



JUDGES MATTER

Judicial Service Commission interviews

4 April 2016, Afternoon session

Eastern Cape Division of the High Court

Interview of Advocate T C S Cossie

DISCLAIMER: *These detailed unofficial transcripts were compiled to the best of the abilities of the monitor. However due to capacity constraints they have not been fully edited. We have therefore made the video recordings available that were taken during the interviews available. Those wishing to cite or quote from the transcript are encouraged to check accuracy with reference to the video file.*

Chairperson (Chief Justice Mogoeng): Good afternoon Advocate Cossie. Are you relaxed or should I help you to be relaxed?

Advocate Cossie: Yes you can help me to be relaxed.

Mogoeng: You were a prosecutor at some stage – for how long?

Cossie: Yes. Well, I was a prosecutor for about two to three years.

Mogoeng: District court, Regional court, High Court?

Cossie: District court.

Mogoeng: We have a problem – I've just been to the magistrates' court you know. Some of them used Friday for preparation, some of them were still preparing by 11 a.m. The result is that there are still far too many cases to be finalised in a number of magistrates' courts, not just necessarily the one I've been to. If appointed a Judge, how would you train magistrates? What advice, if any, or guidance can you provide to the prosecution if you were to train them?

Cossie: I think if I was to give any advice I would adopt a similar approach with the case flow management taking place in the High Court currently. You find that in the magistrates' court you have cases postponed while in the High Court you would know, for instance, a criminal case would run for a week or for two weeks so it was definite for how long it was going to run. Even in civil matters you get a certificate that the case was trial ready, while you don't get this in the magistrates' court. I think that is where we should start with case flow management there.

Mogoeng: Well, one of the problems I've realised is this – there is a tendency to arrest even where arrest could have been avoided. The result is, over the weekend, far too many people are arrested and within 48 hours they must appear in court and instead of the magistrate dealing with many cases that have been pending for a long time, they must now be dealing with the postponement of these new cases and the applications for bail. What approach must the police adopt to avoid this problem of burdening courts with work that really did not have to be there – what advice can you give them? Can they investigate for instance without arresting or must they arrest before they can investigate?

Cossie: There are instances where the police can investigate without arresting, because bringing a person under incarceration does not necessarily mean they will be able to investigate thoroughly or properly. Most of the people they arrest are not even the ones that they were supposed to arrest.

Mogoeng: Are you settled or should I still try to settle you down?

Cossie: I am okay although you can never be 100 percent settled.

Mogoeng: I understand. In 1999 you joined the Bar and then you acted as a Judge on a number of occasions – what is the longest period you've kept a judgement reserved for?

Cossie: I've never kept a judgement for more than three months.

Mogoeng: Do you have reserved judgements now?

Cossie: Currently I have two that I picked up last week.

Mogoeng: Would you, in your own words, like to tell us why you believe you are ready for permanent appointment to the High Court?

Cossie: I am now ready. I've been an advocate for the past 17 years and I've been through the ranks of the Justice Department beginning with being a prosecutor, and I've done a lot of things in the Department of Justice. I have also taught law at Fort Hare to give back to university – not because I did not have other things to do - and I have also acted intermittently since 2007. I think now the knowledge I've acquired and the manner in which I deal with issues is more mature now than it was before. And also, I am in a better frame of mind as a person who is practising law. And also, if one looked at the natural progression in what I've done, I've now reached a stage where I am ready to serve on the bench.

Mogoeng: I've noticed that you were involved in a very important case – Tongoane that went up to the Constitutional Court- is that the good quality work that you are exposed to on a fairly regular basis, or is it once in a while?

Cossie: Not on a fairly regular basis – once in a while you get such cases. Also, the briefing patterns and the fact that I've been acting on and off for a long time, I have not practised since 2012 to be exact. This was not because you were not capable but because you were not there most of the time.

Judge President Sangoni: I am keen to know, you observe that there is an objection from the Society of Advocates in the Eastern Cape and they are quite lengthy in what they are saying. Now, on the other hand, I see that the Bisho bar is somewhat supportive and though it has not written much, it is quite firm in what it is saying. If you know, why is there such difference between these bodies?

Cossie: Well, if I have to be specific in the complaint that has been lodged, as a human being or as a person, I am not robust in my approach, however I have delivered or done my work in a way that is beyond reproach in that, the mistakes I that I have made are mistakes that are made by anyone. In this issue I have to be very specific – there are two issues, the one matter I did prepare reasons for judgment and I gave them and I've even brought a copy of that. The Murray matter. The other matter is a matter of contempt of court and the Judge who dealt with that matter before me even wrote a judgement in this regard, and it is a clear contempt of court and did not need me to write another judgement. I agreed with the judgement and I am convinced with the submission made by the applicant and I could see that this person really is in contempt of court and I granted the order accordingly – there was no need for me to write a judgement in that regard. So those were the two issues. As to whether I was tentative or not that is a personal judgement for anyone.

Sangoni: In other words, you are aware of these objections?

Cossie: Yes, I am aware.

Sangoni: Now, have you been confronted as a Judge or a person by anyone to say this does not appear to be regular or whatever?

Cossie: No, I have never been confronted by anyone. I would like to say something in that regard, when a Judge is in court and gives an order, the parties are free to ask for reasons for that order, and most of the time, if parties wanted to know the business they could ask for it so it was not something which was not done, I am aware that that is done.

Sangoni: Last question – I've met a number of judges that have been coming from the SAJEI course and the aspirant judges training, and most of them were very excited and thankful they attended that course and you were one of them – was there anything special about it?

Cossie: Yes there is, even as a practitioner, going to those courses it makes you realise the shortcomings that you have, both in your practice and when you are sitting as a Judge. There you are taught the correct way of looking at your judgments and writing your judgments and dealing with all the aspects that you deal

with when you are in the Bench. So it does make your life easier and your work easier – it really does. I'm more effective now than before.

MEC Makupula: Good afternoon Advocate. In the submission, your response to the questionnaire, the one around the proportion of your litigation work, it would seem you have done five percent of criminal work, what would be your take given that you've done that limited level of work? The second one is you responding on the questionnaire, question number eight, whether you had any judiciary or quasi-judiciary experience, and you indicate yes – I'd be interested in which areas specifically. Lastly, there's a general perception out there that the justice system in SA is for the learned and the monied. The majority of poor people always have this feeling that this is not for us – in your own opinion, what do you think needs to be done to turnaround this perception?

Cossie: It is different when you are a practitioner dealing with criminal law and criminal procedure than when you are sitting as a Judge. When you are a practitioner and you have and make choices that you do crime or don't do crime, but sitting as a Judge, you do the work allocated to you without any choices. So, I don't have a choice when I'm sitting as a Judge. Normally when you start practising as an advocate, you do legal aid work and there you get a lot of criminal exposure, but as you grow in your practice, you graduate to other work and do less of the criminal work, so that's why I've answered my questionnaire in that fashion. In my practice, I hardly do criminal work anymore, but in the bench you don't have a choice. The second question, can you please remind me?

Makupula: Yes, page nine in your questionnaire.

Mogoeng: Advocate, if you are able to be direct and answer the question without being unsettled, that would help a lot.

Cossie: Alright, in fact if you look further MEC, there is a response to that question at paragraph number nine, where I've served as deputy chairperson of the Eastern Cape Legal Board, where I was a convener of peace and justice ministries, where I was a director in the ADP project, and where I was a legal adviser in the Council of Churches, so I've been in that quasi-legal position for a long time and I was also a member in the Eastern Cape gambling board – it's covered somehow.

Makupula: The last question is on her opinion to change the perception that the judiciary is more for the learned and monied.

Cossie: That is a perception which was going to carry on for a long time, however as the different organisations and even as the practitioners, advocates, we do give time and we represent people without getting money for it, and women lawyers do provide that service, and as individuals, not in a way that is going to be, I don't know how to put it, we do dispense legal advice in the students that we deal with, and other organisations. People are aware, but it is going to take longer.

Mr Notyesi: The last time you were here, you told this Commission that Parliament is sovereign, and when your attention was drawn to section two of the Constitution you said those were semantics – have you changed your views?

Cossie: That was the biggest mistake because I was so nervous. The Constitution is the supreme law of the country and it can never change. It was just that it was a big, big, big mistake.

Notyesi: Now, the power of judicial review no longer resides in the common law but the Constitution itself – can you, briefly, in your own understanding explain what must be the approach of the court in circumstances where it reviews a matter that is excluded under section 1(3)(g) of PAJA, and how it should approach that matter?

Cossie: The courts are there to uphold the Constitution and rule of law but in review matters where it is excluded in PAJA, the courts should not take the functions of that functionary first and use their own. If it's possible, unless it is something illegal or something, how can I put it, it must be ... the courts should, first of all, it must be a matter that affects the rights of that person in a way that it was prejudicial or it was unconstitutional otherwise those matters should be referred to the functionaries and not to take the work of the functionaries.

Notyesi: The other question is on this complaint by the Eastern Cape Bar, where they say, in the opposed motion, you merely give an order without reasons. Is it not that there is just a standard of where reasons are not given, there must direction that they can be sought within a particular period?

Cossie: That is standard and in this matter, I even said I made an ex tempore judgement and said that this is what was submitted and this is my view in this regard, this is the order I am going to give in terms of what was submitted, so that is what I did. And I also mentioned that there is a judgement already that was delivered in this instance, which was the one which was defied, so it was not necessary for me to write another judgement, saying these people are in contempt of this judgement.

Mr A Nyambi: When you responded to JP, you said your approach is not robust – can you explain this so we know what you mean?

Cossie: My approach in court is that I listen to both parties before me and I take time to respond because sometimes when you just respond, especially in court, you are bound to overlook some of the things you were supposed to look at. At times, when people argue before you, you go there with a prima facie view and when you get there you get convinced otherwise. For me, that's my view. It's not good to take a robust view and decide something there and then even if you have another view. For example in this one, what they were complaining about, I had read the papers and I knew there and then that person was in contempt and he has been in contempt several times – there was no need for me think about it and give a decision later on. I don't know whether that is what you ...

Nyambi: You were able to clarify the mistake that you made in your previous performance – do you have any mistake that you can outline to us instead of doing a repetition of what was asked then?

Cossie: When you are answering questions in a forum like this, you were bound to make mistakes so I don't know what your question is. What are you referring to?

Nyambi: I said you are able to clarify now that now you understand that Parliament was not supreme so instead of repeating that, do you have anything you realised you made a mistake on that you'd like to clarify today?

Cossie: I did not read that report, I know I was very nervous then and that is going to make me more nervous.

Professor Ntlama: Good afternoon Advocate Cossie.

Cossie: Afternoon.

Ntlama: You are applying for the PE division. Tell us, how is your appointment going to transform that division if you are given an opportunity?

Cossie: In that division, I think I will be an asset. One, the language – I am able to read and speak three languages, English, Afrikaans and Xhosa, and some of the litigation there is in Afrikaans, so I will also be able to deal with most matters without wasting time with transcriptions and so on. That's one, with the experience I have, I'd be able to deal with the matters that come before me and I had done now. I had acted there and I think that we need more people especially women because there were two women and I think we need more women to get the justice system going. Regarding the transformation, if one talks of transformation, there are different emphasis on transformation - I don't want to say because I am black I should be taken, I think on merit, I deserve to be taken because I am able and I've carried out my work in an acceptable way. Each division has different practitioners that practice in that division, and a way of doing things. In PE, the practitioners there make you want to go and work there not because of the type of work, because of the diversity.

Ntlama: How does this appointment, if you get the opportunity, transform the jurisprudence that emanates from that judiciary?

Mogoeng: Do you understand the question though, because I don't understand it – Prof, would you like to clarify?

Ntlama: Let's put it simple, King Dalindyebo, when he was convicted and sentenced, both the High Court in Mthatha and the Supreme Court of Appeal, phrased the common law principles since 1906, when customary law was never recognised as a legitimate system of law, when in the new dispensation, the Constitution required the courts to apply customary law, so in the King's case, the King was found guilty through the importation of the common law principles instead of the principles that the King subscribes into to which means that customary law continued to be the baby struggling to get out of the bath water. In this context,

how would you use customary law to influence your legal interpretation to ensure that the jurisprudence that emanates from the courts is inclusive of the various legal systems of the country?

Cossie: Ok, now I understand. If you look at my background, I come from a customary system and I have applied that system and I've also been involved in matters concerning land under chieftaincy. And although PE is an urban area and some of these issues do not arise there, PE has a lot of blacks and there is a lot of people who need help with that. And also you get urgent applications with burials so sometimes you get those aspects which one has to apply one's knowledge and one's experiences – I don't know whether that answers your question?

Advocate Motimele: Counsel, you say you conflated parliamentary sovereignty and supremacy of the Constitution last time because you were nervous, is that so, not because you know better now? So in other words you knew the answers, but because of the moment you gave the type of answers you gave?

Cossie: Yes, especially that one because everyone knows the Constitution is the supreme law of the country.

Motimele: I am going to ask you another question and see if you know better now or whether the answer you gave is also out of nervousness - the question was what is the relevance of PAJA to the concept or the doctrine of Separation of Powers. Your answer was that, I quote, "it is relevant to the separation of powers because the Act comes to play where the public institution or public bodies deal with the decision and in terms of the Constitution, I mean the public bodies, when people are aggrieved by the decisions, it should protect the right that people have to. So that is how it comes into play". Do you still hold that view?

Cossie: No, definitely.

Motimele: Did you answer in that particular manner because you were nervous or because you now know better?

Cossie: I now know better because that is completely wrong.

Ms T Modise: Good afternoon ma'am.

Cossie: Good afternoon.

Modise: You were convicted in the magistrates court at age of 13 with your friends for stealing a handkerchief – how was that resolved, because the sentence was never carried out? What happened?

Cossie: Nothing happened, those were the things happening at the time I was growing up.

Modise: What I was hoping you would tell us was if you had stolen the handkerchief.

Cossie: No, I had not stolen the handkerchief, but I did not want to hide it and say I was never arrested for it because we were arrested as a group, and charges were prepared against us because we were a group of school children in the bus, so that's what happened.

Modise: Has this influenced the way you looked at juvenile delinquency at all, or has it influenced the way you look at children now that you have been an acting judge?

Cossie: It has in a way, although the law has now completely changed and the attitudes of people completely changed, but it has because everyone must be given the benefit of the doubt and no one must say they were guilty before that had been established. You know in those days, police would just arrest and charge you without even producing evidence to that extent.

Mr Fourie: You recently delivered a judgment on 18 November 2015 involving the Road Accident Fund – do you recall that judgment?

Cossie: Yes.

Fourie: in brief what happened there, a driver of a vehicle lost control, left the road and the driver was then killed in the process. His wife and children then instituted an action for loss of support against the Road Accident Fund and you heard the matter. Merit and quantum were separated – is that correct?

Cossie: Yes

Fourie: Now what you say, in paragraph seven, is that what requires to be decided in regard to the merits whether there was another vehicle involved in the collision and then you go further and you say, in paragraphs 24, the issue before court is whether or not there was another vehicle involved in the said collision so you repeat that. And then again you say in the circumstances I find, in paragraph 25, you found the plaintiff succeeded in proving her claim on a basis of probabilities and conclude therefore that there was an unidentified vehicle involved in causing the collision - is that the only issue to be determined? Whether there was another vehicle or not? An unknown vehicle?

Cossie: Yes, on the merits.

Mr Fourie: So let's assume there was an unknown vehicle, but the driver of the vehicle drove correctly and there was no negligence at all - would that have influenced your view? Is that not the test whether the negligent driving of the unknown driver caused the deceased to lose control of his vehicle?

Cossie: Yes.

Mr Fourie: But you say that nowhere in your judgement.

Cossie: That was also an issue which was supposed to have been there.

Fourie: Then you say in the result I make following order, the plaintiffs case succeeds – what does that mean in view of the fact that merits and quantum had been separated? What do you understand by that order “the plaintiff's case succeeds”?

Cossie: The plaintiff's case succeeds – what is the question?

Fourie: Would a prudent order not have been under the circumstances, if you found that the unknown driver was negligent and that his negligence caused the deceased to lose control over his vehicle, would a prudent order not have been that the defendant, being the Road Accident Fund, was liable to compensate the plaintiff for her proven damages?

Cossie: Yes.

Fourie: Where is that order?

Cossie: It's not written here but however, Mr Commissioner, that is why I said when I went to that course that I went to, these are the issues that were clarified to us when you write judgement. The people I gave the order to are entitled to come and say the order is not clear, so there were checks and balances when a judge makes a mistake.

Mr J Malema: So those people when they come back to you, who's going to pay? Because coming to court is very expensive. Who's going to pay?

Cossie: To pay?

Malema: For them to come to court they must get lawyers – who's going to pay for those lawyers?

Cossie: Normally when a judge makes a mistake the people who, the costs depend on what was happening or what is about to happen. This one for example, the people are supposed to come and seek a clarification of the order, they don't have to pay.

Mogoeng: Do you understand Commissioner Malema's question? He's not a lawyer, but he's asking a question which should be obvious to a lawyer. They've paid, they've left, the order is not correct. When they come back, must they pay again for the mistake that is not theirs? Who must pay, that's his question.

Cossie: The mistake will be rectified and no order as to costs.

Malema: For them to come to you, they have to go to a lawyer, so that they can come back to you, and for them to go to a lawyer they have to pay the lawyer to come to you.

Cossie: The mistake that is contained in this, there are checks and balances – people go and ask for an appeal or a review, or they come and ask for clarification of the order and, for example, in this instance, this

was against the Road Accident Fund – a Fund which has enough funds to engage the services of a lawyer. I don't know whether I am answering this – there are checks and balances when anyone makes a mistake.

Malema: You are making similar mistakes to the previous time you appeared here and I don't know whether it is becoming uncomfortable again but for the lack of a better word, would I be correct to say this is what can be described as a miscarriage of justice?

Cossie: No, this is not a miscarriage of justice. I'll tell you why I don't think it's a miscarriage of justice – the order, although it says the plaintiffs case succeeds, the plaintiff was claiming that he is entitled to the relief he was seeking.

Mogoeng: You know what the problem is? You can never succeed in a claim for damages where negligence is contested until negligence is established. Now you are not saying anything about negligence, he is asking you, is it not a miscarriage of justice to find for a party in circumstances where negligence, which is a key requirement in that finding, has not been established? Now if parties have to come back to court because of the Judge's mistake, who should pay? Why should the parties pay? Why should the Road Accident Fund pay because of the Judge's mistake?

Cossie: I should live with this mistake but in living with this mistake, I do seek help when I err – it is just one of those issues where I have to live with this mistake unfortunately, and I accept the responsibility for that, but in the normal course of my duties, I do seek advice and help.

Malema: Maybe let's move forward – we'll deal with that in our deliberations. Can you just give us a brief lecture on PAJA again.

Cossie: PAJA was enacted in order to put effect to section 33 of the Constitution because section 33 provides that decisions taken by functionaries must be reasonable and must be just. PAJA was enacted to be the vehicle used to make it practical for the, for people who are not happy by the decisions that have been taken or by the decisions that have not been taken by that functionary which are prejudice to them or which affects their constitutional rights.

Malema: Did you prepare for this interview?

Cossie: Yes I did.

Malema: In the preparation of this interview, you didn't see the need to refer to your previous performance and previous interview so that you did not commit similar mistakes?

Cossie: As I've already indicated, the last interview was not good.

Malema: I am worried you are committing the same mistakes, because if you had referred to the previous interview in preparation, the likelihood is that you are going to be asked the same things so that you did not commit similar mistakes because you take this body very seriously, but it looks like you have not done that.

Cossie: I do take this body very seriously and I would like you to repeat your question, because there is no way I could not take this body seriously, definitely.

Advocate Ntsebeza: The Chief Justice commented on your having been part of the Tongoane and Others case – was this the case that originated in the North Gauteng High Court?

Ms Cossie: Yes.

Ntsebeza: At what level were you involved and for which party were you involved? Were you involved in the Constitutional Court when this matter was dealt with there?

Cossie: Unfortunately not at that stage because I was acting at that time.

Ntsebeza: At what level were you engaged?

Cossie: I was representing the Department of Land Affairs.

Ntsebeza: Where?

Cossie: In Pretoria.

Ntsebeza: Because I see that in the list of counsel that were involved in the Con Court, your name does not appear.

Cossie: Yes, I did not go to the Con Court.

Mogoeng: Why do you cite the Constitutional Court part of it as if it's one of the cases you were involved in up to Constitutional Court level?

Cossie: The citation is what is there but I was involved in all the proceedings, but I did not go to the Constitutional Court but that is the citation Chief Justice.

Mogoeng: No, I want to be fair to you and I don't want you to be misunderstood and possibly to your disadvantage. When you cite cases, it is those in which you were involved in court, either as an attorney or as an advocate. If you were only involved at High Court level, you don't cite the Supreme Court of Appeal, you don't cite the Constitutional Court because you were not there, so it should not count in your favour. Why did you cite the Constitutional Court one, because I specifically said I see you were involved in this important case of Tongoane which was handled by the Constitutional Court, and then you said yes.

Cossie: Yes I was involved, but not at the Constitutional Court – I did not go to the Constitutional Court because I was not available at that time.

Mogoeng: Thank you, you are excused.