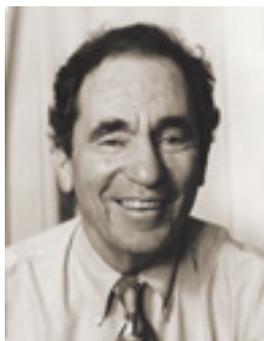


## INFUSING THE CONSTITUTION WITH 'AN ETHIC OF CARE': THE HUMANE JURISPRUDENCE OF JUSTICE ALBIE SACHS

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Source: <http://www.constitutionalcourt.org.za/site/judges/justicealbiesachs/index1.html>

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### 1 Introduction

We wanted a Constitution that was smiling to the people – but it mustn't be a sneer smile, or an insincere mask of a smile. The smile must come from inside, that people may believe in it, because it's authentic. And the smile contains tears, and sadness, and a knowledge of imperfection.<sup>670</sup>

It is a complex task to write about the unique jurisprudence of retired Constitutional Court Justice Albie Sachs. In a sense, his own words tell the story better than anyone else could. Thus, in this chapter we refer extensively to Justice Sachs 'in his own words'. We also recognise that many knowledgeable persons have written about him and his role in the

670 'Soft Vengeance: Albie Sachs on loving your enemy into defeat' *Canadian Broadcasting Corporation* (CBC) 30 September 2016 <http://www.cbc.ca/radio/ideas/soft-vengeance-albie-sachs-on-loving-your-enemy-into-defeat-1.3785689> (accessed 20 June 2017).

transformation of South African law and society. However, a book such as this about the importance of the South African Constitution, its birth and evolution, could never be complete without once again re-visiting Justice Sachs's words and their meaning within the context of his life as a 'gentle' freedom fighter seeking 'soft' vengeance.<sup>671</sup>

The quotation by Sachs opening this chapter illustrates that for him the Constitution and the constitution-making process should be people-centred and focused on the humanity of the people it serves. For him, as for many others who craved freedom, the road had to be walked despite, or perhaps because of, the pain of the journey. Sachs's jurisprudence and life story more broadly have largely portrayed him as a sensitive and caring freedom fighter and a poetic judge – hence the title of this chapter. This approach, explained in more detail below, places emphasis on *context* in decision-making. To advance such an argument, we take a critical look at his contribution in building a free democratic South Africa. We trace his path, from growing up in a politicised Jewish family with a father who dreamt of him becoming a freedom fighter when he was merely six years old, to his participation in the struggle against *apartheid* and the Defiance Campaign, to his contributing to the Freedom Charter, to his experiences in jail and exile, and to the attack that almost cost him his life.

In 2009, one of the authors of this contribution, Narnia Bohler-Muller, wrote an article predominantly critical of the socio-economic jurisprudence of Justice Albie Sachs. In this article, 'The strange alchemy of the judge and the blue dress',<sup>672</sup> she recognised the remarkable contributions he had made in building an understanding of the South African Constitution and its values, but questioned whether he had not left his activism behind when he reached the first Bench of the Constitutional Court:

It should be noted from the outset that I write this critique of Sachs's socioeconomic jurisprudence within the context of my respect for the contributions he has made as a judge. My concern rests, however, with the fact that Sachs's pre-Bench political activism did not (fully) translate into judicial activism, but rather tended towards a utopian yet cautionary approach that failed to adequately interrogate the status quo.<sup>673</sup>

671 As above. See also A Sachs (n.d) 'From the soft vengeance of a freedom fighter' <http://anthropology.msu.edu/anp336-us13/files/2013/06/6.2-Schepper-Hughes-From-The-Vengeance-of-a-Freedom-Fi.pdf> (accessed 7 March 2017).

672 N Bohler-Muller 'The strange alchemy of the judge and the blue dress' (2010) 25(1) *South African Public Law* 152 (hereinafter referred to as 'Blue dress'). In this article Bohler-Muller takes exception to what she perceives as a lack of discomfort when faced with human suffering and Sachs' seeming ability to cling to the law to justify hard choices. This impression predominately relates to his socio-economic rights judgments, which appear more deferent than necessary. However, when not speaking 'as a judge' but as an 'activist', Sachs explains the internal tensions that may not have been an express part of his judicial discourse.

673 Bohler-Muller (n 672 above) 154.

The concerns expressed were that he had not done enough to assist in alleviating the suffering of the poor, by remaining cautious in his judgments and unwilling to openly and aggressively challenge the executive in a post-*apartheid* context when it came to fulfilling socio-economic rights in particular.<sup>674</sup> But, in hindsight, perhaps it is apposite to listen to his voice again, and to understand the differences in the nature of activism before and after 1994; in other words, activism under an oppressive regime versus activism in a democracy. Activism takes different forms, and at times the Constitutional Court has had to defer to the other two branches to ensure that the Court was not seen to be ‘over-stretching’ or counter-majoritarian (or, even worse, counter-revolutionary).<sup>675</sup> It could be argued that the dawn of democracy brought an end to the kind of activism needed before 1994. However, the persistence of poverty and inequality in South Africa has raised questions about whether enough has been done.

Justice Sachs has stretched our legal imagination(s), but he has also worked within strict constraints – the limits of the law – which have prevented him, to some extent, from being the kind of judicial activist he *could* have been within the context of transformative constitutionalism,<sup>676</sup> described by Van Marle as a ‘critical account of the notion [of law] itself’,<sup>677</sup> where judges read the Constitution as being both legal and political:

What I mean by transformative constitutionalism as critique, for the moment, is an approach to the Constitution and law in general that is committed to transforming political, social, socio-economic and legal practice in such a way that it will radically alter existing assumptions about law, politics, economics and society in general.<sup>678</sup>

Prior to 1994 Justice Sachs fought bravely against the oppression of *apartheid*, and he paid a high price for his courage. After 1994 Justice Sachs entered a new phase of ‘activism’ considered more suitable to South Africa’s new democratic dispensation. As a member of the first Bench of the Constitutional Court under the Presidency of former Chief Justice Chaskalson, he did continue to fight, in new ways, to protect the Constitution and to ensure that its interpretation reflected an ethic of care and *ubuntu*. This is truly a valuable contribution, one we wish to

674 The ‘suffering’ Bohler-Muller refers to in her critique is based on LE Wolcher *Law’s task: The tragic circle of law, justice and human suffering* (2008).

675 ‘Judges must not undermine the integrity of the courts’ (2008) 8(27) *ANC Today* 11-17 July <http://www.anc.org.za/docs/ancctoday/2008/at27.htm> (accessed 15 May 2017). The anonymous article denied that Mantashe had used the term ‘counter-revolutionary’.

676 Originally introduced into South African legal discourse by K Klare ‘Legal culture and transformative constitutionalism’ (1998) 14 *South African Journal on Human Rights* 146.

677 K van Marle ‘Transformative constitutionalism as/and critique’ (2009) 20(2) *Stellenbosch Law Review* 293.

678 As above, 288.

acknowledge in the writing of this chapter, where we take a fresh look at the humane jurisprudence of Justice Albie Sachs.

The chapter draws on academic literature, the Constitution, various interview transcriptions, judgments, Justice Sachs's own writings, lectures and speeches as well as media articles or coverage of his contributions in the political and legal landscape of South Africa. It is divided into three main parts. The first sketches the background, where we provide an abbreviated 'biography' of the life of Albie Sachs as liberator, jurist and beyond. The second provides an overview of his contribution to the evolution of the Constitution and to a democratic society through a selection of his most ground-breaking judgments. The third part identifies the themes we find in his work (*ubuntu*, an ethic of care, storytelling, reconciliation and restoration) and describes his journey in the making (and continued protection) of the Constitution – one could say his perpetual love of the Constitution.

## 2 Background: The stories of Justice Albie Sachs

Born in 1935, Albie Sachs is known not only as a former Justice of the Constitutional Court; he is an activist, a writer, a teacher, a lecturer, and a well-known international personality. Sachs has often been described as a humane person who has a heart for forgiveness.<sup>679</sup> His background, rooted in radical politics, led him to join the struggle against the oppression of South Africa's black population. His background shaped his political ideas and ultimately his contribution to the Constitution and the jurisprudence of the Constitutional Court.

Sachs graduated and started practising law at the age of twenty-one. Most of his clients were black people who were facing oppression at the hands of the *apartheid* government. Although he worked within the law, his support for marginalised communities made him a target for the state's security forces. The *apartheid* government had a 'right' to imprison 'traitors' and 'terrorists' in solitary confinement for 90 days, later increased to 180 days, without laying charges.<sup>680</sup> In his words, 'when I had been in solitary confinement I had wondered why it had been so difficult to be brave.'<sup>681</sup> He wrote a narration of his ordeal in *The jail diary of Albie Sachs*,

679 P Trehwela (nd) 'The dilemma of Albie Sachs: ANC constitutionalism and the death of Thami Zulu' <http://www.sahistory.org.za/sites/default/files/sloct93.6.pdf> (accessed 15 May 2017).

680 The Internal Security Amendment Act of 1976 was promulgated following the uprisings of students in Soweto. This Act allowed for renewable 12-month periods of preventive detention and six-month detention of potential witnesses in solitary confinement. As mass protests grew in the 1980s, a new Internal Security Act was enacted in 1982, streamlining previous legislation. Section 29 of this Act allowed for detention until 'all questions are satisfactorily answered' or 'no useful purpose will be served by further detention.'

681 A Sachs *The strange alchemy of life and law* (2011) 140.

which was later turned into a play and produced by the Royal Shakespeare Company.<sup>682</sup>



*Twenty-one-year-old Albie Sachs (centre) at a meeting of The Congress of the People to adopt the Freedom Charter, Kliptown, 1955 (Source: Robben Island Museum Archives)*

In 1966, Sachs moved to England, where he and his first wife, Stephanie Kemp, had two sons. During this time he received a PhD scholarship to study at the University of Sussex. As a scholar he has written several books, including *Justice in South Africa*,<sup>683</sup> *The jail diary of Albie Sachs*,<sup>684</sup> *The free diary of Albie Sachs*<sup>685</sup> and *The strange alchemy of life and law*.<sup>686</sup> His latest book, *We the people: Insights of an activist judge*, was published in 2016.<sup>687</sup>

When Mozambique gained independence in 1975, Sachs moved from England to Mozambique, where he lived for eleven years. He worked at Eduardo Mondlane University in Maputo as a law professor and continued his activism against the *apartheid* regime. During that period of his life he met and befriended Oliver Tambo and together they drafted the

682 D Edgar *The jail diary of Albie Sachs* Royal Shakespeare Company.

683 A Sachs *Justice in South Africa* (1973).

684 A Sachs *The jail diary of Albie Sachs* (1990).

685 A Sachs with V September *The free diary of Albie Sachs* (2004).

686 Sachs (n 681 above).

687 A Sachs *We the people: Insights of an activist judge* (2016).

ANC's Code of Conduct and the laws guiding the organisation as a liberation movement.<sup>688</sup>

In 1988 Sachs faced a threat to his life when his car exploded in Mozambique. As a result of this attack he lost his right arm as well as the sight in one of his eyes. The bomb was orchestrated by agents working for South African Military Intelligence.<sup>689</sup> However, as testimony to his resilience, this tragedy did not deter him in his fight for freedom and democracy. In fact, Sachs preached forgiveness; his story about 'the soft vengeance of a freedom fighter' illustrates his steadfast belief in reconciliation. In an interview with Patrick Barkham of the *Guardian* newspaper, Sachs had this to say about the incident that almost cost him his life:

To wake up without an arm but to feel joyously alive, to learn to do everything – to sit up, to stand, to walk, to run, to write again. Every little detail became a moment of discovery and breakthrough. I had an absolute conviction that as I got better, my country got better.<sup>690</sup>

He had survived and triumphed over those who wanted to see him dead, as South Africa would triumph over the evils of *apartheid*. This marked a 'new journey of discovery' and portrayed his undying spirit. Describing the Constitution as an example of soft vengeance, Sachs notes that:

It totally smites the horror, the division, the hatreds, the separations of *apartheid* but it does so in a way that is benign and creative and humanising. It's a far more profound vengeance than doing to them what they did to us.<sup>691</sup>

Upon his return to South Africa after twenty-four years in exile, Sachs was appointed as a member of the Constitutional Committee that was responsible for developing a democratic constitution. Sachs proposed the inclusion of the Bill of Rights and an independent judiciary. He also successfully fought for justiciable socio-economic rights such as access to water, housing, a clean environment, and healthcare. With such a strong a commitment to the building of a constitutional democracy it was not surprising that former President Mandela appointed him as one of the eleven judges of the Constitutional Court's first Bench.

Some of the milestones marking Sachs's contributions to South Africa's road to transformation include the abolition of the death penalty,<sup>692</sup> arguing for the decriminalisation of homosexuality in the *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice*

688 'Sachs tells how he crafted ANC's code of conduct' *Mail & Guardian* 9 November 2007.

689 C Steinberg 'Albie Sachs: Our Shakespearian fool' (1991) 35(1) *The Drama Review* 194-199.

690 I 'can't tell my son everything' *The Guardian* 8 October 2011.

691 As above.

692 *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 262.

and Others case,<sup>693</sup> which led to the legalisation of same sex marriages in 2005,<sup>694</sup> and introducing the concept of ‘meaningful engagement’ in eviction cases.<sup>695</sup> His contribution to the development of socio-economic rights jurisprudence is discussed in more detail below.

Even after retiring as a judge in 2009, Sachs continues to play a significant role both in South Africa and internationally. He served as a member of a magistrates and judges vetting board in Kenya involved in assessing whether judicial officers were still suitable for their jobs following the adoption of the new Constitution, largely modelled on that of South Africa.<sup>696</sup> Recently, he was awarded the Tang Prize, which in Asia is equivalent to the Nobel Prize. The Tang Prize Foundation honoured Sachs for his contribution to human rights and justice, particularly in the realisation of the rule of law in a democratic South Africa.<sup>697</sup>

In his Oliver Tambo Centenary Lecture he asked the audience ‘what good thing came out of *apartheid*?’ To cheers he stated that *apartheid* created ‘anti-*apartheid*’. Although his remark sounds simplistic, such a statement is pregnant with meaning. *Apartheid* did indeed see the joining of forces by different peoples both within South Africa and outside. In South Africa, the fight against *apartheid* gave birth to the Defiance Campaign, which saw different liberation movements joining hands in the struggle.<sup>698</sup> On the global stage the principles of the Freedom Charter were visible in the policies of the Organisation of African Unity and in statements by the Front Line States that condemned the ideology and practice of racism. In 1979 the UN ‘Declaration of South Africa’ was adopted.<sup>699</sup>

However, despite celebrating the solidarity of the anti-*apartheid* movements locally, continentally and internationally, Sachs also acknowledges the challenges that South Africans face today and promotes the need to reclaim human rights.<sup>700</sup>

693 1999 (1) SA 6 (CC). See also the ground-breaking judgment of *Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* – 2006 (1) SA 524 (CC), which recognised the right of gay and lesbian couples to marry.

694 Academy of Achievement ‘Albie Sachs’ <http://www.achievement.org/achiever/albie-sachs/> (accessed 23 February 2017).

695 Starting with *Port Elizabeth v Various Occupiers* 2005 (1) SA 217 (CC), where Sachs referred to the need for mediation between the land owners, the ‘squatters’ and the municipality. This later evolved into the concept of meaningful engagement.

696 ‘Transcript of the interview with Albie Sachs’ *International Centre for Transitional Justice (ICTJ)* 25 April 2011.

697 ENCA ‘Anti-*apartheid* hero Albie Sachs awarded Tang prize’ <http://www.enca.com/anti-apartheid-hero-awarded-tang-prize> (accessed 23 February 2017).

698 ‘Freedom charter our blueprint for human rights’ *Cape Times* 23 June 2016.

699 As above.

700 Centre for Human Rights ‘Oliver Tambo centenary lecture by Justice Albie Sachs’ 22 February 2017 <https://www.youtube.com/watch?v=U3g6LJyQCDE> (accessed 7 March 2017).

In the next section we explore Sachs's contributions to the evolution of a constitutional jurisprudence which places emphasis on the role of rights in alleviating suffering and advancing principles of social justice, something no doubt worth reclaiming.

### 3 Understanding Sachs's contribution to the evolution of the Constitution

Sachs is a strong believer in human rights and the need for government to respect and protect such rights.<sup>701</sup> With regard to the Constitution, Sachs notes that 'the issue is no longer whether to have democracy and equal rights, but how fully to achieve these principles and how to ensure that within the overall democratic scheme, the cultural diversity of the country is accommodated and the individual rights of citizens respected.'<sup>702</sup>

This section focuses on how Sachs himself understands constitutional justice in his own words and how this understanding is illustrated in the *Soobramoney* and *Grootboom* cases, which required of him to make hard choices in the face of human suffering and tragedy.

#### 3.1 In the beginning: Humanity and incertitude

In the beginning and the end is the word, at least as far as the life of a judge is concerned. We pronounce. We work with words, and become amongst the most influential story-tellers of our age. How we tell the story is often as important as what we say. The voice we use cannot be that of a depersonalised and divine oracle that declares solutions to the problems of human life through the enunciation of pure and detached wisdom. Nor dare we seek to imitate the artificial sound of a computer that has been programmed to produce inexorable outcomes. We speak with the living voices of real protagonists who are immersed in and affected by the very processes we deal with. If law is a machine we are the ghosts that inhabit it and give it life. We are animated by consciences that will have been shaped not only by our learning but by our varied engagements with life, with experiences both inside and outside the law.<sup>703</sup>

For Sachs, true transformation and reconciliation requires the recognition of the absence of legal certitudes and embracing the messiness and uncertainty of humanity. In the book *Albie Sachs and transformation in South Africa. From revolutionary activist to Constitutional Court judge*<sup>704</sup> there is extensive discussion about the centrality and importance of the recognition of humanity. According to Sachs the law should show compassion

701 A Sachs 'Towards a Bill of Rights for South Africa' (1991) 35 *Journal of African Law*.

702 As above, 21.

703 Bohler-Muller (n 672 above) 170.

704 D Cornell *et al Sachs and transformation in South Africa. From revolutionary activist to Constitutional Court judge* (2014).

towards the people it serves, unlike the role the law played in oppressing and attempting to de-humanise the majority of South Africans under the *apartheid* regime, during which time the legislature was supreme.

Narrating his involvement in the case of an HIV positive person who was unfairly discriminated against by South African Airways because of his HIV status, Sachs reveals his belief in humanity and humaneness<sup>705</sup> by admitting to shedding tears after some of the cases he presided over. For example, he confessed that 'the tears had come because of an overwhelming sense of pride at being a member of a court that protected fundamental values and secured dignity for all human beings.'<sup>706</sup> It should be noted here that the emotions that Sachs openly shares are those one could consider to be 'feminine'. In the sense that he describes himself as a feminist he is resisting stereotypes in his own life, another sign of the activist within.

Sachs's jurisprudence has received extensive attention from academics<sup>707</sup> and the media. In an article entitled 'Freedom, constraint and (the) judging of Albie Sachs'<sup>708</sup> Brand examines the extent to which Sachs's judgments reflect an interplay between freedom and constraint. The motivation of such an engagement comes from Sachs's claim, the central theme of his book *The strange alchemy of law and life*, that life and law are interconnected. The central argument is that a judge is constantly affected or constrained by the environment surrounding him / her when adjudicating various cases, thereby limiting his or her freedom to judge. *The strange alchemy* is a journey in and of itself as Sachs probes his own life as a judge. He admits that Cartesian rationality plays only a small part in decision-making, as it is also laced with elements of passion, creativity and intuition, some of which occur in interesting places such as a warm bath.<sup>709</sup> These bath-time revelations, according to Sachs, are some of the 'best-travelled' of all his opinions.<sup>710</sup>

Brand concludes that the best way to define Albie Sachs's constitutional work is 'one that would assume rhyme and reason, which

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

706 P Jones & K Stokke *Democratising development: The politics of socio-economic rights in South Africa* (2005) [https://www.researchgate.net/profile/Peris\\_Jones2/publication/248706970\\_Democratising\\_Development\\_The\\_Politics\\_of\\_SocioEconomic\\_Rights\\_in\\_South\\_Africa/links/56cbee4d08aee3cee5419712.pdf](https://www.researchgate.net/profile/Peris_Jones2/publication/248706970_Democratising_Development_The_Politics_of_SocioEconomic_Rights_in_South_Africa/links/56cbee4d08aee3cee5419712.pdf) (accessed 7 March 2017).

707 For example, P Lenta 'Revelation and legitimation in Albie Sachs's *The strange alchemy of life and law* (2013) 40(1) *English in Africa* 79-97; S Woolman & M Bishop (eds) *Constitutional conversations* (2008); D Cornell & K van Marle *Exploring ubuntu: Tentative reflections* (2005); T Metz 'Ubuntu as a moral theory and human rights in South Africa' (2011) 11 *African Human Rights Journal*; F Horne 'Can personal narratives heal trauma? A consideration of testimonies given at the South African Truth and Reconciliation Commission' (2013) 39(3) *Social Dynamics: A Journal of African Studies*.

708 D Brand 'Freedom, constraint and (the) judging (of) Albie Sachs' (2010) 25(1) *South African Public Law*, 25-38.

709 Bohler-Muller (n 672 above) 116.

710 As above, 117-119.

would assume the existence of a normative framework that guided his individual decisions about how to approach specific cases.<sup>711</sup> This implies that Sachs saw legal rules as flexible and not fixed and that he emphasised the importance of a normative environment and context.

Brand uses the example of *Port Elizabeth Municipality v Various Occupiers* 2004 to show the interplay of life and law in Sachs's judgements. This case was brought by the Port Elizabeth Municipality after land owners had complained about the illegal occupation of their private land by impoverished squatters. In dealing with this case, Sachs underscored the importance of moving away from the abuses that were common during the *apartheid* period, making reference to the Prevention of Illegal Squatting Act (PISA).<sup>712</sup> In contradistinction to PISA, Sachs chose to be guided by the Constitution's values of human dignity and equality as a path towards justice and equity.<sup>713</sup> Such considerations saw Sachs denying the eviction order, arguing that the Port Elizabeth Municipality should instead offer alternative accommodation to the squatters and not evict them as this would render them homeless and even more vulnerable. As he noted in his *free diary*, 'as long as we are judges and not computers, an element of ourselves must inevitably and properly go into our decisions.'<sup>714</sup>

In his contribution to the *National Coalition for Gay and Lesbian Equality v Minister of Justice* case on same sex unions, Sachs made it a point to illustrate the uniqueness of people. He explained that sexuality varies and that it is everyone's responsibility to create safe spaces that give people the freedom to become who they want to be. Similarly, in *S v Jordan* Sachs 'recognises that the lived experience of prostitutes is subject to the same constraints and the same demands we all face – survival, support of the family'<sup>715</sup> and therefore demands equal respect and concern.

Thus, part of Justice Albie Sachs's legacy to us is his insight into the process of judging, and his experience of being a judge.

He has expressed a degree of uncertainty about his role as a judge because his was quintessentially a journey in which he 'made the road by walking'. He begins his story with an account of his experiences as a freedom fighter. In the prologue to the *Strange Alchemy* (one of many, but probably the most remarkable of his books) Sachs describes his early life as dichotomous, of his being 'divided' between 'lawyer' and 'outlaw'. He did not see his relationship with the law as unproblematic in the light of his activism against *apartheid* law. He relates the story of a lecture he delivered at the University of Toronto, where he told students that '[e]very judgment

711 Brand (n 708 above) 38.

712 Act 52 of 1951.

713 Brand (n 708 above) 38.

714 Sachs with September (n 685 above).

715 Woolman S, "I am large": Sachs, Whitman and democracy' (2010) 25 *Southern African Public Law* 72

I write is a lie'.<sup>716</sup> This is not as a result of the *falsehood* of the content of the judgment, but rather refers to the internal struggle a judge goes through when thinking through difficult concepts and then articulating these concepts as clearly as possible.

Despite claims of radicalism and activism, Sachs's relatively cautious approach as an 'activist judge' is epitomised in his commentary on the enforceability of socio-economic rights in the *Soobramoney*<sup>717</sup> and *Grootboom*<sup>718</sup> cases, which reflect his 'compassion' on the one hand and his acceptance of the law's role in perpetuating 'necessary' suffering on the other.<sup>719</sup> These two judgments – and his own and others' views about them – are discussed in some detail below. The Constitutional Court's version of the *Soobramoney* and *Grootboom* stories is well known and has been written about extensively.<sup>720</sup> Here, we focus on Sachs's interpretation of the enforceability of socio-economic rights as a reflection of a general tendency to accept the notion that human suffering is necessary in order to ensure the greater good.

### 3.2 The value of an individual life

Thiagraj Soobramoney was a 41-year-old diabetic suffering from ischaemic heart disease, cerebrovascular disease and irreversible chronic renal failure. It was common knowledge that his life could be prolonged by regular renal dialysis. He did not have sufficient resources to continue renal dialysis in a private hospital and sought dialysis treatment from Addington State Hospital.<sup>721</sup> However, because of a shortage of resources, based on a set of guidelines to determine eligibility for the dialysis programme the hospital could only provide dialysis to a limited number of patients.

Soobramoney was adjudicated by the public hospital to be ineligible for the dialysis programme and was denied treatment. In July 1997 he made an urgent application to the Durban and Coast Local Division of the High Court for an order directing Addington Hospital to provide him with dialysis treatment.<sup>722</sup> His application was dismissed, and the matter was

716 As above, 7.

717 *Soobramoney v Minister of Health KwaZulu-Natal* 1998 (1) SA 765 (CC).

718 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

719 See Bohler-Muller (n 644 above).

720 See for example, A Sachs 'The judicial enforcement of socio-economic rights: The Grootboom case' (2005) 56(1) *Current Legal Problems* 579-601. See also JJ Williams *The Grootboom case and the constitutional right to housing: The politics of planning in post-apartheid South Africa* (2005). For the *Soobramoney* case see, E Kramer "'No one may be refused emergency medical treatment'" – Ethical dilemmas in South African emergency medicine' (2008) 1(2) *South African Journal of Bioethics and Law*; and K Lehmann 'In defense of the Constitutional Court: Litigating socio-economic rights and the myth of the minimum core' (2006) 22(1) *American University International Law Review*.

721 *Soobramoney* (n 717 above) paras 1 and 5.

brought on appeal to the Constitutional Court in an attempt to enforce his right to emergency medical treatment and his right to life.<sup>723</sup> In short, Soobramoney wanted to enforce his right to be kept alive by a kidney dialysis machine for as long as possible, whilst the hospital in question claimed that it was not equipped to do so as it lacked resources and had to keep many other people alive – people who were more likely to survive.

The Court subsequently dismissed the claim based on these two rights, but then went further to discuss the possibilities for the success of the claim had it been brought on the basis of section 27(1)(a), the right to access to health care services.<sup>724</sup> The Court found that section 27(1)(a) was qualified by section 27(2), which determines that the state is only required to give effect to the section 27(1)(a) right ‘within its available resources’.<sup>725</sup>

The Court further found that the hospital had proved that it had limited resources available for the provision of kidney dialysis treatment. The hospital had also shown that it had developed a set of reasonable and fair criteria that enabled it to decide who would receive treatment and who would not and that those criteria had been applied in good faith in the instant case.<sup>726</sup> It was stated in the judgment that courts should be ‘slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.’<sup>727</sup> It was therefore held by the Court that Thiagraj Soobramoney was not entitled to the kidney dialysis treatment. He died shortly thereafter. In a commentary on his judgment in this case, Sachs stated:

This was a most painful case. Effectively, it was up to the eleven men and women on the Court to decide whether this man lived or died. *There was no precedent to guide us* – all we had was the text of the Constitution, a hospital with good but limited resources, and the pleas of a dying man.<sup>728</sup>

It felt wrong that a test for ‘reasonableness’ was used in response to the pleas of a dying man. It felt cold, even heartless. In essence, the hospital’s policy was found to be ‘eminently rational and non-discriminatory’ and Soobramoney’s pleas were dismissed. In fact, Sachs recalls remarking to counsel that if ‘resources were co-existent with compassion, the case would have been easy to decide.’<sup>729</sup> The sadness, according to Sachs, is that it had already been established that the enforceability of socio-economic rights is dependent on the availability of resources, and as

722 As above, para 5.

723 As above, paras 5 and 7.

724 This is highly unusual as the Court usually deals only with arguments before it, and is thus an indication of how much the judges were willing to grapple with the difficult issue of imminent life and death.

725 *Soobramoney* (n 717 above) para 22.

726 As above, para 29.

727 As above.

728 Bohler-Muller (n 672 above) 176 (emphasis added).

729 Bohler-Muller (n 672 above).

resources are limited, such rights must be ‘rationed’ through a system of ‘apportionment’.<sup>730</sup> Sachs concluded that the reach of health programmes should become progressively larger, and that each individual should be granted the right to be considered fairly and without discrimination for treatment within such programmes. But the moment of judgment itself constituted the subjugation of an individual, whose death was deemed to be necessary in order to save the lives of others.

The fact that the judges had ‘no precedent to guide them’ as stated by Sachs in the above quotation is again a reminder as to how uncertain the terrain was. The road did not exist and was being made by walking, an enormous responsibility as the precedents being set would influence the interpretation of the Constitution in the future.

### 3.3 Irene Grootboom and her struggle for shelter

This brings us to the story of Irene Grootboom, who initially lived in Wallacedene, an informal squatter settlement in the municipal area of Oostenberg. The residents of Wallacedene lived in severe poverty, without any access to water, sewage or refuse removal.<sup>731</sup> The area is partly waterlogged and lies dangerously close to a main thoroughfare. Many Wallacedene residents had placed their names on a waiting list for low-income housing.<sup>732</sup> As time passed, a group of about 900 people, including Irene Grootboom, began to move from Wallacedene onto adjacent, vacant, privately-owned land that had been ear-marked for low-cost housing. The landowner obtained an eviction order and the Sheriff was ordered to dismantle and remove any structures on the land.<sup>733</sup> The magistrate who granted the eviction order stated that the community and the municipality should negotiate in order to identify alternative land for the community to occupy on a temporary or permanent basis.<sup>734</sup> Since they had lost their former sites in Wallacedene, the community moved onto the Wallacedene sports field and erected temporary structures there.<sup>735</sup> With legal assistance, they notified the municipality of the situation and demanded that the municipality meet its constitutional obligation to provide adequate temporary accommodation.

After receiving an unsatisfactory response from the municipality, the community launched an urgent application in the Cape High Court.<sup>736</sup> The Grootboom community based their case on two constitutional

730 As above.

731 *Grootboom* (n 718 above) para 7.

732 As above, paras 7 & 8.

733 As above, para 9.

734 As above.

735 As above, para 11.

736 *Grootboom and Others v Oostenberg Municipality and Others* (6826/99) [1999] ZAWCHC 1 (17 December 1999).

provisions: section 26 of the (interim) Constitution,<sup>737</sup> which provides that everyone has a right of access to adequate housing, obliging the state to take reasonable measures, within its available resources, to make sure that this right is realised progressively; and section 28(1)(c), which provides that children have a right to shelter, without condition.

The Cape High Court rejected the first argument. It held that government's housing programme was reasonable and thus fulfilled the requirements of the Constitution.<sup>738</sup> In terms of the second argument, the court held that parents are primarily responsible to provide shelter for their children. If, however, they are unable to do this, section 28(1)(c) places an obligation on the state to do so.<sup>739</sup> Furthermore, the court found that parents should be able to live with their children as it was not in the best interests of children to be separated from their families.<sup>740</sup> This seemed to overcome some of the obstacles faced by the community.

Government took the decision of the High Court on appeal to the Constitutional Court. In the case of *Government of the Republic of South Africa v Grootboom*<sup>741</sup> the Court, as with *Soobramoney*, adopted a standard of review founded upon an assessment of reasonableness. At the centre of this approach lay its concern with an assessment of resource availability and the fact that the realisation of socio-economic rights is a function of resource allocation over time. In addition, the Court also carefully located its socio-economic rights adjudication function within its understanding of the fundamental principle of separation of powers as between the judiciary and the legislature as policy formulator and the executive as the driver of service delivery.<sup>742</sup> In his commentary on the judgment in the *Grootboom* case, Sachs warns that judges should avoid the pitfalls of being 'passive and uncaring' on the one hand and seeking 'headlines as champions of the poor' on the other.<sup>743</sup> So, how then did the Court respond to people sleeping with their heads in the dust under plastic sheeting?<sup>744</sup> It determined that the state had an obligation to take reasonable, progressive measures to provide adequate housing within its budget in order to respect the dignity of the poor. The result, as Sachs mentions much later in the epilogue of his book, was that Irene Grootboom died some years later 'without having moved from her shack to a brick house'.<sup>745</sup>

Within this context Sachs acknowledges the difficulty of enforcing socio-economic rights and states that '[t]he years on the Court have not

737 Act 103 of 1994, now section 27 of the 1996 Constitution.

738 *Grootboom* (n 718 above) para 14.

739 As above, para 15.

740 As above.

741 As above.

742 As above, paras 21-25.

743 Bohler-Müller (n 672 above) 177.

744 As above.

745 As above, 274.

always been free from moments of pain and discomfort'.<sup>746</sup> In response to the socio-economic jurisprudence of Sachs and his colleagues on the Bench, Dugard maintains that the judiciary remains institutionally 'unresponsive to the problems of the poor and fails to advance transformative justice.'<sup>747</sup> Dugard notes that the Constitutional Court has adopted a cautious style, which Iain Curry – following Cass Sunstein – has termed 'judicious avoidance'.<sup>748</sup>

Despite the existing potential for radical innovation in the interpretation of socio-economic rights through the adoption of a more flexible and creative judicial engagement with rights, the Court rather fixated on the 'availability of resources' as determined by the executive's budget. The judgment did, however, lead to a change in housing policy and thus could be interpreted ultimately as transformative and in the public good.<sup>749</sup>

In Sachs's interview with the HSRC as part of the Constitutional Justice Project,<sup>750</sup> he spoke extensively about the Grootboom case and its significance:

Sometimes I start with Mrs Grootboom, and I tell the story about the rains coming down and a thousand people trekking to get away from being submerged by water in the middle of the winter rains in the Cape .... I

746 As above.

747 J Dugard 'Courts and the poor in South Africa: A critique of systemic judicial failures to advance transformative justice' (2008) 24 *SAJHR* 215.

748 See I Curry 'Judicious avoidance' (1999) 15 *SAJHR* 138, drawing on CR Sunstein *Legal reasoning and political conflict* (1996).

749 See for example, South African Government 'Social housing policy for South Africa' (2003) [http://www.gov.za/sites/www.gov.za/files/social%20housing%20policy\\_0.pdf](http://www.gov.za/sites/www.gov.za/files/social%20housing%20policy_0.pdf) (accessed 15 May 2017); Department of Human Settlements 'National housing code, 2009' <http://www.dhs.gov.za/content/national-housing-code-2009> (accessed 15 May 2017); Socio-economic Rights Institute of South Africa, 'Upgrading of Informal Settlements Programme (UISP) Part 3, Volume 4 of the National Housing Code, 2009' [http://www.seri-sa.org/images/5\\_Volume\\_4\\_Upgrading\\_Informal\\_Settlement.pdf](http://www.seri-sa.org/images/5_Volume_4_Upgrading_Informal_Settlement.pdf) (accessed 15 May 2017); Socio-economic Rights Institute of South Africa 'Emergency Housing Programme (EHP) Part 3, Volume 4 of the National Housing Code (2009)' <http://www.seri-sa.org/images/2%20Volume%204%20Emergency%20Housing%20Programme.pdf> (accessed 15 May 2017).

750 The Human Sciences Research Council (HSRC), together with its partner the University of Fort Hare (UFH), was appointed by the Department of Justice and Constitutional Development (DOJCD) to assess the impact of the Constitutional Court (CC) and the Supreme Court of Appeal (SCA) on the lived experiences of all South Africans (the 'Constitutional Justice Project'), particularly in respect of the adjudication and implementation of socio-economic rights within the context of a capable and developmental state. Included in the scope of the research is an analysis of pertinent issues relating to access to justice – including direct access to the Constitutional Court – with a view to addressing inequality and the eradication of poverty. In this research project an in-depth legal analysis of the jurisprudence of the apex courts was complemented by a strong empirical component that sought to investigate the broader impact of these court decisions on South African society. A unique case study methodology was adopted to track the impact of landmark cases in all spheres of government and society, which involved interaction with various role players, from academics to litigants to members of the Bench, and public officials responsible for the implementation of court orders.

imagine her lying out at night, she's only got plastic to cover herself and she's looking up at the sky, she sees the clouds overhead, and thinks to herself why ... why am I sleeping out like this? All I want for my children is a decent home. I haven't done anything wrong and yet I'm in such a vulnerable situation ... why, why, why?

After sketching this vivid picture of the suffering of this individual and this community, Sachs explains his existential moment, the discomfort one would expect from an activist:

... the terrain was open at that stage .... The great constitutional [texts] like the American Constitution [do not] include socio-economic rights. Canada with a wonderful Charter of Rights doesn't include socio-economic rights. So there's lots of theorisation on liberty and more recently on equality, but on this theme if you like, of human solidarity, social solidarity, there was nothing ... it's not the ordinary job of judges to determine questions of housing and housing priorities. We know very little about it on purely technical terms, and our expertise and our thinking is not directed towards those questions. In a sense we work in another realm.

Sachs describes remembering 'so vividly the tensions in my own head that reflected the tensions of the Court ... we were also a fairly new Court and we were feeling our way, the government was feeling its way and ... so we don't want to pick up the reins of government and take over and be too pushy.' He explained the need for caution in the context of a new democracy, but he also acknowledged that on 'the other side there were a thousand people sleeping out on a bare field, the rains are coming, they've got plastic to protect themselves ... if we can't come up with something in this case, then what the hell are the Courts doing at all?' In this case, as with *Soobramoney*, life and law become entangled in a way that is difficult to reconcile. The Court chose avenues that it believed would have wider policy impact in the long term, whilst recognising the suffering of those trapped in the present.

Sachs has described the need for a cautious 'activism' by referring to the *Treatment Action Campaign*<sup>751</sup> case:

... to bring it back to separation of powers. In the *TAC* case we expressly dealt with the argument that [socio-economic rights were individual rights] presented by Wim Trengrove ... I remember it. It's one of my very special moments on the Bench, a dialogue between him and myself when he was arguing very persuasively, or very forcefully, about why rights should be individual and personal. And I said, well, does that mean that somebody living up in the high mountains far away from any dam or source of water complain[ing] that she must have a tap, when the same expenditure involved in getting that water up into the mountain could provide water for ten thousand people. He said that's an emotional argument. And I said the issues

751 *Minister of Health & Others v Treatment Action Campaign & Others* (No 2) 2002 (5) SA 721 (CC), para 106.

are emotional. It was a marvellous interchange, but we rejected his approach and I think appropriately so.

Having analysed the two Constitutional Court cases that had a substantive impact on Sachs' life and his understanding of the law as well as an impact on the lives of others, we now turn to the themes that can be distilled from these judgments and consequent decisions.

## 4 Discussion and themes

Sachs concludes his book *strange alchemy* with a simple answer as to what judges do: 'in a word', they 'judge'.<sup>752</sup> In this section we unpack, within the context of his understanding that life and law are intertwined, what 'judging' entails as illustrated above. These themes are tightly related, but have been 'categorised' in order to allow a focus on particular curial and extra-curial expressions of judging and judg(e)ment.

### 4.1 Storytelling, *ubuntu* and care

*S v Makwanyane*<sup>753</sup> was the first human rights case heard by the newly constituted Constitutional Court in which the concept of *ubuntu* was referred to as a means of voicing the marginalised other. In this case Sachs was instrumental, together with Mokgoro J, in introducing the concept of *ubuntu* into the common law and into contract law.<sup>754</sup>

If *ubuntu* is conceived as a philosophy of the individual-in-relationship, freedom constitutes an act of responsibility to the community. This disposition does not rely on uniformity or sameness within community, but plays out as a question of potential – in other words: who I am able to become through a sense of belonging. This is reflected in Sachs's jurisprudence and was based on his ability to care – about people and about the law.

The way in which Sachs expresses himself in his activism, both political and legal, is through the medium of stories and storytelling. Through this medium he contextualises his decision-making and provides a window into the mind of a judge. He makes clear in the telling of these stories that real lives, including his own, are 'messy, as we constantly travel between our own internal worlds and those of the outside. These world

752 Bohler-Muller (n 672 above).

753 *Makwanyane* (n 692 above) para 262.

754 At its root, the Nguni phrase *umuntu ngumuntu ngabantu* ('A person is a person through other persons', or 'I am what I am because you are'), or the Sotho-Tswana phrase *Motho ke motho ka batho babang*, communicates a basic respect, empathy and compassion for others and encourages a worldview that recognises not only the rights but also the responsibilities that inevitably arise when we live in community with others – even those who may not share our values, beliefs or backgrounds.

travels are metalinguistic and multivocal.<sup>755</sup> Storytelling and narratives can assist us in avoiding monovocalism. If we listen attentively, with care and compassion, to the stories of others – in a spirit of *ubuntu* – without making their stories our own, we hear voices previously silent to us. In his telling of stories, Sachs expresses the kind of care and compassion seldom expressed by one who judges. His ethic is one that correlates with Sevenhuijsen's (2001) understanding of the four interrelated values underlying the ethic of care, namely:

1. **Attentiveness** to the needs and particularities of individuals
2. A sense of **responsibility** in the fulfilment of needs
3. **Competence** in developing the capabilities of others and to improve their well being; and
4. **Responsiveness** to the voices of others and recognition of care as an everyday practice of life.<sup>756</sup>

These values emphasise that the particularity of the story and context are values evident in the life's work of Justice Sachs, who recognises care as an 'everyday practice of life' and who tried within the limits of the law<sup>757</sup> to introduce a caring jurisprudence.

Although Justice Mokgoro, a contemporary of Sachs and the first black female Constitutional Court judge, does not use the words '*ubuntu*' or '*botho*' in the groundbreaking *Khosa* case,<sup>758</sup> her insistence that everyone is responsible for ensuring the well-being of persons within their community and society reflects such thinking. She is therefore promoting not only a fair community but a *caring* one.<sup>759</sup> In her view, there is a connection between a just and a caring community. Later in her career Mokgoro dedicated her scholarship to unpacking *ubuntu*.<sup>760</sup>

The concept *ubuntu*, like many African concepts, is not easily definable. To define an African notion in a foreign language and from an abstract as opposed to a concrete approach is to defy the very essence of the African world-view and can also be particularly elusive .... Because the African world-view cannot be neatly categorised and defined, any definition would only be a simplification of a more expansive, flexible and philosophically accommodative idea.

755 N Bohler-Muller 'Really listening? Women's voices and the ethic of care in post-colonial Africa' (2002) 17(54) *Agenda* 89.

756 S Sevenhuijsen 'South African social policy and the ethic of care' (2001) unpublished paper delivered at the annual meeting of the American Political Science Association.

757 D Cornell *The philosophy of the limit* (1992) 154.

758 *Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minister of Social Development & Others* 2004 (6) SA 505 (CC).

759 Y Mokgoro 'Ubuntu and the law in South Africa' (1998) 1(1) *Potchefstroom Electronic Law Journal* 17.

760 As above, 2-3.

Echoing Mokgoro's concerns with the development of a caring society, Sachs makes explicit reference to *ubuntu* in the *Port Elizabeth Municipality v Various Occupiers* case.<sup>761</sup> In justifying his refusal to uphold an eviction order which would result in the homelessness of a large number of 'squatters', he highlights in his judgment the constitutional requirement that everyone must be treated with 'care and concern' within a society based on the values of human dignity, equality and freedom. He also reminds us that the Constitution places a demand upon us to decide cases not on the strength of generalities but in the light of their own particular circumstances:<sup>762</sup>

The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.<sup>763</sup>

Justices Mokgoro and Sachs thus argue, albeit in different ways, that *ubuntu* is central to a new constitutional jurisprudence and to the revival of sustainable African values as part of the broader process of the African renaissance.<sup>764</sup>

Ultimately, *ubuntu* as relied upon by Sachs amounts to the belief that life is dependent on interactions with others. In the words of Archbishop Emeritus Desmond Tutu, '[w]e think of ourselves far too frequently as just individuals, separated from one another, whereas you are connected and what you do affects the whole World. When you do well, it spreads out; it is for the whole of humanity.'<sup>765</sup>

However, it has been argued that it would be dangerous to merely embrace or operationalise *ubuntu* as a 'universal' value without some serious reflection. Postmodern critiques of essentialism, foundationalism and metanarratives have taught that rendering concepts stable and static

761 *Port Elizabeth Municipality* (n 695 above).

762 As above, para 31.

763 As above. See also See Sachs J in *S v Makwanyane* (n 668 above) 374, 516E.

764 *Ubuntu* was mentioned in the Post-amble to South Africa's first democratic Constitution (the 'interim' Constitution of 1993), where it was contrasted with the destructiveness of retribution, vengeance and victimisation. In this sense, *ubuntu* was used to craft a strong reliance on restorative justice within the local context, a positive value that would assist in constructing a better life for all in post-apartheid South Africa. See also Y Mokgoro (n 759 above).

765 See *Ubuntu Women Institute USA Inc 'UBUNTU: Brief Meaning of African Word "UBUNTU"'* <http://uwi-usa.blogspot.co.za/2012/01/ubuntu-brief-meaning-of-african-word.html> (accessed 22 June 2017).

only leads to further oppression and exclusion as those who do not ‘fit in’ are once again silenced and excluded.<sup>766</sup>

In the words of Douzinas, *ubuntu* could be understood as the ‘image of a prefigured beautiful future which, however, *will never come to be*’.<sup>767</sup> Cornell articulates this as follows:

Utopianism has always been tied to the imagination, to visions of what is truly new. A world in which we could all share in life’s glories would be one radically different .... At last it is up to us to turn yesterday’s utopia into a new sense of reality.<sup>768</sup>

In his interview for the Constitutional Justice Project, Sachs spoke extensively about *ubuntu*, referring specifically to Cornell’s *Ubuntu* Project and rejecting the need to ‘operationalise’ this value:

There’s a time when Drucilla Cornell was waving the banner of *Ubuntu* very strongly, and getting good discussions going, and she asked at some forum, she asked me would I think *Ubuntu* was a significant constitutional principle, and I said no. I said, it’s an important value, it informs other constitutional principles but it doesn’t have any operational force as such.

Related to the care and *ubuntu* themes addressed in this section are the themes of reconciliation and restoration.

## 4.2 Reconciliation and the restoration of balance

... the theme of reconciliation had lodged itself deeply into my legal consciousness, surfacing rather strongly in two of [my judgments]. One emphasized the role of apology as a restorative justice response to defamation (libel). The other stressed the role of mediation in reconciling the rights of poor landless people with those of wealthy landowners on whose vacant property they had erected shacks.<sup>769</sup>

Besides developing a jurisprudence of *ubuntu* Sachs and Mokgoro have also expressed similar views on reconciliation and restoration. In this regard, it would be useful to consider the ground-breaking reasoning in the cases of *Dikoko v Mokhatla*<sup>770</sup> and *PE Municipality*. In the former case the court had to decide on the ambit of the immunity from civil liability given to municipal councillors in respect of what they said when carrying out their functions as municipal councillors. Immunity from civil liability, which protects councillors from litigation based on allegations that their

766 N Bohler-Muller ‘Developing a new jurisprudence of gender equality in South Africa’ unpublished LLD thesis, University of Pretoria, 2006. <http://repository.up.ac.za/bitstream/handle/2263/25545/Complete.pdf?sequence=4> (accessed 8 May 2017).

767 C Douzinas *The end of human rights* (2000) 338 (emphasis added).

768 D Cornell *At the heart of freedom: Feminism, sex and equality* (1998) 186.

769 Lenta (n 707 above) 87.

770 *Dikoko v Mokhatla* 2006 (6) SA 235 (CC).

words have been defamatory, enables them to speak and express themselves freely and openly. This, in turn, advances democratic government. But the ambit of the immunity is not without limit, as a balance must be maintained between the need to speak freely and the dignity of the person being defamed.

On the facts of this case, Mr Mokhatla called on Mr Dikoko to appear before the North West Provincial Public Accounts Standing Committee to provide an explanation of certain debts he owed to the Council. Dikoko's statement in his defence, made while he was providing the explanation, was to the effect that his overdue indebtedness was because Mr Mokhatla had changed the accounting procedures of the Council.

Mr Dikoko entered a special plea of privilege against a civil claim for defamation based on section 28 of the Local Government: Municipal Structures Act,<sup>771</sup> arguing that this section afforded him privilege in that he was not liable to civil proceedings. However, the court held that section 28 was not applicable, and it was determined that a case for defamation had been made. The High Court, having found Mr Dikoko liable for defamation, awarded damages against him in the amount of R110,000. He appealed against the award, claiming that it was excessively disproportionate or grossly unreasonable and not commensurate with the limited publication of the statement as well as the slight injury to Mr Mokhatla's reputation, and contended for the Constitutional Court to substitute its own award of damages for that of the High Court. Now retired Justice Yvonne Mokgoro considered the rules of the *actio iniuriarum* as applied in South African law and held that an apology (*amende honorable*) was one way of restoring balance in a situation of defamation.

Mokgoro held that in a consideration of the purpose of compensation in defamation cases, the true value of a sincere and adequate apology, the publication of which should be as prominent as that of the defamatory statement, and / or a retraction as a compensatory measure restoring the integrity and human dignity of the plaintiff, could not be exaggerated.<sup>772</sup>

She adjudicated that the High Court order be set aside and replaced with an order for damages in the amount of R50,000. In a separate but concurring judgment Justice Sachs emphasised the importance of restoring relations between the parties. He expressed that it was virtually impossible to measure a person's dignity, reputation and honour 'as if these were market-place commodities. Unlike businesses, honour is not quoted on the Stock Exchange.'<sup>773</sup> Sachs reiterated Mokgoro's view that the quantum of damages was too high and that the value of *ubuntu*, which in his view overlapped with the *amende honorable*, would support the making of a

771 Act 117 of 1998.

772 *Dikoko* (n 770 above) para 67 (references excluded).

773 As above, para 109.

sincere apology rather than the imposition of a large sum in damages. Sachs argues that:

The placing of a monetary value on a reputation, to my mind, is actually a denial of the intrinsic quality of what your dignity as a human being is really worth. *Ubuntu* and the African mode of settling disputes by bringing the parties together and acknowledging that you're all going to live together in the same community afterwards can do more to restore dignity and heal the social rupture than a monetary penalty calculated to ensure continuing antagonism.<sup>774</sup>

As reflected above, adherence to the value of *ubuntu* as outlined here demands that we deal with people in the context of their historical and current disadvantage and that equality issues must address the actual conditions of human life, for example life as a 'non-citizen' or a 'squatter'.

Some years later, in the *Port Elizabeth Municipality* case, Sachs stated that *ubuntu* was central to the whole Bill of Rights project: 'Our Court had used *Ubuntu*, referred to it in the very first place in *Makwanyane* in relation to capital punishment. But in that case it wasn't an operational principle, it was a value that informed the operational principles.' In *Port Elizabeth Municipality*, he maintained, 'it just seemed to me that unless there was some notion of human interdependence being recognised, we couldn't get the right answer .... So, again I tell the story as a story ....'

Sachs describes this case as 'a serious crisis' for him because he had:

... taken an oath to uphold the law and the Constitution without fear, favour or prejudice, and people have come and put up their shackles on somebody else's land, and we have the Rule of Law in South Africa, and we have private property and, you just can't do it. They've got to move. But I, Albie, I can't ... I can't sign an order telling them to go. It goes against my whole life, my whole sense of justice and fairness, and if I can't reconcile Albie, the former activist, fighting for the socio-economic rights that's been put in the Constitution envisaging, and understanding the background of dispossession and true justice, and removals of people and homelessness and joblessness and landlessness, if I can't write that judgement upholding the law, then I must get off the Bench. And I seriously thought about it.

He then describes how he was able to 'convert a purely personal dilemma into an intellectual tension, and it's the tension between the property owners' rights not to be arbitrarily dispossessed for their property, and the right of people to have access to housing, which is in the Constitution, and how to reconcile the two.' It became clear to him that there was no 'right answer'. When writing up the judgment, faced with this dilemma, he realised that 'without that notion of *Ubuntu*, that somehow established a

774 A Sachs 'Liberty, equality, fraternity: Bringing human solidarity back into the rights equation' (2012) 4 *Journal of Human Rights Practice* 381.

connection between the white homeowners living in their beautiful homes ... and the homeless black people out there in shacks on the land belonging to the wealthy people ...' he would not have been able to resolve the issue. He was convinced that the solution lay in:

some sense of neighbourliness and some sense that the whole nation's involved in this, the courts and the government and everybody, that it's an affront not just for the dignity of the poor people that they're living in shacks like that with nowhere to lay their heads, it's an affront to each one of us in our society, and that's implicit in our Constitution ... and it's taking account of all relevant circumstances ....

He thus held that the municipality should offer alternative accommodation to those who would be evicted and that there should be 'meaningful engagement' around this issue. Sachs acknowledges that the words *meaningful engagement* are borrowed from Zac Yacoob, who came up with those words in dealing with 'jurisprudence on evictions'.<sup>775</sup> In his public lecture titled 'Liberty, equality, fraternity: Bringing human solidarity back into the rights equation', Sachs explains that:

[c]ases frequently are brought to the courts in South Africa by desperately poor people crowded into innercity buildings, where the lights have been cut off, the water's not there anymore, they've got nowhere else to go, and the buildings are needed for redevelopment. Instead of simply saying to the occupants 'you've got to get out' or 'you can stay', the courts now require 'meaningful engagement'... the dignity of all South Africans was assailed by the fact that millions of our fellow human beings were compelled to live as homeless wanderers in the country of their birth.<sup>776</sup>

Sachs's thinking in cases such as *Soobramoney*, *Grootboom*, *Dikoko* and *Port Elizabeth Municipality* has been described as 'radical', a position which values pluralism and solidarity as key ingredients of democracy over stark and self-serving individualism.<sup>777</sup>

## 5 Persistent love of the Constitution

Sachs's care for the Constitution – and by association people and the law – can be seen long after his stint on the Constitutional Court Bench. Amongst other activities he has been responding to new proposals that the Constitution needs to be amended to remove the requirement of paying just and equitable compensation for land expropriated. As one of the ANC negotiators at Kempton Park who worked directly on the question of property and land redistribution, Sachs has made it clear that this proposal of Constitutional amendment is based on others' false assumptions and an

775 As above.

776 As above, 380.

777 Woolman (n 715 above).

incorrect interpretation of section 25 of the Constitution.<sup>778</sup> He outlines the three strategic propositions on land that were adopted by the working group on land:

1. *Proposition One:* The Constitution as a whole should be a transformative document
2. *Proposition Two:* Victims of forced removals after 1913 should get their land back or alternative restitution; and
3. *Proposition Three:* Extensive programmes of land reform to deal with colonial dispossession before 1913 should be instituted.

Sachs clarifies that there was an extensive consultation process leading to the drafting of the controversial property clause and that one of the main aims was to prevent the fragmentation of South Africa or the continuation of the 'bantustans'. It was considered best to consider the dispossession of blacks holistically. He explains:

Far from being a barrier to radical land redistribution, the Constitution [on a correct reading of section 25] in fact requires and facilitates extensive and progressive programmes of land reform. It provides for constitutional and judicial control to ensure equitable access and prevent abuse. It contains no willing seller willing buyer principle, the application of which could make expropriation unaffordable.

As a protector of the Constitution, Sachs is of the opinion that

... deficiencies with land reform thus far have stemmed from failure either to use at all or to exercise effectively the full powers given under the Constitution. The Constitution as it stands provides powerful instruments to bring about comprehensive land reform. The problem so far has been one of *implementation* rather than of impediments created by the Constitution (emphasis added).

Sachs thus continues to argue that the Constitution remains relevant and resilient:<sup>779</sup>

The Constitution is not a housing act, it's not an education act, it's not a nourishment act. The Constitution deals with rights, mechanisms, procedures and what we did when we fought for this Constitution.<sup>780</sup>

778 See A Sachs 'Oliver Tambo Centenary Series, Part 3: Does the Constitution stand in the way of radical land reform?' (2017) [https://www.dailymaverick.co.za/article/2017-05-05-oliver-tambo-centenary-series-part-3-does-the-constitution-stand-in-the-way-of-radical-land-reform/#.WQ\\_k2tyZHmS](https://www.dailymaverick.co.za/article/2017-05-05-oliver-tambo-centenary-series-part-3-does-the-constitution-stand-in-the-way-of-radical-land-reform/#.WQ_k2tyZHmS) (accessed 8 May 2017).

779 'Violence undermines values students are fighting for – Albie Sachs' 702 25 October 2016 <http://www.702.co.za/articles/193817/violence-undermines-values-students-are-fighting-for-albie-sachs> (accessed 1 March 2017)

780 'Albie Sachs: Free housing, food and education were not promised in the constitution' *Mail & Guardian* 19 October 2016 <https://mg.co.za/article/2016-10-19-albie-sachs-free-housing-food-or-education-was-not-promised-in-the-constitution> (accessed 1 March 2017)

One of the most pressing challenges in South Africa in 2017 is the attempted de-legitimisation of the Constitution and the Bill of Rights.<sup>781</sup> Whilst it is self-evident that economic freedom is still to be achieved and that the poor are tired of waiting for their (economic) emancipation, the arguments against the Constitution and the courts are based on a false premise, and the blame for the failure of transformation is misplaced. During Sachs's OR Tambo centenary lecture 'The Constitution: The negotiation processes that led to South Africa's first great act of decolonisation' at the University of Western Cape in 2017, some students in the audience vehemently challenged his views,<sup>782</sup> with one student claiming that the Constitution 'is against us, especially when you are poor' and other students making reference to Franz Fanon's revolutionary principles.<sup>783</sup> The responses by Sachs to these provocations reflect his continued belief in the transformative power of the Constitution:

If government has not used its powers given by the Constitution, don't blame the Constitution. That's a matter for self-reflection by the government .... I'm not saying there's nothing to complain about. I'm saying nothing will be achieved by tearing up the Constitution. We will not advance if we refuse to acknowledge what has been achieved by democracy.

He emphasised that the Constitution was written by those consciously keeping in mind the need for transformation: '[W]e opened the door for transformation, for change. After that it is about (political) will, leadership, vision and the sensibility to work with others to bring about the change.' Ultimately, it is not for governments to determine the limits of well-being, but for human rights to be used as tools against oppression and deprivation.

Today we continue to see Sachs's legacy in some Constitutional Court rulings. Recently the Constitutional Court handed down a landmark judgment in *Occupiers of erven 87 & 88 Berea v Christiaan Frederick De Wet*.<sup>784</sup> In this case the Constitutional Court repealed the eviction order of 184 applicants from Berea. The ruling resonates with what Sachs fought, and continues to fight, for: protection of the rights of the poor. The Court referenced the *Port Elizabeth Municipality* case as precedent, where Sachs attempted to protect the poor from homelessness. As in *Port Elizabeth Municipality*, the need in *Occupiers of erven 87 & 88 Berea* to consider all

781 At an anti-corruption 'African Perspectives on Global Corruption' conference held in Pretoria on 22-23 February 2017 one of the Chairs, a member of the Black First Land First movement, proclaimed that the Constitution is 'racist', 'anti-Black' and 'illegitimate'. When one of the authors of this chapter (Bohler-Muller) questioned him, he admitted that the main concern was section 25, dealing with the right to property, and thus the issue of land. Many such statements are made at public events and the veracity thereof is questionable.

782 "'Constitution is against the poor" – students give Sachs a tough time' *City Press* 26 April 2017 <http://citypress.news24.com/News/constitution-is-against-the-poor-students-give-sachs-a-tough-time-20170426> (accessed 15 May 2017).

783 F Fanon *The wretched of the earth* (1963).

784 2017 8 BCLR 1015 (CC) (8 June 2017).

circumstances surrounding the case before reaching a fair and just decision was paramount. The clarification of what is meant by 'meaningful engagement' and reasonableness is evident; as stated by the Socio-Economic Rights Institute (SERI):

The Constitutional Court found that the residents were indeed unaware of their legal rights, and so unable to give true consent to the eviction. The Court emphasised 'the fundamental importance that a person's home has to the realisation of almost all human rights'. Even where it seems a person has agreed to be evicted, a Judge must not order that eviction unless he or she is made aware of all the relevant circumstances, including the residents' needs and attitude to the proceedings, and is sure that no-one will be left homeless. The Constitutional Court accordingly set aside the eviction order against the Kiribilly residents, joined the City of Johannesburg to the proceedings, and directed the City to report to the High Court on the steps it would take to provide the residents with alternative accommodation.<sup>785</sup>

In this instance the Constitutional Court took steps to ensure that the 184 applicants were protected and that the Johannesburg Municipality prioritised finding alternative accommodation for victims of the eviction. The Court underscored the importance of informed consent, reasoning that the eviction order was erroneous as only four applicants were consulted while the other 180 were clearly not informed, and that all of the applicants were not fully aware of their rights to contest the eviction as they did not have proper legal representation.<sup>786</sup>

This case illustrates how the Constitution continues to evolve as a result of the impact of judges such as Albie Sachs.

## 6 Conclusion

This chapter is not meant to deify Albie Sachs's contribution to the constitution-making process; rather, it uses his journey to tell a story about 'making the road by walking'. Being human and loving humanity, Sachs made mistakes and has faced strong criticism from activists and scholars; yet his jurisprudence is instilled in our memories. His journey has taught us that soft vengeance is possible and that as a country we can move beyond the challenges we face. His activism has not ended; a new national dialogue has begun in South Africa that seeks to place the values of the Constitution at the centre of transformation.<sup>787</sup> Sachs is one actor in this

785 Socio-Economic Rights Institute of South Africa 'Constitutional Court issues ground-breaking housing rights judgment' *Press Statement*, 8 June 2017.

786 *Occupiers* (n 784 above) para 69.

787 See, for example, 'Former presidents launch national dialogue to address threats to SA's democracy' 702 <http://www.702.co.za/articles/254974/former-presidents-launch-national-dialogue-to-address-threats-to-sa-s-democracy> (accessed 23 June 2017). See also 'Why does South Africa need a national dialogue?' *IFP* 25 May 2017 <http://www.ifp.org.za/newsroom/south-africa-need-national-dialogue/> (accessed 23 June 2017).

dialogue, having discovered a new spirit of post-Bench activism in the process.

The chapter has also shown Sachs's contribution to the birth, evolution and protection of the Constitution. The cases cited in this chapter illustrate the complexities of making judgments. We have learnt that 'judging' is indeed a continuous struggle with irreconcilable issues which requires hard decisions to be made in the face of uncertainty. Sachs openly acknowledges this as one of the severe challenges of being on the Bench. How does one define 'equity' and 'reasonableness'? What about the people involved and the inevitable consequences of judgment? The dilemma with which he was faced in the *Port Elizabeth Municipality* case *supra*, where he stated that he had contemplated resigning from the Bench, epitomises this inner wrestling. What worked for him in this context, however, was to tap into his intellectual and emotional capabilities, which led to an outcome infused with an ethic of care.

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