**In memoriam**

**The late former Chief Justice Arthur Chaskalson**

Tribute delivered by Geoff Budlender SC of the Cape Bar at the funeral in Johannesburg on 3 December 2012

We are blessed to have had Arthur Chaskalson in our lives. I have been given the privilege of saying something about how he touched and continues to touch our lives.

Arthur’s first career was as a practising advocate at the Johannesburg Bar. He had a stellar commercial practice – and some very uncommercial clients. The Rivonia trial is well known. Another amongst many was the trial of the ‘Pretoria 12,’ in which the most prominent of the 12 ANC activists were the late Joe Gqabi and a young man named Mosima Gabriel Sexwale, otherwise known as Tokyo.

Arthur was inspired by his clients. He was inspired by their passionate commitment to freedom, and by the price they were prepared to pay to achieve freedom. He developed deep and lasting personal loyalties to the people concerned.

Arthur was an extraordinary advocate. He was not one to engage in rhetoric or sound bites. His weapon was precise and remorseless logic. He was, quite simply, the best arguer of a case that I have ever heard. I still remember his performance in the Komani case in the Appellate Division, in 1980. Mr and Mrs Komani had a simple yet profound desire. They wanted to live together. The pass laws forbade it. The law was plain, and it was against Mr and Mrs Komani. Arthur constructed a brilliant and novel argument which was so persuasive that Chief Justice Rumpf – no friend of Mr and Mrs Komani – became frustrated: ‘I think you are leading us down the garden path,’ he said to Arthur. But he could not find the flaw in the argument, because there was none. Ultimately, the Appellate Division unanimously decided in favour of Mr and Mrs Komani. It was the result of the most brilliant advocacy I have ever heard.

Arthur took on important positions as a leader of the Bar. I was at first puzzled by this: the Bar seemed rather like a parody of an English public school, with some strange customs and practices. I couldn’t see why he put so much time and energy into it. But Arthur saw the need for an independent legal profession. Much of the legal profession was cowed by those who held power, and was subservient to them. It was, frankly, a degrading spectacle. Much of the profession abandoned those of its members who were harassed, detained, banned or assassinated. Arthur worked to build the institution of an independent and fearless profession, which served the people and which served justice. He saw this as a foundation of the rule of law.

He returned to this theme in his last major public address, just three weeks ago, on 9 November. He spoke at the AGM of the Cape Law Society on ‘The rule of law: the importance of independent courts and legal professions.’ He pointed out that the profession was under an obligation to serve the public interest, that it did not do so if it served only the elite in our society, and that legal services had to be available to all who needed them. And he said that an independent legal profession was now an imperative of the Constitution. He quoted the Chief Justice of New Zealand:

‘Effective judicial process cannot be obtained from independent judges without independent lawyers.’

He then undertook a typically careful Chaskalsonian analysis of the detail of the present version of the Legal Practice Bill. His conclusion was devastating because it was so typically unembellished:

‘The legal profession has a duty to itself and to the people of our country to do all that it can to protect its independence. That involves ensuring that its rules and practices are in the public interest and facilitate access to courts by the public and in particular by those whose need is the greatest, by promoting the culture of independence and professionalism in practitioners, by explaining to the general public the role of an independent legal profession in protecting democracy, and by raising its voice against measures calculated to erode that independence. The Legal Practice Bill in its present form is such a measure.’

One form of suitable tribute to Arthur would be to ensure that the Bill, when adopted, protects the independence of the profession, while ensuring that the profession serves the public interest and not just private interests. We can do better.

Another institution to which Arthur devoted much of his life was the Legal Resources Centre. Many people were involved in building it and doing its work. None of them would deny for a moment that Arthur was its inspiration, its leader, and the key to its success. He saw the need for a durable institution committed to ensuring that those who most needed it, received the protection of the law. He built it patiently, skillfully, carefully. The result of that careful work is that the organisation stands 33 years later, still committed to the work which it started in 1979. It is the same work, for the same people. Only the legal and political context have changed.

Again, Arthur drew inspiration not just from theoretical ideals, but much more from the people whom he and the LRC represented. I remember the cases around bus fare increases – in Johannesburg, the principal client was Nthato Motlana; in Cape Town, it was a young community organiser named Trevor Manuel, whose local lawyer was Dullah Omar; I remember Tom Rikhoto and the pass laws; the forced removal cases in Oukasie at Brits;
the Marievale litigation for Cyril Ramaphosa and the NUM. He relished being able to contribute to a broader struggle for freedom; it moved him and it motivated him. The LRC gave him the chance to do this.

Arthur then became involved in institution-building on a grander scale: he started his constitutional work. While we were still in the throes of apartheid, he was an adviser to the Namibian Constitutional Assembly. I was quite recently in Namibia, in the company of the former Chair of the Namibian Constitutional Assembly and Prime Minister of Namibia, Hage Geingob. He spoke about their constitution-making process – and then, quite unexpectedly, started talking about Arthur – with awe and affection. I suspect that Arthur’s role in Namibia was much greater than any of us knew. Certainly, given his modesty, we did not learn about it from him.

What was to come next, of course, was his massive work in our own constitutional negotiations and the drafting of the interim Constitution. His hand is clearly visible in the text which was finally approved: his fingerprints are all over the document. You see them in the care, precision, and attention to detail; and you see them in the Constitution’s recognition that we need to go beyond a typical liberal constitution, which aims to limit the power of the state. Arthur understood that we needed what some have called a post-liberal constitution – a constitution which not only limits the power of the state to interfere with the rights of the individual, but which also addresses the regulation of private power; and even more fundamentally, a constitution which recognises the need to empower the state to address and redress the consequences of centuries of dispossession and discrimination. We needed a constitution which would provide a framework for the democratic transformation which was yet to come. The interim Constitution, and its successor the final Constitution, are among Arthur’s most enduring memorials.

And then came his masterpiece – the Constitutional Court. The first Constitutional Court consisted of a remarkable group of people. I do not exaggerate if I say that I am not aware of any apex court, anywhere in the world, which has had such a rich and diverse array of talent and experience. It included some very large personalities – some with egos to match. Arthur’s job was to weld them together, to lead them, and yet again to build institutional structures and procedures which would be durable. And what a success he made of it. The respect and affection in which his colleagues held him was palpable, and it was well-founded.

Our Constitution created a number of new institutions. We have to admit that the record of some of these institutions is inconsistent, and that our ambition may have over-reached our ability. But I think few people would dispute the proposition that the Constitutional Court has been an outstanding success – I would say the outstanding success of the new institutions. I think few would dispute the proposition that a very large part of the credit for this has to go to Arthur Chaskalson. It is not just a matter of the penetrating and profound judgments which he wrote. Perhaps even more important, Arthur understood how to build this institution, how to make it work, how to make it durable, and how to lead it.

It is an extraordinary story of achievements. Each one of them, standing on its own, was remarkable. Who in one lifetime could achieve that much? How did Arthur do all of this? Of course he was brilliant, but there are other brilliant people. How did Arthur do this?

I want to suggest three factors which were significant.

First, there was the transparent integrity in everything he did. You could trust Arthur Chaskalson. He was a person of rock-solid integrity and morality. The result was that even those who disagreed with him, very seldom questioned his motives. Even his opponents respected him and trusted him. He won trust, and that trust enabled him to achieve amazing results. He was a touchstone as to what is right and what is just. Kate O’Regan said to me last weekend ‘Whenever I am not sure, I ask myself what Arthur would say.’

Second, was the way he engaged with people. It was a respect and concern for people, not theoretical philosophies, that lay at the heart of his life and his work. His core belief was that it was human beings that were really important in life – and therefore also in the law. He put people at the centre of everything which he did.

Two events come back to me when I think about that.

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**Press release**

**Tribute to the late former Chief Justice Arthur Chaskalson**

The GCB is deeply saddened by the sudden passing of the former Chief Justice and honorary president of the GCB, Arthur Chaskalson. His contribution to the legal fraternity has left an indelible mark in defense of an independent legal profession, for which we owe him eternal gratitude.

As a judge, he was the most ardent supporter of an independent judiciary. His legal prowess was matched only by his humility and judicial temperament. His stewardship as the first President of the Constitutional Court, and his contribution to the law and the development of our constitutional jurisprudence, were unparalleled and have helped place South Africa as a proud member of the democratic countries of the world. He was undoubtedly one of the greatest legal minds of our times and we hope to build on the legacy which he has left behind. We, as the GCB, and the nation extend our support and sympathies to his family during this time, for the loss of a true son of the soil.

He lived his life as an avid servant of the law and his life’s work will forever be a testament to the values of a democratic South Africa.

May his soul rest in peace.

Ishmael Semenya SC, chairman of the GCB

3 December 2012
First, I remember Tokyo Sexwale’s trial. Twelve accused, and five lawyers, consulted in the cells. I remember Arthur sitting for a long period with each one of our clients in a corner of the cell, talking and listening intently. I never found out what they spoke about. They weren’t talking about the merits of the case: Arthur did not have a pen or a piece of paper in his hand. He was learning about the human being who was going to be his client for two years, what was important to him or her, how he or she felt about what lay ahead – and he was making himself available and known. He was respecting the person called ‘client.’

Second, I remember the famous Grootboom case in the Constitutional Court. It was a difficult and important case about the right to housing. Counsel for the government started his argument. He talked about the structure of the Constitution and the Bill of Rights, separation of powers, and so on. After about five minutes Arthur interrupted him. He leaned forward and said ‘Mr X, leave aside for a moment these questions of constitutional theory. Just tell me this: where does the government suggest these people should sleep tonight?’ Possibly for the first time in his career, Mr X was lost for words – he had no answer, for there was none. Arthur had put his finger on the issue. These elaborate constitutional structures and principles were there for a reason – they were supposed to serve people, and in particular poor people. Arthur was not asking a rhetorical question. He was saying ‘If your theories can’t answer that question, then they can’t be right, because our Constitution is a Constitution for people, and particularly for those who are marginalised or vulnerable.’

For Arthur it was all about people. It was by putting people at the centre, that he was effective. It was his respect for people that made him such a brilliant teacher. He wanted to hear your views; he listened to you carefully and respectfully; and he taught you – not didactically, but by example. It was also people who caused Arthur the most pain. It caused him deep pain when we failed to live up to the promise we made each other in our Constitution, that we will build a society in which all can live in freedom with dignity. It caused him pain to see cynical betrayal of the sacrifices which were made in the struggle for democracy. Greed caused him pain, corruption caused him pain, and lies in our public life caused him pain. There was much around us at the moment that caused him pain, as he made clear in his speech to the Cape Law Society. But through that pain, he retained hope and confidence in the people of the country which he loved. He believed that we would yet put this behind us, because he believed in people.

That respect was reciprocated. The recent outpouring of grief from people from all walks of life speaks more clearly than I could. A friend sent me an email after attending the memorial service for the late Jakes Gerwel, another great South African, on Saturday. He wrote: ‘Very sorry about Arthur Chaskalson, whose death was announced, to a huge spontaneous groan by the whole hall.’ Many judges are respected and admired. Arthur, notwithstanding his reserved manner, was loved by many. That was because of the respect, concern and equality with which he treated everyone he came across.

I have mentioned two reasons why Arthur succeeded as he did: his integrity and his putting people at the centre.

I said that I would mention three reasons. The third reason is Lorraine. Lorraine and Arthur loved each other deeply and consistently. They supported each other in everything which they did. They took care of each other when they were in trouble; they gave each other advice when they did not know what to do; they acted together, in unison. They were a team. Their love for each other was usually undemonstrative, but it was obvious. They took care of each other, and they supported each other. For me, one of the most moving things about this relationship is the care, energy and pure love which Arthur put into organising Lorraine’s recent birthday celebration, just a couple of months ago. It took place in at least three venues, in different parts of the country, over an extended period, with the people whom Lorraine loves. It is almost as though Arthur knew, intuitively, that this was his last opportunity to do this. It was a wonderful and happy and timely celebration.

Arthur was blessed by Lorraine, and she by him. Our hearts go out to her, to Matthew and Susie, to Jerome and Jackie, and to their grandchildren.