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5 June 2009

The Honourable Mr Arthur Chaskalson  
c/o The Director  
Constitutional Court  
Private Bag X 1  
Constitution Hill  
Braamfontein 2017

Dear Mr Chaskalson

I write to you as a fellow lawyer with twenty years of daily practice in the courts behind me, variously as a prosecutor, district, civil and regional court magistrate, and mostly as an advocate at the Pietermaritzburg Bar. I currently work full-time as a researcher and writer, focussing on the HIV-AIDS *Problemfeld* as a point of engagement with wider and deeper political and economic ills.

I enclose a copy of my latest book *The trouble with nevirapine*. More than a little fearful, to be honest, I've hesitated some months in sending it to you, mindful of the Hungarian proverb I read on a plaque in Budapest in 2007, 'If you tell the truth, expect a kick in the head.' The German socialist Ferdinand Lassalle warned, 'Truth is always revolutionary', and revolutionaries, even unarmed ones, tend to attract bullets, bayonets and chains. (I have some experience of this already, and once bitten twice shy: some years ago the world's largest pharmaceutical corporation at the time, GlaxoSmithKline, had a go at assassinating me professionally in retaliation for the trouble I'd caused it over its drug AZT (see [www.tig.org.za](http://www.tig.org.za)). Fortunately the plane never even left the airport, so to speak, but it was a sharp lesson all the same in the personal perils of the particular politics I'm in.)

Stephen Clingman's co-dedication of *Bram Fischer* to you for your 'clearest vision of justice and trust', and Hugh Lewin's account in *Bandiet: Seven Years in a South African Prison* of your plea in mitigation of sentence at his trial, in which you 'traced the history of dissent in South Africa' and the 'long history of leniency' you said judges had shown for dissidents moved by public over private interest, gave me the heart to take the dangerous step of approaching you.

Dangerous, because as *The trouble* shows, rather than coming down on the side of all that's good, right and true as you and your colleagues imagined you did, you made the most terrible mistake in the nevirapine case; and so many powerful interests are threatened by my book's revelations that turning on the messenger would be the easiest fix. Especially since his message is so unwelcome, his criticism so uncompromising, and his tone of voice so scathingly irreverent.

Like most extraordinarily bad news, what I relate in my book is scarcely believable at first sight, but then you have the benefit of a lifetime's applied legal experience in picking truth from lies, facts from propaganda.

You'll read that as a consequence of your court's nevirapine order, thousands of babies, practically all born to poor African mothers giving birth in public hospitals, are being needlessly exposed to a useless, extremely toxic chemical, and untold numbers of them are being seriously harmed, many fatally.

There's no question that in unanimously granting the TAC its order against the government in July 2002 you and your colleagues acted with the best intentions, but as you'll read in the book you were gravely misdirected on the facts. Your judgment sprung from the foundational premise that nevirapine had been shown beyond serious question to be safe and effective for giving African women in labour and their newborn babies – something TAC fan Judge Dennis Davis calls a 'no-brainer' in his chapter celebrating the nevirapine case in *Precedent and Possibility: The (Ab)Use of Law in South Africa* (which is to say that in

contradistinction to brainy people like him only a brainless person like me would claim otherwise). But there was already clear evidence to the contrary, some just surfaced, at the time your court heard and decided the case, brought to your attention by the late Professor Sam Mhlongo in the *amicus curiae* application I drew for him, which you dismissed because it was brought at short notice (he explained why) but mainly because it would have required a disruptive radical rethink of the premises on which the case was set to be argued, when everyone was rearing to go; and two and half years later, in December 2004, conclusive and damning evidence of how very harmful nevirapine is for African babies came to light thanks to Dr Jonathan Fishbein, the highest ranking whistleblower in the history of American government.

If your intentions in your judgement were to bestow life and health, you'll be mortified to learn from the information Fishbein brought to public attention that you meted out death and disease instead.

My own experience in court brought home to me the hazards of going into a case with a glowing sense of high purpose where the line between right and wrong, good and bad, light and dark, seems so clearly marked from the outset, and how this pleasurable sentiment can skew one's reasoning, as coolly detached as it may look in print. Justice Albie Sachs's account, quoted in my book, of how he wept in the corridors after the decision, overcome by moral rapture over the tremendous blow he felt had just been struck for human rights, over the wonderful victory for the little African babies he was so concerned about, was I'm sure a joy and deep satisfaction shared by you and the rest of your colleagues, even if you didn't also need to reach for your handkerchiefs. Your court's performance during the argument of the case, criticised in the book, illustrates my point.

I write hoping to arouse the profound, exceptional moral conscience that impelled your long and creditable career in service of justice in our country, especially during the apartheid era when

ordinary human rights were the preserve of the privileged few and the majority suffered bitterly without a voice in the country.

Should you be disposed to retort – in a formal sense quite properly – ‘I’m retired now; this is none of my business; it’s up to the Medicines Control Council to sort out this horrible mess’, you’ll discover from the book that the MCC has proved to be scandalously derelict in discharging its statutory obligation to protect the South African public from the marketing of harmful and ineffective drugs by the multinational pharmaceutical industry. In short, these people are completely useless.

I hope instead that you might find the time to reconsider what was your court’s most acclaimed decision, and that you won’t stint thereafter at pursuing the matter with your former judicial brethren to set right what was done wrong, even if this would be at the cost of considerable personal, professional and institutional embarrassment.

I’m not sure how this atrocity might be brought to an end. Any interdict can be discharged on application on the basis that it’s become insupportable in changed circumstances over time, or in view of new facts come to light that vitiate the factual foundation on which it was issued. Unfortunately I don’t have the TAC’s millions in foreign funding to bring such an application myself, and the Legal Resources Centre you founded, which claims to ‘use the law as an instrument of justice for the vulnerable and marginalised’, acts (*per the cui bono test*) for multinational corporate capital instead: the drug industry and its merchandise promoted by the TAC. Whether the highest court in the land has the power to recall its orders and mend its blunders of its own motion is beyond my ken. But it seems to me that if the High Court is the upper guardian of our country’s minor children, the Constitutional Court carries the ultimate responsibility for their protection, especially in regard to those born to ‘vulnerable and marginalised’ mothers at the bottom of the economic and social order who are being injured by an order the court made to the effect that they be doctored with a worthless, very harmful drug.

As a trial lawyer who's seen from all sides of the bar and bench how seemingly stonewall cases can fall through the finest cracks, please be assured that I've learned to be meticulously careful with fact – all the more now in my work in an ideologically and politically supercharged field of contested knowledge, where the slightest imprecision could wreck my reputation for reliability in my writing. *Ex abundanti cautela*, since I'm only a lawyer, I've had the book vetted on the technical aspects by high-ranking mainstream expert pharmacologists and other scientists, mentioned in 'Notes, sources and acknowledgments' and cited on the back cover.

I regret that you're likely to be appalled by the disclosures in my book and will find them very distressing. But I'm sure you'll agree there's little worse than the sight of a suffering child – and since delivering your decision in the nevirapine case, uncounted thousands of newborn African babies have been and continue to be needlessly poisoned by the drug. It's a horror you'll agree must be stopped as soon as practically possible. As the country's once top judge who led the court in the nevirapine case, I cannot imagine that you'll look the other way.

With great respect.

Yours sincerely

ANTHONY BRINK

Cc, with a copy of *The trouble with nevirapine*, to:  
Chief Justice Pius Langa  
Deputy Chief Justice Dikgang Moseneke  
Judge President Lex Mpati, Supreme Court of Appeal  
The Honourable Mr Thabo Mbeki

And to:  
Justice Edwin Cameron  
Justice Yvonne Mokgoro

Justice Sandile Ngcobo  
Justice Bess Nkabinde  
Justice Kate O'Regan  
Justice Albie Sachs  
Justice Thembile Skweyiya  
Justice Johann van der Westhuizen  
Justice Zak Yacoob

And to:

Deputy Judge President Louis Harms, Supreme Court of Appeal  
Judge Dennis Davis, Cape Provincial Division

And to:

The Honourable Mr Laurens Ackermann  
The Honourable Mr Richard Goldstone  
The Honourable Mr Johann Kriegler  
The Honourable Mr Tholakele Madala