

Judicial Services Commission Interviews

Friday 09 October 2015

Eastern Cape Division of the High Court (Port Elizabeth)

Chairperson: Chief Justice MogoengMogoeng

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Interview of Advocate E Crouse

Chief Justice Mogoeng: How long have you been practicing as an advocate?

Advocate Crouse: I worked as a litigator in 1987, before that I was a prosecutor from 1986.

Mogoeng: With all the prejudices that women legal practitioners have to contend with, did you manage to build a strong practice?

Crouse: I cannot say that it was totally easy as a woman at the bar, especially since I was the only woman at the Port Elizabeth bar. But I do not want to hide behind that. I think when I left the bar in 2004 I had a very good senior/junior practice. At that point, many of the men asked me to lead them in civil cases. The bar in itself bestowed on me the honour to represent them on the Bar Council and at EXCO meetings at the bar. I must say that being a woman is not always easy, my youngest child was born in the middle of a court case. The bar has the story a little bit wrong, they think I gave birth at court, I actually gave birth at the hospital. I was in the middle of a court case and she was born early in the morning, and I said to my husband that I had to get back and just finish argument, and my husband said if you get out of hospital I am divorcing you. Then I weighed the options and decided I would stay with my marriage. Being a woman is difficult, it took long to convince the men that I can be equal to them. I left as a senior-ish/junior in 2004 to join Legal Aid South Africa, which with respect, was a very good thing for me to do at the time.

Mogoeng: Is that where you are now?

Crouse: I am a senior litigator at Legal Aid South Africa. We have 6 senior litigators in South Africa. The aim of a senior litigator is to act within the organisation as a senior advocate would do. My work is there to give support to practitioners who need support and also to try to represent poor and vulnerable persons on the same level as a paying client would get at the bar. I think we have been very successful with that. I have at least four cases where the law has been changed. The latest is the judgement which you gave, Chief Justice, in the Saramich matter. In that matter it was a vulnerable woman who paid in cash for her house, she was later retrenched, and before transfer could go over into her name, the seller became insolvent. And in terms of the common law in South Africa since Jan Van Reibeek, the trustee of the insolvent estate can then choose what to do with the contract with the contract. This trustee chose to say well you can buy the house again and the poor woman could not. And then Chief Justice, with the consent of the Minister of Trade and Industry, you changed the Constitutional Court matter, you changed the Alienation of Land Act. There are some issues. The trustee of the insolvent estate can choose what to do with the estate. You changed the common law on the alienation of land act.

Mogoeng: While you are there, we all found this matter to be so complex, that it actually took us long to produce a judgment. Because none of us knew what to make of the matter. It really was a complex matter and I really must tell you, you are very impressive in your presentation and preparation.

Crouse: Thank you very much, Chief Justice. In one matter where I appeared before your court, and it did not go well in that matter, as I was leaving, as the court was about to adjourn, Deputy Chief Justice Moseneke said I should not get on the aeroplane and feel disheartened, I wanted to say that I enjoyed your heads of argument and your research. Even though my heart was sore that I was not going to win this, I left that court with a song in my heart. So because I do all my own research and all my own typing, it meant a lot to me and encouraged me, and I am very glad for that.

Mogoeng: The depth of the preparation, the quality of your presentation is what moved him to tell you to have belief and courage even if you lose, that will not be because you have been found wanting in your presentation and preparation.

Ms Crouse: That meant a lot to me. I was very humbled by that.

Judge President Sangoni: Let us look at demographics before I say anything else. There are four white males, two white females in Port Elizabeth. The senior judge there is Judge Chetty who is an Indian man and there is one African man. The vacancy that has been created there is that of a black African female. What is your attitude towards this disclosure, where do you place yourself in this?

Crouse: I am not sure I understand the question.

Sangoni: Having looked at these demographics for Port Elizabeth, how do you place yourself? Would you feel comfortable to place more whites, so to speak, in Port Elizabeth? And remain with one African male and one Indian also male?

Crouse: Are you saying, should you rather appoint a black woman or a black man in Port Elizabeth? Of course the bench cannot have the necessary resolve outside, people will lose confidence if we do not follow the Constitution. However, I will always stand back, if this was a black female, then yes of course, please let me stand back. But I would submit that you look at whether I am competent and look at the demographics. I do not want to ride on the fact that I am a woman, I really do not want to do that, but there is a lack of women in the Eastern Cape. The Eastern Cape judiciary are very much not only in Port Elizabeth, you send them all over the place. I act in Mthatha, people from Port Elizabeth act in Mthatha, they actually a grouping in itself, they are not separate groupings. I have looked at Port Elizabeth and Grahamstown, and of the 18 judges it seems to me there are only 4 women, which is also not a good representation.

Sangoni: In other words you would be comfortable in just joining them and being the third white female so to speak? Nobody is rejoicing talking about these figures.

Crouse: I do understand that and I am in your hands. I would want to say that I do bring a new perspective to the Port Elizabeth bench. None of the judges there had been public interest lawyers before, and if you were to appoint me that would be a new perspective as well.

Sangoni: The GCB is opposed.

Ms Crouse: The bar says they rely on what they said previously about me. And previously in 2013 when I applied for a position they said three things. First thing was she's a woman and that would be good. Second thing was she was a member of the bar and the Bar Council, they did not say whether that was good or bad. The third thing they say, and you must remember, there was this perception that Legal Aid South Africa did not do legal work, I do not know why they said that. They said I do not have enough experience in legal litigation especially that I did not have enough commercial experience. That was the sum total of what they said against me. Now what they are saying is that we do not support her, she does not have enough civil experience and she lacks giving out her judgments. Now I would want to answer that because it is totally biased against me, if I may just deal with a lack of exposure. I have been in the courts for nearly 30 years, I have currently 26 reported judgments, of these 9 are civil, that is 35%. I have got 35 judgments online, of those, 26 are civil judgments, that is 60%.

Sangoni: How many civil?

Crouse: I have got 9 civil judgments. Of the civil judgements, 4 are SCA judgments, I was successful in 3. 2 have been Constitutional Court judgments. Overall I have 7 Supreme Court of Appeal judgments and I have 6 reported Constitutional Court judgments. I really do not want to say this, and I probably would not have said it if I was the first interview, because I have the greatest respect for the other two persons that were interviewed, but because of the bar saying that I do not have enough exposure, I just did a spot check to see how many reported judgements the other two candidates have. I have 23 more judgments than the one candidate and 50% more than the other candidate. So I think the bar is just being biased against me. If I could just finish the bar's thing about the civil judgments. At the time that I left the bar, I led other juniors, and they were men, in civil matters. I had also been actively involved, and because of my exposure to public law, the Nelson Mandela University had bestowed upon me the title of Professor. The bar may not have confidence in that but that must surely say something that in profession itself there are so confident. I must also add that I have always been a staunch supporter of the bar and many of the bar's advocates have expressed their support for me. I even have an email from the Family Advocate that nominated me, from one of the senior members of the bar saying that I have done a written letter of support to the bar and I have spoken to a senior member of the Bar Council who would do that. So as far as my exposure is concerned, I do not know why they say in comparison to the other two, why I do not have enough exposure. If I might just deal with the problem of delay in judgments, that just comes out of the blue. I asked the leader of the Bar Council where that comes from, he does not know. It is blatantly untrue. I have no idea where that comes from. Just to make sure I checked on my acting stints in Port Elizabeth, every time after the acting stint, JP it was before your time, I wrote an email to the then JP, saying thank you for the chance to have acted, I have

no judgments outstanding. I acted for 5 weeks, 4 weeks and I had no judgments outstanding, in fact, most of my judgments I give ex tempore. I have one other matter that took some time, and I do not know if that is what they are referring to because it was a partly heard matter I heard at the last time I acted. I finished that after my acting stint. That took some time to get out. That is the matter of Burchell v Anglin, which is a judgment on private international law. I just want to say I did not do private international law at university at all and I had not dealt with private international cases. But after I did that judgment, Professor Tom Bennett sent me an email saying he found this and he had been waiting 40 years in his teaching private international law, an authoritative judgment on the onus to begin and the handling of jurisdictions. Since then it was reported. Forsyth's International Law has dealt with it in their handbook. There is some criticism in my handling of one of the aspects. He thinks it is a good judgment, he said it was a carefully considered judgment. Also in obiter Professor Frans Mutz wrote about this. He also had some criticism of my handling of one aspect but he did say that it was a ground breaking judgment. Other than that one judgement which took 5 months to get out, while I was employed at Legal Aid working 12 hours a day, I kept the hours I was working, it was always after hours and on weekends because I thought it would be unethical to work in Legal Aid time for it. I got it out. I think it shows my judicial potential. Even though I knew nothing on the subject, I could bring out a judgment of that calibre, and I think that needs to be noted.

Sangoni: Legal Aid has spoken very well, not so? You read their letter?

Ms Crouse: They have been very kind.

Sangoni: What do you think is the reason for the bar to be opposed?

Crouse: I think they have a candidate to push, I cannot think for any other reason. I have been thinking about that. I have got good relationships with the bar, I have always had and I can understand why they are doing it.

Sangoni: You cannot understand?

Crouse: I can understand, of course I can understand. They have got a good candidate that they want to push.

Sangoni: But they have not presented anybody, have they? Who is the person they are pushing?

Crouse: Are they not supporting any candidate?

Sangoni: Who? The key word is push, not just support.

Crouse: Sorry, it has been a long day, maybe I used the wrong word. They are supporting.

Sangoni: Now senior litigator, is that a formal title? Who is bestowing it?

Crouse: I would say it is a job description.

Sangoni: formal job description?

Crouse: it is a formal job description. I think it was, the idea was to get one practitioner that could fill the role of senior advocate and that is the role I have. I should perhaps also mention that my silk recommendation is currently before the Minister. You have sent to the Minister.

Sangoni: The Minister is here.

Crouse: The Minister is here.

MEC Makupula: I do not have much to say except to indicate that I would wish to see growth, not quantitatively, but qualitatively of women participation in this sector and then if things go well for you here, part of your plan to ensure that there is, I mean you have undergone the difficult experiences, it was painful when you were sharing with us what happened on that morning when you had to go for your wedding but, the point is, out of that experience, you surely do not want other women to experience that. Surely, in part of your plan and vision there is a plan to ensure that women are empowered qualitatively, and indeed take charge of this sector?

Crouse: I must perhaps say that I am on your Advisory Council for Education in the Eastern Cape. We know each other from there. I strongly feel that, whether I am being quoted or not, my grassroots empathy for good education in the Eastern Cape will always be there. I have always felt very strongly about mentoring and training and if I were appointed I would try to keep the high standards. I just remembered, that if I may just answer the JP, I have not dealt with the bar's comments against me totally. I just realised I wanted to say something about the judgments if I may. JP, I just want to say that in my last acting stint in Johannesburg

when I acted for February and March; in that stint I had given 25 judgments, of the 25, 23 were given extempore, because when I prepare for a matter, I try to know the papers and the law better than council before me so that I am ready to give an ex tempore judgement. One judgment I gave 2 days later, and 1 judgment I gave 11 days later. I just really wanted to underline that because I am hardworking, the bar's comment that I do not deliver judgments is just really not true.

Mogoeng: You have helped the poor, the poorest of the poor, like Ms Saramich. If you get appointed, who is going to help them? Have you got someone to take over from you?

Crouse: I am always mentoring. If I should get this position, there is someone I think is much better than me that I think can take over from me and I have to agree with you, my heart is really with the poor and vulnerable. But I just really want to outline, if you look at the one judgment that was the Khan matter, the fact that someone is poor or vulnerable, would not let me stray from my position of judging a position fairly.

Mogoeng: I noticed that you often brought along the juniors from your office to come and learn from you as you appeared in the Constitutional Court.

Crouse: I have tried that.

Mr Singh: I see you feel very strongly about the comments of the bar and rightly so, and I am glad that you managed to give us answers to those queries. Yesterday I got some documents which I think if I am correct, there are other members from different bars here, some of us are laymen and go to another kind of a bar. But I notice that males dominated in the bar, if I can remember, 1800 males against 400 or 500 females. What is your experience, personal and generally, of acceptance of women at the bar?

Crouse: I think this is like everything in life, some people like you, some do not. I remember walking out of court one day and my opponent said to me, and I was still the only woman at the bar, it was a civil matter by the way and he got a hiding. He had a junior and two attorneys and his client, and they walked past me and my attorney and my client and he said women like you need to be barefoot and pregnant in the kitchen, and I was totally taken aback by that comment. But that does not define me. There are many males at the bar that have accepted me and accepted my leadership. Yes, you have both of them. I do not see myself as a victim. This is part of life, I think. Being an advocate is not a Sunday school picnic. We have differences of opinion.

Singh: My second question relates to your acting stint, and I know just when you were under pressure you said acting stunt instead of stint. But when I look at your acting stints I see you worked until February 2008 and then you acted much later in Gauteng.

Crouse: Yes.

Singh: Give me some background on what happened there.

Crouse: In terms of the Legal Aid policy you are allowed to act 3 months in 5 years. I do not know why I was not asked, whether that was for that reason or for any other reason. Judge Malambo was very kind to give me the opportunity to act in Johannesburg and it was a wonderful experience for me. It showed that I can work in a busy court and I could do the work. I must say, in the 6 months or so that I have acted, if you take into account the part where I finished, none of my judgements have ever gone on appeal. I submit that that shows I have got a solid way of dealing with judgements. When I give reasons in my judgments, I give it in such a way that the losing party will understand so that they can take it on appeal or they can understand the reasons for my judgment.

Singh: So one does not become a sore loser, like we were when Japan beat us.

Minister Masutha: Honourable Singh stole my thunder I was going to say that when you said obiter, I suspect you wanted to say obiter, or obiter dictum to put it in Latin. It just proves that you do not have to speak in Oxford English accent to be a good lawyer. I also just wanted to compliment you for being bold enough to confront some of those negative comments and rebut them. Do you think there could have been some malice in it? And if so, should we as the Commission be sending any messages? In situations where comments about candidates, which could influence our decision, are unfair, that we encourage professional bodies to exercise caution when making such comments?

Crouse: I must say I am in my second language and I type a little better but I still get the is's and are's wrong in typing. I do not think you need to have an Oxford English accent to make yourself clear. Insofar as the bar is concerned, my relationship with the bar, I have a real love for the bar. My pupil master says to this day, if you are not sold on the bar yet, you would be, because I was not at that time. In my leadership with the bar and my interaction with the bar, I have always felt that is a good place to be. I do not want to say that there is malice. But it is very easy to say to a candidate no they do not have exposure or they cannot write

judgments, because those are the two things that the commission will look at. I do not want to say they are biased, I will just say that they are misinformed.

Minister Masutha: My question is whether this Commission should be sending a cautionary to professional bodies to be circumspect and cautious when making an informed, or unsubstantiated remarks, given the weight that these remarks tend to carry when we consider candidacy?

Crouse: That is a very difficult question, I see you are going to push me. I submit this is a very important Commission, and professional bodies should be careful in what they say, they should research. And just to say willy nilly that nothing has come to our attention to help us change our mind, I submit if they had read my judgments or my CV they would have seen I have had exposure and I cannot answer the thing about not getting out my judgments.

Minister Masutha: I will not push you any further.

Mr Fourie: I wanted to interrogate the acting stints and particularly the gap but I have been covered by Mr Singh so thank you.

Mogoeng: Just out of curiosity, while you were practicing at the bar, did the bar have black members?

Crouse: Not in the beginning when I started practicing. Then the time of AFT came and just before that black members were admitted. I am a little bit hazy on the timeline. But there were black members then. I have led some of the black members in civil matters as well and I have also had black pupils. There was an invigoration while I was still at the bar.

Mogoeng: What kind of support were they provided with, considering their position of disadvantage?

Crouse: From my side?

Mogoeng: Let us start generally, we will get to you later.

Crouse: I think it was a free for all mostly at the bar. At the time, I do not think the bar realised the importance at the beginning of transformation and how difficult it is. I remember how difficult it was at the beginning of the Bar Council and having a voice for the black contingency at the bar. I remember how difficult it was to get the clause in that there should be equal representation between white and black candidate. That was a huge debate, and it was very difficult. And it was a difficult tie for the bar, and it was unfortunate at that.

Mogoeng: And your own role in doing whatever you could to address their plight?

Crouse: I have always been a strong mentor, I have always tried to mentor, I have always tried to be there. I have sent a letter that one of my ex pupils sent to NADEL in support of this and he said that I changed the way he looked at himself and practiced and that my family supported his family. He was going through a difficult time as well when he did his pupillage. I have learnt so much from that young man. I will probably always be his friend just because of who he is. But the gratitude that he expressed of what he has learnt from my way to doing things was really encouraging to me. I have got so many letters from other people doing that. So I have always tried, that if a black member comes to the bar and sought my help, I try to give more than legal help, because I think of people holistically. Even white members, I feel the same about any junior.

Mogoeng: Would that explain why 1991 1992 you did voluntary work at a shelter for the homeless?

Crouse: At that stage I had this idea that you had a child you would stay at home and I realised very soon that I could not. I think it was because my parents grew up very poor that I have a feeling for people who are poor.

Deliberations.