sup>8</sup> a very serious case in which we knew the small temporary court chamber would be filled with people wearing T-shirts saying ‘HIV-positive’. Sandile said to me: ‘Albie, can I lend you a handkerchief?’ I responded: ‘No, Sandile, it’s okay this time; I’m ready.’ The background to that moment was a decision he had given in the case of *Hoffmann*<sup>9</sup> dealing with someone who had applied to be a steward on SAA flights and passed all the examinations with flying colours, but who had been told he could not be employed as a steward because he was HIV-positive. Sandile had written what I regarded as a

6 See, for example, para 94, where Ngcobo J notes: ‘The [Marine Living Resources Act] recognises that it is insufficient merely to eliminate causes of past unfair discrimination but also that there is a need to redress the imbalance caused by such discrimination. As one reads on, therefore, one finds provisions which plainly show a commitment to redressing the historical imbalance and to achieving equality.’

7 *Bhe & Others v The Magistrate, Khayelitsha & Others* 2005 (1) SA 580 (CC). For the discussion of this case in this volume, see Chuma Himonga, ‘Reflection on *Bhe v Magistrate Khayelitsha*: In Honour of Emeritus Justice Ngcobo of the Constitutional Court of South Africa’ and Muna Ndulo, ‘Legal Pluralism, Customary Law and Women’s Rights’.

8 *Minister of Health & Others v Treatment Action Campaign & Others* 2002 (5) SA 721 (CC).

9 *Hoffmann v South African Airways* 2001 (1) SA 1 (CC).

powerful and exquisitely sensitive judgment for the Court. He explained how important the right to work was to human dignity and said that the duty of a parastatal, like SAA, was not to capitulate to prejudice, but to combat it.<sup>10</sup> The Court had on that occasion also been filled with people wearing T-shirts saying ‘HIV-positive’—black, white, brown, young, old ... the nation. As we filed out of the Court there was total silence, but when we reached the passage behind, cheering broke out, and I burst out crying—crying not just because of the weight of the pandemic in our country, but out of the feeling that I was part a project that was defending fundamental rights. I was just overwhelmed with emotion. I told the story some weeks afterwards when visiting Harvard University in the United States and someone had written to Sandile saying: ‘You made Judge Albie cry.’ So, there he was offering me his handkerchief as we were going into the Court in the TAC matter.

To complete the story, this time it was Arthur Chaskalson who explained why it was a denial of constitutional rights to prevent pregnant women living with HIV and about to give birth from having full access to antiretroviral treatment. And as we left the Court, there was the same silence, followed by the same cheering, and the same tears from me—the second-time round.

One day, Sandile, who knew that I was the head of the Court artworks committee, showed me some artworks and asked me how much I thought they would be worth. My comment was that the works—I think they were watercolours—had some very strong and interesting features, but there was a certain lack of structure and composition in the design. And I said, if it’s not by a recognised artist, maybe each piece would be worth around R150 to R200. He then told me that it was his nine-year-old daughter who had produced the works. Phew ... I had passed that test!

Sandile was a fine legal craftsman, very correct in his reasoning. But what stood out was his creativity and independence of mind. This came to the fore in the *Doctors for Life* case,<sup>11</sup> which dealt with the distinction between representative democracy and participatory democracy. The details can be found elsewhere in this volume,<sup>12</sup> but very briefly, the issue concerned how to interpret the provision in the Constitution which said that when adopting legislation, Parliament should take reasonable steps to involve the public. *Doctors for Life* complained that the National Council of Provinces (NCOP) had told them that it had not been necessary for them to make submissions in Cape

---

10 See, for example, para 38, where Ngcobo J holds that ‘[p]eople who are living with HIV must be treated with compassion and understanding. We must show *ubuntu* towards them. They must not be condemned to “economic death” by the denial of equal opportunity in employment’ [footnote omitted].

11 *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC).

12 See elsewhere in this volume Gilbert Marcus and Max du Plessis, ‘The Importance of Process and Substance’; Mtendeweka Mhango, ‘Chief Justice Sandile Ngcobo’s Separation of Powers Jurisprudence’; Ziyad Motala, ‘Brexit, the Election of Donald Trump and Activism in South Africa: Lessons for Democracy – The Contribution of Justice Sandile Ngcobo’.

Town because there would be hearings in the provinces. The hearings had, in fact, been cancelled because of timetabling problems and Doctors for Life asked that the law, which permitted senior nurses to perform abortions, be declared invalid even though it had been passed with all the necessary majorities in Parliament.

This was completely new terrain for the Court. Sandile, who had been asked to prepare the lead judgment, did prodigious international research. In the end, if I remember correctly, all of us agreed that the NCOP had acted unreasonably by offering and then withdrawing the opportunity for public consultation. But some judges felt that the appropriate remedy was simply to point out the failure to parliament and direct that they should not err in the same way in future.<sup>13</sup> The question was whether or not we should strike down a law that had been validly passed, and I think, signed into law by the president. Once more, Sandile wrote what I consider to be a magisterial judgment on the importance of public participation in our democracy. In doing so, he ended up fully persuading me<sup>14</sup> and a majority of his colleagues that the only effective remedy would be to invalidate the law and not simply say tut tut to Parliament, do better next time.<sup>15</sup>

Until the issue was sharply raised in this case, the general understanding had been that public involvement could be achieved through publishing texts in advance to give the public the chance to comment, through allowing the public and the media to attend all debates and through enabling members of the public to intervene with specific recommendations when the portfolio committees were dealing with the text in the National Assembly. However, the majority in the Court said that our Constitution envisaged something larger than that, a principle of ongoing interaction between the legislature and the people. The important qualification was that the degree of involvement had to be reasonable and that, by and large, parliament itself would determine what was reasonable in the circumstances. But in this case the NCOP had offered the hearings, which were considered reasonable, but then it had been unreasonable in withdrawing the offer that had already been made. I think this is an important judgment with implications for democracy going well beyond South Africa and which could turn out to be influential in coming years.

In keeping with the approach in *Doctors for Life*, Sandile, in one of our case workshops, used the phrase ‘in a constitutional state the hands of justice are never tied’. I found it immensely powerful and encouraged him to use it in one of his judgments, which I think he went on to do. When I later attended a high-profile conference of judges and academics at Yale University in the United States, I was able to quote my colleague Sandile Ngcobo, making the point that if the law, as it stood, produced results that were manifestly inconsistent with justice as contemplated by the Constitution, then the judges

---

13 See the dissenting opinions of Van der Westhuizen J (para 244) and Yacoob J (para 246) in *Doctors for Life* (n 11).

14 *ibid* para 240 of my concurring opinion, where I state ‘I concur in the monumental judgment of Ngcobo J, with which I am proud to be associated.’

15 *ibid* para 225 outlining the Order.

couldn't say: 'Well, sorry, our hands are tied; it is up to Parliament to bring about the change.' The hands of justice are never tied, and the law would have to be reconfigured. This is the thinking of a very creative judicial mind that will not be subordinated by the way things have always been done or any business-as-usual approach to constitutional justice. And I must say, it was very well received at the seminar and brought honour to the Constitutional Court.

Sandile is thoughtful, quiet, reserved—sometimes outwardly stern. His wife, Zandile, is warm, outgoing and immensely personable. And one day he told me a story. His wife had been driving their car from Durban up to Johannesburg. There had been terrible fog and, for some reason or another, she couldn't get through, and she had commented to him how wonderful a white family had been to her in that moment of distress. When he passed this tale on to me, I felt such pain that it should even be a matter for comment. It was so telling that the kindness had come as a surprise—so telling about our country.

Traditionally, judges had grown up as part of the social elite; they had absorbed the manners, style, modes of thinking of the advantaged section of the community. Sandile had grown up in an under-resourced peri-urban area, sensitive to the importance of law in traditional African society, with little early exposure to the ideas, habits and assumptions that would be second nature to people who'd become judges in the past. And yet, despite or maybe because of this, he had a clarity of legal mind that was quite exceptional. And maybe, just as some people are born gifted with a capacity to paint, to sing, to design buildings, he was born with a capacity to handle the abstractions of legal logic as triggered by the experiences of daily life. The richness of his life experience and the strength and discipline of that legal logic, encased to some extent in that formidable array of pens and that hermetic office in which he worked, produced results of outstanding benefit to the nation.

I was proud of a Court and a system that enabled people of such divergent backgrounds to work together as a team in defence of the Constitution for which we had all, in our different ways, fought. And at a personal level I was honoured and delighted to be Sandile's colleague, learning from him, debating with him, at times persuading him, and even when disagreeing with him, admiring the skill, subtlety and thoughtfulness of the way he expressed his opposition. It is lovely to have a colleague who whistles on his way to work. It is even lovelier to have one who agrees with you. But the loveliest of all is to have a colleague who compels you to recalibrate your axioms.

I don't think I've ever said this to anyone before, but I will say it now: Thank you, Sandile Ngcobo, for helping me to recalibrate my axioms.

## References

McGreal C, 'Mbeki under Fire for Veto on Judge' *The Guardian* (London, 2 June 1999) <<https://www.theguardian.com/world/1999/jun/02/chrismcgreal>> accessed 13 November 2017.

Taylor P, 'Mandela Swears In First Constitutional Court' *The Washington Post* (Washington DC, 15 February 1995) <[https://www.washingtonpost.com/archive/politics/1995/02/15/mandela-swears-in-first-constitutional-court/3915edf7-0554-4ed2-980e-b12bf2f14a40/?utm\\_term=.df13c2814fae](https://www.washingtonpost.com/archive/politics/1995/02/15/mandela-swears-in-first-constitutional-court/3915edf7-0554-4ed2-980e-b12bf2f14a40/?utm_term=.df13c2814fae)> accessed 13 November 2017.

## Cases

*Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism & Others* 2004 (4) SA 490 (CC).

*Bhe & Others v The Magistrate, Khayelitsha & Others* 2005 (1) SA 580 (CC).

*Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC).

*Hoffmann v South African Airways* 2001 (1) SA 1 (CC).

*Minister of Health & Others v Treatment Action Campaign & Others* 2002 (5) SA 721 (CC).

*S v Basson* 2005 (1) SA 171 (CC).