

Judicial Services Commission interviews

6 October 2015, Morning session

Gauteng High Court

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Interview of Adv W H G van der Linde SC

Chairperson (Deputy Chief Justice Moseneke): Welcome, Adv van der Linde. You have forty-five minutes in which you will be prompted by questions by the JSC. Commissioners have the full paperwork necessary as well as other details. This gives you the opportunity to highlight the areas that you feel are important. I must disclose that Adv van der Linde and I started the bar together. We were pupils together and we wrote exams together. This starts and ends my disclosure. I became a judge whereas you became a practicing advocate. Why do you now want to become a judge?

Adv van der Linde: I have practiced for a very long time. I like judging and resolving issues for litigants. I have found myself throughout my career contributing outside his practice many times. There is an obligation on parties to give back to the communities from which they took for so many years.

Chairperson: What is your age?

Adv van der Linde: I was born in 1956, so I will be 60 next March.

Chairperson: You had a very good education and followed a traditional route to the position of Senior Counsel. What do you want to say about this route? Do you recognise the privilege of having the ability to go to a good school followed by a good university, etc?

Adv van der Linde: It is not hard to imagine that, especially when one looks at the whole of South Africa, this route was an artificial one. I have no doubt that all did not share my privilege. This privilege affects more than schooling, but big business and briefing patterns. This country's history advantaged some and, conversely, disadvantaged many. I accept this.

Chairperson: One can expand this to the wonderful arbitration practice that you developed thereafter. This was an outcome of your own hard work and excellence on the one side, but also commercial business practices that made this arbitration practice possible. Is that not so?

Adv van der Linde: That is so. I am also involved in arbitration agreements in which government is involved. But, on the whole, commercial arbitration is a function of corporations that conclude arbitration agreements. I do not want to take your comment about excellence too seriously; any normal human beings that have opportunities, apply themselves and take their work seriously will benefit.

Chairperson: South Africa is trying to equalise society by equalising resources and opportunities and the ability to access opportunities. Judges have a role to play in this project. The Constitution is remedial. The Constitution aims to move South Africa from a dark corner to a well-lit future. What is your view on this project? The project started in 1994 but is clearly still underway.

Adv van der Linde: South Africa cannot have a Judiciary that is one race and one gender serving a country that is multi-gender and by far and away the other race; this would be perverse. It is absolutely necessary for people to embrace transformation; Professor De Villiers finally did today in the Cape Times. It is a challenge but it also exciting to unlock all the talent that there is.

Chairperson: Do you agree that we need judges who embrace the goals of the Constitution?

Adv van der Linde: Absolutely.

Chairperson: I will not speak about your qualification; your experiences speak volumes on paper. My last point is this: judges bring their background to the job, their inarticulate premise. Our past intrudes into what we do and influences our decisions. How should judges overcome the biases their past creates? I have a background of being part of the broader liberation struggle, of being a prisoner, coming from the township and struggling through the profession to get where I am. Many suspect that it will intrude into my decision-making. How do judges overcome this?

Adv van der Linde: Until 1994, South Africa had a seriously problematic moral compass among a small portion of the population. It was legitimately attacked by the greatest part of the population. For me, what 1994 brought was an emotional and intellectual liberation and the supplanting of a moral compass. The Constitution contains not only rules, but values. The Constitution is not only a guiding light for lawyers, but also for people. People would be well served to live by these principles like transparency, accountability and equality.

Chairperson: You disclosed that in University, you joined the Ruiterswag and remained a member in your youth. You resigned thereafter and declined to join the Broederbond. Later, you have disclosed that you joined NADEL. This is quite a change. Do you want to express yourself on this?

Adv van der Linde: Long before joining NADEL, I committed to change the governance of the General Counsel of the bar when I was Vice Chairperson to a fifty-fifty composition. I have long been driven by positive action for transformation. These actions meant that we had changed the general composition of the bar in Johannesburg. After me, there was the first black chairperson of the General Counsel. I spent a lot of years with the Independent Regulatory Board for Auditors (IRBA). I was chairperson of IRBA for four years; I instituted a permanent commitment to transformation there as well. I have always been driven to make a positive contribution in the areas in which I can. As for the Ruiterswag, I was asked by the Dean of Students to join; I was told that it was an Afrikaner think tank. I thought at the time that it was a cool idea, if I may say that. I thought of myself as a progressive; I thought I could contribute in these young Afrikaner circles. I can see now quite clearly that it took far too long for me to absorb the fact that it was only white, only male, and that it was secret. One today can hardly think of three more abhorrent qualities looking back. I stayed too long in it; I should have resigned. I stayed out the term, which was until I was thirty-two. At that point, I declined to join the Broederbond. It seemed to me that this was going nowhere, and I was also busy with my law career. The 1980s were tumultuous; Dakar and other things were happening and I was not a part of them. It was not such a cool idea. I could have done more. One wants to make a contribution. I have had advantages, and I want to give back to society.

Chairperson: Thank you for that answer. I appreciate your transition to a progressive stance. You and I once had a discussion when we were pupils and I said that your government would collapse eventually. Sheer force of the people will win out. I do not want to say that I was right. I am quite happy that you have made yourself available and I admire your progressive stance. I am now done with my questions; we needed to debate these important matters.

JP Mlambo: I will take over where the Chair left off. I do not want a story, but what is your view of your membership of the Ruiterswag today?

Adv van der Linde: It is indefensible.

JP Mlambo: You are not my first candidate to come from this background. Other judges have been nominated that were members of the Ruiterswag. Judge Fourie also had to come and talk to us about his background with the Ruiterswag. In terms of driving transformation, you say that you were instrumental in introducing the fifty-fifty rule that helped black advocates. Would that have been the reason why a black person took over your position?

Adv van der Linde: Yes. I am proud of this.

JP Mlambo: The significance of the fifty-fifty rule was that it brought advocates of colour into the decision-making process of the General Counsel. Is that correct?

Adv van der Linde: Exactly. For years, black advocates had no access to the regulation of the profession. The problem was that there were way more white advocates than black advocates. The only solution was power sharing.

JP Mlambo: You have done much work as a Senior Counsel in a number of matters, some big. Has this provided the opportunity to drive transformation by bringing in black juniors or ensuring that they were part of the teams that you led?

Adv van der Linde: Yes, but I want to make something clear. The beneficiaries of transformation are not only the youngsters. Many eyes open, many perspectives change. It is a two-way stream. Transformation is a part of our society and will be for quite some time. Many years of our history, even before 1948, led to the skewing of our society.

JP Mlambo: What other things have you done to drive transformation?

Adv van der Linde: Something close to my heart is that my group began a mentorship programme for people, not only black young people, to share very personally and on a regular basis the problems of their practice on a confidential basis. This was one on one, say every second week. We would discuss practice problems, matters of pleading, ethical or procedural questions, etc. This was gratifying because, after a couple of months, I have been able to help people and that many have thanked him and no longer needed the help.

JP Mlambo: I have a spreadsheet here that shows that you have been doing acting stints since 1998. I have captured what you have done over all those years; I hope nothing is unrepresented.

Adv van der Linde: I do not pretend that he records every judgment he has ever made. I remember acting in Pretoria at least three times. This list must be incomplete.

JP Mlambo: You made this point in your application. You and Advocate Davis have done many pro bono cases. These do not appear.

Adv van der Linde: I also did those in Pretoria, yes. But I did civil work. I first acted when you asked me to, Judge President, several years ago. That was not criminal appeals. I also acted when Judge Van De Merwe was running that court. There were programmes that the General Counsel did to assist in clearing criminal appeal backlogs. I remember one such stint, but I cannot remember clearly.

JP Mlambo: The point I am making is that, with pro bono cases, you guys aimed to help the court clear its backlogs at no pay. If you look at the spreadsheet, you start acting in Johannesburg at a time when there was no differentiation between special motions and normal opposed motions. I have captured eight weeks in the opposed motion court. Would there have been any time during those weeks where you did special motion work?

Adv van der Linde: I do not remember. I took Silk in 1996. I have always acted when asked. In those days, you were given trials and motions. If you given motions, you did the motion court. Sometimes there were applications that I thought were quite tough or long, but they did not have a label for organisation; the result was that you were overbooked.

JP Mlambo: Those were the bad days. I would know; I did work in those courts. I have captured a total of twelve weeks in the unopposed motion court, eight weeks in the opposed motion court, and two weeks in the urgent motion court. In those three courts, looking at your judgments, am I correct in saying that over 70% of your judgments written come from motion court?

Adv van der Linde: This is correct. I did a few trials, but by far and away I have done motion court.

JP Mlambo: For one to fit in as a motion court specialist, one must have much experience. Do you regard yourself as a motion court specialist?

Adv van der Linde: I am a jack-of-all-trades.

MEC Lesufi: You are a top commercial lawyer. Would I be wrong in saying that those people who benefitted under apartheid also benefit from the post-1994 opportunities? You say that the system in the 1980s when you

joined that secret youth group was wrong, but for you it was a passport to opportunity. Now, you are applying to be a judge so that you can continue to benefit, only now it is from the democratic government.

Adv van der Linde: I do not doubt that I will benefit from the opportunities that this country offers. I am applying for it, yes.

MEC Lesufi: Look at your pro bono case on behalf of the Children Resource Centre Trust. This case involved the right of access to courts by way of a class action. Would you support class action against companies that have invested in this country during Apartheid?

Adv van der Linde: Yes I would. I did that case pro bono. It was one of important, founding class actions in our law. The wonderful thing here is that class action is an economic equaliser in the economies of litigation. In a sense it millers trade unionism. It is the numbers that help equalise the playing field against the big corporations. It is an exciting new window that has opened up in our jurisprudence.

MEC Lesufi: My last question regards a judgment that was overturned by the full bench on SASOL, purely on legal grounds. Your views?

Adv van der Linde: I think the full court was wrong, respectfully. I wrestled about that judgment. It was a question of trade usage and when trade usage becomes a part of a general contract. It is not always easy to determine when this transition happens. If the full court feels that way, then they are right and I am wrong.

Chairperson: We have a long list, members. Please be succinct in your questions.

Minister Masutha: We have a serious challenge of transformation for advocates, which is a primary feeder into the judicial system. In the Western Cape, out of 420 advocates on the bar, less than 20 are African; I will not even speak about women. The situation is worse for Silks. The SC here today is one of only four or five African female Silks in the whole country. With your many years of experience, what advice can you give to me that I can convey to the President about how we can change the profession insofar as opening up access, especially to Silk, for people who have been marginalised? In twenty years, we seem to have moved back instead of forwards. What advice would you give?

Adv van der Linde: Firstly, I wish I had a perfect answer. In England, there is a concerted push to put women on the bench. There is a controversy in England about someone being appointed to the high court in England recently. More than fifty percent of judges under forty in England are women. Many years ago, I wrote an article in the Advocate about how it is that women practitioners are retarded; I have a daughter who is a lawyer and I would be aghast if she had her opportunities limited because she wanted a child. Many reasons retard women in their pursuit of this career. I can say no more than that what one currently observes, that more women come to act on the bench. The only way is to give women opportunities to act on the bench, to give judgments, to get to like it, and to pursue appointment.

Minister Masutha: I am still sticking with the profession itself. You are still in the profession. There are still experienced SCs that have said that they will only have white male juniors and that they will not compromise. Maybe it is a specific junior, but they will not shift. How prevalent is this situation and how do we solve it? You guys have the skills and are hoarding the experience. How do you open up to black and or female juniors?

Adv van der Linde: A colleague and myself started last year to introduce a rule to make transparent Silks' fee books to monitor which juniors are hired. This would allow one to check at the end of the year how many juniors the Silk has been briefed and which juniors. This is currently at the request level, but the Johannesburg Bar has accepted this plan. It should be compulsory eventually, but should start with voluntary disclosure. The example you gave is very disconcerting. Section 9,4 of the Constitution applies throughout the land and addresses this, I believe. A matter like the one you describe would require serious attention.

Chairperson: I must urge the Minister to set up a private meeting. There will be fifteen more minutes. If you feel that your point has been covered, please say so.

Dr Motshekga: I think you need encouragement on your management of time, Chairperson.

Judge President Kgomo: In 2001, you were a guest speaker in the Northern Cape. We had a discussion on the broadening of the pool for black and especially black female judges. My suggestion from our conversation was that, like myself, I did pupillage when I was a regional magistrate, and I wanted to continue pupillage so that magistrates in particular could do their pupillage first and not resign because they do not know whether they will succeed or not. That would have helped. Where did this go wrong?

Adv van der Linde: I am guilty of extending pupillage from half a year to a year. At the time, we were experiencing at the bar that people were coming from university with four year LLBs only. We had to design English as a Second Language writing and speaking courses. We designed a unique model for education for professional legal practitioners. To try and ameliorate that, after six months, a pupil would start giving briefs. So, although you had to write an exam during the second half of your pupillage, you could also take certain briefs after six months. There was also an exemption system for persons that the Exemption Committee decides fit.

JP Kgomo: The gap between practitioners and non-practitioners, the magistrates or even attorneys who do not make it to the high court, is very big. There is this mentoring programme. Can it not still be pursued? Can it not still be open to magistrates if they take a sabbatical?

Adv van der Linde: Are you referring to the pupillage?

JP Kgomo: Yes. I just want a brief answer as to whether the route is there.

Chairperson: May magistrates be taken on as pupils?

Adv van der Linde: There is a substantial burden on someone who takes on a pupil.

Chairperson: Thank you for the response. Judge President Kgomo can follow up on this matter later.

Mr Nyambi: Why was the Ruiterswag a secret organisation?

Adv van der Linde: It was presented to me as secret. I do not know why it was secret. We met every month and talked among white men in secret. This was the telltale sign of the problem.

Mr Nyambi: What did these meetings talk about?

Chairperson: I do not know how old you were then, Honourable Nyambi. The Ruiterswag was the youth wing of the Broederbond.

Mr Nyambi: The documents and the verbal explanations you have provided are different.

Chairperson: Why was the organisation secret?

Adv van der Linde: I welcome the question. I suppose that the organisation thought that it could only advance the interests of Afrikaners in secret.

Mr N Singh, Member of the National Assembly: Hindsight is the best sight. You said that being a part of the Ruiterswag was cool as a student, which is understandable. However, you remained a part of the organisation well after university; why? What prompted you to stay in this organisation for this long?

Adv van der Linde: I must have joined around the age of 18; 14 years in all. I stayed in for ten years as an adult. I have thought about this often, and I cannot explain it to myself. I find it indefensible. The country and the outside world was in turmoil in the 1980s. People were making changes at that time. De Klerk had to concede eventually, and I was not a part of that. I should not have stayed.

Chairperson: That is an answer, whether or not one likes it.

Mr H Schmidt, Member of the National Assembly: On page ten of your nomination form, you indicated that you never marked any of your judgments reported; you say that that is the duty of permanent judges. I take it that you are not saying that acting judges should not deliver judgments of a reportable standard. Can you explain this comment?

Adv van der Linde: From the day that I acted, I took the attitude that the duty of the acting judge is to get through the work. Permanent judges run the bench; acting judges are only there to help out. I got the impression that acting judges float in, write a dissertation and leave. Thus, they get the benefit without buckling down and doing the hard work. I think that it is the job of permanent judges who have been appointed to report judgments.

Chairperson: The convention supports this. This position shows modesty.

MrMabunda: I want to see your transformative agenda as an SC to advance the cause of black counsels as well as junior counsels. The Deputy Chief Justice has complemented you for joining NADEL. Why did you only join NADEL last year? Democracy has been here since 1994.

Adv van der Linde: I joined NADEL last year on the suggestion of a colleague. I cannot explain why I did not join sooner. My own personal transformation agenda is that, with junior counsel who are black in long cases, for both private and state cases, in the work that I do, I interact with young colleagues and draw them into the briefs that I get.

Adv I Semanya: My interest is that, when we go into deliberations, the records must be clear. In the almost three years of practice, you and I have dabbled in the unpaid efforts of the governance of the profession for hours and hours. I am placing it on record that I have yet to see anybody who was on the other side of the debate who would have been more cooperative than you in assisting transformation.

Chairperson: Thank you, Adv Semanya. What a bouquet of flowers. Now is the time for closing remarks.

Adv van der Linde: Humankind does not live in society on their own; people must give back. I would like to contribute to society.

Chairperson: I hope that this experience of looking at the past was cathartic. I adjourn for tea.

Chairperson: Welcome Norman Shushu, MEC, who is here on behalf of the Northern Cape Premier. Also, welcome Justice Tlaletsi, who is also from the Northern Cape and is here in the stead of the Northern Cape Judge President.