



JUDGES MATTER

Judicial Service Commission interviews

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Eastern Cape Division of the High Court

Interview of Advocate R W N Brooks

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Chairperson (Chief Justice Moengoeng): Good afternoon Mr Brooks.

Mr Brooks: Good afternoon Chair.

Mogoeng: Are you well?

Brooks: Yes, very well thank you.

Mogoeng: We've had the privilege of interviewing you at least twice before. Could you just make a statement in motivation of your application – whatever it is you may wish to say and from there we can put questions to you rather than take you through the whole long process.

Brooks: Thank you. That is correct, I have been twice before which means the passage of time and it has been my privilege to be requested, during that period of time, and I've been based in Umtata for the majority of that time period. And, I've got to know the division from the inside, as it were and there are a few factors there that I feel need to be taken into account. One of them is that there is a definite increase in the number of medical negligence cases in Umtata which was an interesting thing within our bigger division and they are complex and they are currently being challenged. The civil role in Umtata is a lot more complicated than many would think and that is an area I think I am able to make an informed contribution. The passage of time has also reintroduced me to the world of criminal law which was something I mentioned in my previous interview I did perhaps not have as much experience in as I would have liked. As is the case for every Judge, we have a fair dose of criminal matters through the term and during the intervening period, I discovered that I am able to judge without condemnation if that makes sense to the Committee – I think that is important because we see some particular horrific things coming across our desks as Judges and through the doors of the court. Those are two very general comments.

Mogoeng: I've noticed also that you have since attached a number of judgements unlike before.

Brooks: No, before there were Mr Chair but these are different ones – I've attached more recent ones, as it were, than very historic ones.

Mogoeng: The previous ones were not recent were they?

Brooks: Yes they were but they were from a few months before the last interview so these are, again, more recent than they were.

Judge President Sangoni: Just a few questions – I suppose you know the law and this had been confirmed in the sense that you have been exposed to it for a long time now but the big problem that arises, normally, is the perception that people find acting a way of getting into the system and they start making, not really demands, but requests to be moved elsewhere in the province. I am not saying you must take an oath or so on, but can you at least make us comfortable that this is not your idea in trying to get this position?

Brooks: Yes, Thank JP. I am aware of that and I am aware of the history of movement within our division but I am also aware of the impediments which are against movements, in other words, it was not an internal process but it requires an approach to this body and justification. It is certainly not my intention to make a request in the near future – one does not know what might arise but I think I have indicated to the Commission before that I only have one eye so travelling was an issue and it was quite a drive to Umtata from wherever one is but it is something I have been doing for the last two years so that is not as big problem as it might have seemed to be two years ago. So yes, I intend to accept my base as being Umtata – it is the only post for which I have applied for out of the two and yes, I enjoy it there – there are many aspects about Umtata which are much better than Grahamstown – the weather for a start.

Sangoni: But do I understand you that you are not only for Umtata but for Port Elizabeth as well?

Brooks: No JP, I applied for Port Elizabeth last time around when there was an available post but I have confined my application to Umtata this time around.

Sangoni: You realise though that if Umtata was given to you that would be your headquarters. There was a question of travelling between Umtata and Grahamstown – I think you've mentioned something like that.

Mr Brooks: I know that may be a change but we do circulate as Judges so wherever one sets off on circuit or on circulation, Umtata was quite far from everyone and that's what I'm referring to.

Mr Singh: I'd just like you to unpack this statement: "able to judge without condemnation". The sense I get is that Judges are allowed to condemn acts of violence, heinous acts or things like that so could you just unpack that.

Mr Brooks: It's generally known that I come here as a Christian but as a Judge, passing judgement was the nature of [indistinct]. But what I have discovered is that my perception of humanity and its frailties that everybody faces, is such that I am not condemnatory of those who err. This was a very different thing from being firm in judgement and I have no difficulty in being firm in judgement and condemning acts of violence in the sense and use of the word in that context. I have judged in horrific criminal matters and found myself able to do that very firmly without condemnation for the accused. And that's something that's a new experience because it's new for me too but I think it's important to be able to judge the accused firmly and in accordance with the law but without personal condemnation, without my condemnation – that's all I mean by that.

Minister M Masutha: There is reference here to the incident which resulted in the loss of your vision in the one eye from an accident in 2014. Do you want to share with the Commission how this has affected your ability to see and how that may or may not have impacted on your ability to work?

Brooks: Yes I have alluded to that earlier in the context of travel and that's the only area in which I have experienced the effect of it because with one eye what one sees is flat, the world is flat so to be able to judge distance was not easy and the brain has to relearn how to do that. Driving was a challenge but it had improved with time but it would never be what it was. But in terms of workload it has not affected by ability to read, watch the face of a witness and sense demeanour and the like, so the only real effect it has is on my movement and I have learnt to adjust and live with this experience. It is a disability but I don't regard it as an impediment to doing the work of a Judge.

Masutha: I did not get the impression that it affects your ability to do your job unlike in my case where I have to use very large print – you still have the ability to read.

Brooks: Yes, I have spectacles.

Masutha: The only other thing I wanted to check – you say you were born in Zimbabwe, when did you relocate to South Africa?

Brooks: I came to SA as a student in 1978 and planned to return to Zimbabwe. I actually had a bursary from the Zimbabwean government to complete my LLB and my obligation was to present myself at the end of that for employment as a state prosecutor. I went back at the end of 1982 to present myself and went for interview and was told they would be in touch with me and never heard another word, so I was stuck down here waiting to be given by job in Zimbabwe. Someone in Rhodes University in Grahamstown, whom I knew, said there was a job going for a firm of attorneys in Grahamstown and why don't you go and apply. To cut a long story short, I did and was given residence and I married a South African girl, and then wanted to vote in 1994 so took out SA citizenship then. Effectively I have been here since 1978.

Masutha: Just lastly from my side, both Zimbabwe and SA are said to share a common history of colonial rule, if you'd like, and racial disparities and so on – do you want to comment on your experience of having been on both sides of the Limpopo River, how you see both countries having evolved out of that unenviable past?

Brooks: Well, we could spend a lot of time talking about it but one thing that strikes me immediately as you speak is that I think we as a society have much more chance of being a better society because of the subconsciousness with which we approach our history. Starting for instance with the Truth and Reconciliation Commission as an example – Zimbabwe did not go through a process like that and I think that even today, I am able to say, some Zimbabweans don't approach their history with the subconsciousness that we do in this country and I think that makes a difference.

Advocate M Hellens: Mr Brooks, just two aspects, when you were at the bar you were involved with pupillage training. For those members of the Commission who did not know what this takes, can you please explain about content, briefly, and the amount of time it took.

Brooks: It's a process that's run under the General Council of the Bar (GCB). One has to go and qualify as a pupillage trainer and there was a United Kingdom method we make use of and the idea is to give pupils practical education during the year of pupillage. We divide the exercise up into the obvious areas of criminal law, civil and there was an ethics component. I specialised in ethics and it involves hands-on mentorship, one-on-one, it involves following coursework which was set out and made available through the GCB. It took a fair amount of time, there was a fair amount of after-hours involved and a training weekend which involved pupils and we assess them and help them move from the academic approach to the more practical approach. Very loosely, this was pupillage training.

Hellens: And what remuneration was there for you?

Brooks: No, there was no remuneration for us.

Hellens: On another aspect, I've seen you've acted from the third term of 2013, the whole of 2014, the whole of 2015 and up to now in 2016 – do you have any practice left?

Brooks: Commissioner, as you know, we are not allowed to practice while we are acting so no, I don't have any practice left but one would hope that if I needed to I could revive it but no, I do not have any practice left in reality.

Hellens: Being very direct with this Commission, there is a significant difference in the income of a Silk and the income of a Judge and you've made this sacrifice for quite a long time – I ask you to be frank.

Brooks: Yes, well if you want me to be frank, yes, in months I've acted as a Judge I earn much less than I used to earn as a Silk and as an acting Judge there were significant periods where I earned nothing, so were I to be appointed, I look forward to an increase in income, but it would certainly not be the same as if I was a Silk.

Mr J Malema: Do judges take an oath?

Brooks: Yes, we take an oath.

Malema: What does the oath say?

Brooks: Well, I presume it's the same as the one we take as an acting judge but we, in basic terms, promise that we are going to treat all persons without fear or favour and that we uphold the Constitution of SA and do our jobs in accordance with both those main tenants.

Malema: Advocate, you did not apply to be an acting judge, you applied to be a judge. What does the oath of a judge say?

Brooks: I have not seen the oath of a judge.

Malema: So you want to be a judge and take an oath you have not seen?

Brooks: I'm presuming that it's similar to the one you take as an acting judge.

Malema: So, when you act inconsistently with the Constitution, as a judge, would you be upholding, respecting and defending the Constitution?

Brooks: No, one must act in accordance with the Constitution.

Malema: When you act inconsistent with the Constitution, will you be upholding, defending and respecting the Constitution?

Brooks: In acting with accordance with it, yes.

Malema: Inconsistent with the Constitution?

Brooks: Inconsistent?

Malema: Yes.

Brooks: No, definitely not.

Malema: And when a judge acts inconsistent with the Constitution, does that judge deserve to continue to be a judge?

Brooks: No.

Malema: Thank you very much.

Professor Ntlama: Just two questions, in the documents, you make reference to the fact that you don't have any publications in law even outside law – how would that impact on you as a Judge to write judgements?

Brooks: I don't think that one needs to have a history of publications in the public realm to write a judgement. Obviously writing judgements took a bit of practice, but it certainly has not been something I've been conscious of to have been to my detriment.

Ntlama: Then the second question is, just to share your opinion with us on the recent judgement of the Constitutional Court in the case of DA and EFF vs. the Speaker on whether the Court has not overstepped its authority and got into the domain of the Executive or of the Legislature.

Mr Brooks: No, I don't think so. My opinion is that it's been a very good bold restatement of the principles of the rule of law. Of course that's all interwoven with the doctrine of the separation of powers and I have not considered any aspect of it to be an overstatement of what the Court would be called upon to state in appropriate circumstances.

Ntlama: So what does the rule of law encompass?

Brooks: It's inherited from way back when and what we are really looking at is to make sure the exercise of power, particularly executive power, is always subject to the law and must always be lawful and usually in accordance with the principles entrenched in the Bill of Rights.

Ms T Didiza: In your introductory comments you mentioned what the span of time has empowered you with in terms of knowledge of certain aspects you might not have dealt with before. One of the things you mentioned was how complex civil matters are in Umtata than what is maybe thought of – if you could unpack that a bit, what did you mean?

Brooks: I come back to the fact that on our civil role in Umtata weekly, there are two, sometimes even four, matters involving medical negligence, and those are intricate. It involves hearing evidence and becoming competent in adjudicating evidence of a specialist medical nature. Those are intricate matters, and the amounts at stake are enormous, so that is what I had in mind when I mentioned that. For the rest, we are on a par with other seats in the division where there is a healthy proportion of road accident fund matters, commercial matters, but in Umtata and to a lesser extent Bisho, but particularly Umtata, the growth in medical negligence cases is quite marked.

Ms T Modise: In your view, what are the major obstacles to justice in SA?

Brooks: Money remains one of them unfortunately – access to justice without money is much much more difficult than access to justice with money. Resources, education, I think there's growing awareness daily of legal rights and the availability of justice in situations but there are many many people out there. Violence and the abuse against women and children and there were many out there who were not aware of rights and legal access so it was a very complex, multifaceted, multi-fronted set of difficulties.

Modise: Can you talk to us a little bit about your understanding of judicial independence and can you perhaps give me an idea of how you balance this understanding of judicial independence and the duty of the courts to avoid encroaching on the matters which may be belonging to the other arms of government?

Brooks: We are traditionally referred to as the third arm of government – I don't think that one can read any value judgement in that but the third arm of government is the judiciary – it's there to interpret and apply the laws. In doing so one must be careful of not legislating because that is the job of the legislature – the second arm of government. And obviously one cannot enter into the realm of using executive power which is the executive's role. It is very necessary to be independent because one is called upon to interpret and adjudicate upon on the way in which the executive has exercised their powers and one could not do so if one was not independent and party of or party to some, biased towards or influenced by one of the other arms of government. We've had an excellent example of how the separation of powers stands us all in very good stead and the ability for the judiciary to express itself as an independent judiciary. So it's a subconscious awareness of the process of being a judge and the maintenance of that independence.

Modise: Is judicial independence and judicial accountability mutual exclusive? Can the two very good concepts be practised in such a way that me, a layman, understands that? Who is supposed to hold the judiciary accountable? In your own thinking, does the judiciary hold itself accountable? Because there is confusion usually, speaking as a politician, of judicial accountability.

Brooks: We may have different views on what that means, but my response would be that within the judicial system, there are the checks and balances for judicial accountability and by that I mean reviews and appeals because the way in which the judicial independence found expression is in the outcome and the manner in which the judicial officer conducts himself or herself. If there is difficulty with the outcome or the process, it is either a review or appeal process and then of course there is the Office of the Chief Justice, there is the JSC - there are avenues through which approaches can be made by the layman who is aggrieved by any experience in the realm that brings them in contact with a judicial officer.

Mr Notyesi: I understand from my reading that you are sensitive regarding quick delivery of judgements?

Brooks: Yes I am – we get into deep trouble if we don't deliver judgements quickly. Within the system, we are accountable on a termly basis to our Judge President in that regard, but I think it's very important because a lot of effort goes in to approaching the court and extremely limited resources are involved in Umtata – it is a deeply rural and impoverished area and a lot of litigants come there with enormous effort. In one of my first judgments that got sent to the JSC, it unfortunately it never encountered the light of day, I spoke of the need to accommodate litigants as far as practically possible – in my view, delivering a judgement as quick as one can is part of that.

Notyesi: When I look into these judgements, I've not seen an instance where you present a judgement for more than three months – is this correct?

Brooks: That is correct. On the occasions I've been here previously, I've had no outstanding judgements. My Judge President would tell you that I have one which I need to work on this recess but it was reserved I think on the 17th of March this year. It's an enormous matter involving quantum in the hands of a foreign national who was maliciously prosecuted by a commercial company in Umtata and he had lodged a claim. It is an intricate and complex matter and I will have to deal with that judgement.

Notyesi: I understand your family is in Grahamstown – in the Umtata area, a lot of people go there just to take a position. What is your commitment?

Brooks: I intend to make that commitment. It's a very difficult place to find accommodation, I must admit that immediately, and I do have a spouse who has just as much right as I do to a career and she has a career at Rhodes University in Grahamstown, and obviously whatever happens to me has an impact on that, but in the last two years we have lived with the reality that I committed to working in Umtata and she is committed to working where she is. One does not want to make decisions about the future in the absence of what may or may not be prevalent and that's the way it's always been and initially, that's the way it's always going to remain if I am put in Umtata, but we are very open to the prospect that she may join me there on a

permanent basis. We are very open to the reality that even if that doesn't happen, I must have a base in Umtata and I need to be there so I can give you my commitment to that extent at this stage.

Minister Masutha: I just wanted clarity on a certain point that was raised earlier with you – there is a school of thought, called the sceptics in jurisprudence, that says that, especially in borderline cases, nobody really knows what the law is until a court of final instance has pronounced on it – do you agree or disagree with that view?

Brooks: I think that that is the sceptical approach – one of the fundamental principles in law is certainty and in many many areas we have certainty. That said and done, there is always a challenge in law and I remember one of my senior colleagues from the Bar, who acted many many years ago, gave very good advice - his advice was don't ever assume that you know the law as a Judge and always refer to the books, always refer to decided cases. But very often you are called on to define a development in the law, a different angle in the law and indeed to pronounce on what the law may be as a court of first instance. But that is not always the case - in very many areas we know what the law is and we have to apply it.

Masutha: I agree with you – in cases of what is or isn't consistent with the Constitution, may elude different Judges at different stages of the development of the law.

Brooks: We are all human and we all have different perspectives – nothing worse than a room full of lawyers having differences in opinion on what something means. That is what I suppose makes our profession so lively and so challenging.

Malema: Can not knowing the law be an excuse in law?

Brooks: It depends on your circumstances – if you are meant to know the law, it is no excuse to say you did not know it. If you are allowed to be ignorant of the law because of whatever other position you occupied, it can be an excuse.

Malema: You are an adult with huge responsibilities, amongst those responsibilities is to sign off the law - can that be an excuse of not knowing the law?

Mr Brooks: No.

Chairperson: Thank you. You are excused.