



JUDGES MATTER

Judicial Service Commission interviews

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Eastern Cape Division of the High Court

Interview of Advocate N C D Msizi

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Chairperson (Chief Justice Mogoeng): Good Afternoon Ms Msizi

Msizi: Good afternoon CJ.

Mogoeng: I notice that you were a prosecutor, am I correct?

Msizi: Yes, that's correct.

Chairperson: For how long?

Msizi: Only for a year.

Mogoeng: You've acted as a High Court Judge on a number of occasions, is that correct?

Msizi: Yes that's correct.

Chairperson: Did you enjoy it?

Msizi: I did CJ, even though it's got its own challenges, but it was indeed a good experience.

Mogoeng: Did you find some benefit from the aspirant judges programme or did you wish it was structured differently?

Msizi: Definitely CJ, I've learnt quite a bit especially from the judgment writing and, in particular, how one zooms into issues and also just the structure of writing a judgement and also, I got comfort from the knowledge that one must just adopt one's style – you know one could pick and learn from others but one must be comfortable in one's style. I did find it quite constructive.

Mogoeng: And what is the longest period over which you kept a judgement reserved?

Msizi: I've been able, so far, to deliver my judgments in three months.

Mogoeng: Just in your own words, just how ready are you for permanent appointment? I understand you people who practice law make a lot of money than we used to. Are you prepared to take that cut?

Msizi: Unfortunately CJ, I am not one of those who are really monied though I must say I really enjoy the practice of law. What I've discovered, as an advocate, is that I enjoy sitting in my chamber and researching, I enjoy writing, I enjoy having discussion with my colleagues in particular just to understand and get people's views – I found that quite a great experience for me. As a result of that, utilising that model, which is what is used at the Bar, I found acting was therefore not a different environment. I am ready to be a Judge.

Mogoeng: Very briefly, what is it that prepared you?

Msizi: Firstly I found, especially because I also acted, I am familiar with most of the Judges in the division wherever they are, and I found that they are very supportive and receptive. Also I assist a lot and I enjoy sitting up there and learning the art of cutting through the chase, and how that asks of me because I already have the competencies as an advocate, but in a different level because I now have to make the final decision – I have become the final arbitrator. I find that a challenging aspect but also very intriguing and very energising – I've really enjoyed that. And I believe, CJ, even the variety of matters that have come before me, also given that I have gone to the various centres, that is Mthatha and the rest of the other courts, I found that also the variety of issues I dealt with at the various courts has also empowered me somewhat.

Mogoeng: I've noticed that you occupied one leadership role or position or other – how did you manage to rise that high in this male-dominated world?

Msizi: Which one?

Chairperson: You were, for instance, the secretary of Advocates for Transformation and also you were the chairperson of the women's chapter of SANSCO at some stage - what is it about you that enabled you to pierce through the barriers that tends to keep women from rising?

Msizi: CJ, I don't know, I'm an only child and when I was growing up, my father told me that I must be able to fend for myself – when I think back and look at my childhood, I always think that's what I can really attribute to navigating the circumstances and not to intimidate me, but rather to intrigue me enough to step in there and learn for myself and take the bruises along the way.

Mogoeng: Finally, and very briefly from your side as well, I read an article recently by a colleague of mine, a retired Constitutional Court Judge – he said that one of the challenges he had been struggling with is that women and men are equal. What is it that you could do to break down stereotypes or unconscious biases because sometimes you have a bias that you don't know and until you know you can't do anything about it or you can't do much about it. As a woman, knowing the challenges that women have to confront, what is it that you can do to help us deal with this thing and deal with the gender question even within the judiciary?

Msizi: CJ in answering maybe I should refer to you to my stint as an executive at the Coega project, where I was responsible amongst others for Human Resources, where diversity in the employment arena was always uppermost – it was something, as an executive responsible for that, I was always compelled to deal with it and I found, CJ, that one of the strategies that one can adopt is to allow a space for that diversity and to do that, I need to first and foremost ensure that I am able to apply myself at a technical level and that I am able to meet my male colleagues toe to toe, if I may say, so that one looks at me first as a professional, and I'm able, once I've ascended to that level, that I'm able to gain a voice, a strong one at that, that I'm a woman and you didn't even notice when you engaged with me as a professional, so that we don't use the issue of gender to suggest to be more sympathetic, be more understanding – we shouldn't apologise because we have the same capabilities, we have the same intellectual capabilities and I think we just need to have the confidence to speak out and to state our point of view, unless of course the issue of gender was the core of that debate or discussion. I am coming here wanting to ascend to the throne of a Judge, and what is required of me, as a person who is a Judge, is intellectual capability, independence of the mind but guess what – I am also a woman because I am not going to downplay the fact that I am a woman and I am not wanting to use it as, because I'm a woman you must overlook some of my weaknesses.

Judge President Sangoni: A few questions. I'm not aware whether you know the comment that came from the Grahamstown part of the Eastern Cape Society of Advocates. And you know that is slightly different from the PE part. Now that is one Society, except that some people are in Grahamstown and others are in Port Elizabeth. Now, what is it, if you know, that could inform the difference between what they say about you – what is behind that? Are they saying that you have no experience – this is what they said last time - to be a Judge, and others say no, you do have that experience, so Grahamstown might be wrong. Why should they commit themselves if there's a likelihood they might be wrong?

Msizi: When I read that comment JP, I also thought about how do I read into the comment – I had to of course take what they were saying as the reason, and the reason they've advanced is that the other candidate has been working in the court for a very long time. I'm really not able to tell, JP, why they are taking the stance they've taken, I'm just limited to their comment.

Sangoni: The other question I thought I should put to you is what one was picking up from the street, which is the period you spent with Coega development. There's a suggestion that you've been away from law practice

and they normally say for 14 years – what period is it by the way? Does it amount to 14 years from what I can see?

Msizi: JP I think it really depends on what is meant by being away from the practice of law. I'm saying this because -

Sangoni: We'll get to that but I just want to know, physically, how long?

Msizi: I left private practice at the end of 1994 and I returned in 2008 to commence my pupillage.

Sangoni: And that gives you what time?

Msizi: That would be 14 years so yes, it is 14 years.

Sangoni: What kind of work were you doing there? Was it something completely away from law? Were you doing duties associated with law?

Msizi: When I was first employed, JP, I was employed as both the company secretary and as the legal services manager. At that time, people will remember the project had just started and there were a lot of systems which still had to be put in place, for instance, ensuring the proper constitution of the company, registration of the company, setting up the letterhead and so on and even working with the board at the time and assisting the members of the board. Very important is that this was also at the time, around 2000, when there was a lot of new legislation coming up, very crucial legislation, and it was also just after the introduction of very new legislation such as the Labour Relations Act which had not been promulgated for a long time. You also had legislation such as PAJA, PAIA, the PFMA so there was a lot of confusion, for instance, in the organisation at the time as to what law the company was bound to.

Sangoni: In other words, you have always been associated with law?

Msizi: I always have been – I would be responsible, for instance, for litigation, I worked with counsel and was some sort of instructing attorney in engaging with them, because it was important for me, to ensure that you don't, when instructing counsel and attorneys, take a distant position because how else, on a day-to-day basis, do you guide the organisation?

Sangoni: Last question from me – well, I must ask the question of reserved judgements, outstanding judgements - what is the picture like as we speak?

Msizi: I've got about three, four judgements.

Sangoni: How old are they?

Msizi: They are from the end of February and two were now in March.

Sangoni: Have you been going on in that fashion - judgements not older than three months?

Msizi: Yes that's right.

MEC Makupula: A very good afternoon Advocate Msizi. Just to clarify for me these statements in the questionnaire – the first one is the 6.2% proportion of work in the world of criminal law, and that you were last involved in a criminal investigation in 1994. Then link up that with 8.1 “Have you acted as a magistrate” - the answer is no. Then link that lastly with 9.2: “Did you sit in both criminal and legal courts” - the answer is yes, and you state criminal cases that you have presided over. Now, to a layman like me, I am unable to make the link. The last one: if things go well and you are appointed as a Judge, one of your responsibilities is not only to issue out judgements, but is also to help the system and improve the system as part of transformation – which other areas still needed transformation in the justice system from the view of a Judge?

Msizi: As I've stated, at the time I was practising as an attorney, I did undertake defending criminal matters but when I left practice, I was not involved in the criminal court. Then on my return as an advocate, I also did not do any criminal matters but from the time I started been acting in 2013, I have been working in the criminal court so I have now, since 2013, been attending the criminal court as a Judge. As I've indicated in my CV, I've never been a magistrate but as a Judge, I have presided over criminal matters. Coming to your second question MEC, before I embark on an answer, do you mind just repeating the question?

Makupula: As a Judge, there are other areas going on like transformation – which other areas need transformation in your opinion?

Msizi: What I have found is that we need to try to nurture the hatching ground of where we source female lawyers in particular so that you have a pipeline that is being readied to get in – that's one. Two, we also need to, as judicial officers, for want of a better word, we need to nurture those practitioners who were already there and appeared before you as a Judge, to ensuring that you are firm but fair and not be intimidating, because it's little things that can unsettle people, especially where you found young ones coming up. If I can illustrate by way of an example, when I was initially practising as an attorney, at that time, the idea of a representative bench never even arose in our mind, and I remember the first time I returned to practice and I went into the chambers and found a black Judge, and I was able to say "Molo Judge" without the Judge doing me any favour or anything. I felt I belonged and I can also be a Judge - I was eased by that. So it's in the small little things without taking away the integrity and the formality that needs to be maintained because as Judge you need to protect the office, but we also need to bring in humility and humanity in how we deal with members of the legal fraternity, and even persons that appear before you as unrepresented litigants, which happens a lot in court - the issue of language and how far you accommodate someone - sometimes you have to adjourn court to ensure the person had an interpreter. So it's the little things.

Mr Notyesi: Advocate, tell me. do you understand that a person arrested and detained, has a right to make bail application within 48 hours, it's just a constitutional right. And if a bail application has been refused, he has the right to appeal. Can he be ordered to pay costs if his appeal fails?

Msizi: I am sure you are referring to a judgment I issued in Bisho three weeks ago. Now and again I always go to Safflii to check the latest judgments, and I picked up that there was an error I had made, I said with costs. I then phoned the Judge in Bisho, the head of the court, Judge Van Zyl – I told him Judge, look, I've picked up that I made an error and I suggested writing another one, in terms of rule 42, varying that order because it was definitely made in error. I'm sorry it's a long answer but I had to give that explanation – it's not right to issue costs against an appellants in a bail.

Notyesi: Yes but I have a judgment here as we speak which you delivered on 11 March 2016. In this judgment, you say there is refusal of bail dismissed with costs – this was an order. Your explanation is that this could be corrected by rule 42 – can that be so, when you make an order which is clear on the face of the order, that the application was dismissed with costs? Can you rescind that on your own?

Msizi: You can on the basis of rule 42 because the rule allows for variation of orders made in a variety of circumstances. When I read that judgment, I'd realised that was not what I intended. The day the judgment was delivered, I was sitting in East London, whereas I had heard the matter in Bisho. I then emailed the judgment and I think my secretary must have made a mistake and I had noticed that I did not delete "with costs" because it was absolutely not correct to include costs in a bail appeal matter at all.

Notyesi: This meant you are doing cut and paste because you are saying you did not delete the costs – was that right?

Msizi: Well, you can cut and paste what is relevant – I'll explained this – if you are dealing with a matter which is similar in terms of the law with another, there is nothing wrong – you can copy and paste the relevant portion, of course your copy and paste could not be blatant copy and paste of things that are not relevant.

Mr Fourie: I'll be brief, you've delivered a judgement in the matter of Tukwayo and the Presiding Bishop of the Methodist Church of Southern Africa – is that correct? That was an application for rescission of judgement.

Msizi: That is correct Commissioner.

Fourie: Now, in terms of how I understand the law, you can bring an application for rescission of judgment in terms of rule 32 or in terms of rule 42, or in terms of the common law – those were three separate types of applications. Do you agree with me?

Msizi: I absolutely agree Commissioner.

Fourie: Now, in your judgement, you inter alia, say the following, in paragraph 70: "in terms of rule 42, an application brought in terms thereof, may also be entertained in terms of common law and rule 32(1) provided that the requirements thereof are satisfied" - can you explain to me what you mean by that?

Msizi: There is a patent error there Commissioner – that paragraph should have read that an application for rescission can be brought under those three provisions, namely, section 42, rule 32 and/or the common law, because rule 42 and 32 deal with completely different applications for rescission.

Fourie: Now, can you briefly explain to me what are the requirements to bring an application for rescission of judgment in terms of rule 32, as opposed to rule 42?

Msizi: Rule 32 says the judgment or order must have been obtained in default, and you must bring the application otherwise you would have defended it, and within 20 days of becoming aware of the decision. Rule 42 on the other hand, and equally common law, do not have the time limit as a prescription, but does require that one brings an application, and rule 42 deals with a variety of bases upon which you can bring an application – it may be an application granted in error and so forth.

Fourie: Do I understand you correctly that you are saying the difference between rule 32 and 42 is that in 32, there is a specific time period, and in 42, there's not? As far as you are concerned, is that the only difference?

Msizi: No, as I've indicated, in rule 32, there must have been a judgement that was issued without you being aware.

Fourie: Now, let me make it easier for you – in terms of an application in terms of rule 32, do you have to satisfy the court that you were not in wilful default? And must you persuade the court that you have prima facie defence? Is that required in terms of rule 42 and, if so, which of those are required?

Msizi: With rule 42 there is a variety, it could be that the order that was granted, is an order where there was an error as a result perhaps of what the parties presented to court or as a result of the court itself making a mistake in the order. With rule 42, guidance is sought from the common law, and the common law tends to provide a broader basis on which you can make an application for rescission of default judgement. What is common in all three of them that you must have a good defence, otherwise what would be the point of going through all the trouble to rescind a judgement when in fact you don't have a case in the event that the judgement is rescinded.

Fourie: If I tell you that in terms of rule 42 you don't have to show that you have a bona fide defence – do you agree with me, because you've said differently?

Msizi: You would recall Commissioner, earlier I was saying because rule 42 deals with a diversity of instances and one of the instances I was mentioning is that the case would have been heard, but then the judgment that comes out could be a judgement that contains an error. In that instance the matter would have been completely adjudicated, therefore you don't even go into the issue of bona fide defence of any defence whatsoever. All that is required is for the court to just change the error that has been made without resuscitating the matter for the hearing of the main action.

Fourie: Now without prolonging my questioning, there are requirements in terms of rule 32 which we've dealt with – am I correct to say to you that in terms of rule 42, the only thing you need to show is that there was indeed an error? Bona fide defence, wilful default, those things do not come into the picture. Do you say that here in your judgement? I didn't see that.

Msizi: I don't recall, but I recall with the issues here was that I limited my writing to what had triggered the application in the first place, and it was a very unusual circumstance in that, the very respondent was in its papers saying that it was not aware that there was an order granted at our instance, and yet when the applicant brought the application, they sought to oppose that on the basis that that order should stay. So I confined my judgement to dealing with that, and did not explain what could be done in terms of the rule.

Fourie: You say in terms of common law, a court is entitled to rescind a judgement obtained in default of appearance provided that sufficient cause is shown. Sufficient cause is synonymous to good cause -

Msizi: Sorry Commissioner, where are you?

Fourie: It's paragraph 16.

Mogoeng: Commissioner it is taking too long, Just put your question to her and let her answer.

Fourie: So in terms of rule 42, paragraph 17, an application brought in in terms thereof, may also be entertained in terms of common law and rule 32 (1), provided the requirements thereof are satisfied - I'll conclude by asking what you mean by that?

Msizi: Depending on which rule one uses in bringing one's application, the requirements of that rule should be satisfied.

Mr Schmidt: According to your abridged curriculum vitae, you indicate that your dissertation is outstanding for commercial law – the LLM - have you completed it?

Msizi: No I haven't.

Schmidt: I see you majored in shipping law, have you done any cases shipping law?

Msizi: Nope

Schmidt: Is there a fair amount of work in the Port Elizabeth division?

Msizi: I know of only one instance where I heard through the corridors that there was such a case in PE but I've never come across any.

Mogoeng: Thank you very much, you are excused.