



# JUDGES MATTER

## Judicial Service Commission interviews

6 April 2016, Morning session

KwaZulu – Natal High Court: Deputy Judge President

### Interview of Judge M I Madondo

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Chief Justice Mogoeng: Good morning Judge Madondo. For how long have you been a judge?

Madondo: For eleven years, including as an acting judge.

Mogoeng: If you exclude the acting years?

Madondo: For nine years.

Mogoeng: And how many years are you left with before retirement?

Madondo: Seven years.

Mogoeng: How have you equipped yourself for the leadership role?

Madondo: Firstly, I have applied myself to research as a judge after that, I served time where I acted as a senior judge, which exposed me to the many developments of the judicial functions, which prepared me to experience so far the many things and that I have done. It prepared me also for the knowledge to be able to deal with leadership guidance.

Mogoeng: Judge Gyanda has acted as a Judge President and the next candidate has also been given the opportunity to act as a Deputy Judge President. You have never acted in a leadership position, is that correct?

Madondo: I have acted, but not with a title.

Mogoeng: No, I meant with a title. They acted with a title and you have not.

Madondo: No, I have not.

Mogoeng: What do you see as your role as Deputy Judge President, and what challenges are you going to have to grapple with and how?

Madondo: Well, the first challenge is to help make the court system easily and equally accessible to all the people, which is still a challenge at the moment. And, to make it equally protecting and benefitting all the citizens, to make it user friendly, understandable, and responsive to the needs of all its users. So, this can be addressed in the first place by providing a simple process for the resolution of disputes, because by so doing a number of intransigences and problems are eliminated, and when it comes to it being more accessible, you find some people due to poverty, lack of education and

ignorance, who are not aware of their rights and the remedies for their breach. So, there should be a programme, which will serve to educate the public at large about their rights and the remedies. The other problem is the provision of legal services, where you find the person who does not have the legal knowledge coming to court without being represented. That is a problem more affecting particularly the majority of the population in this province, and that should be sorted out so to create an access to justice for all the people. The user friendly – you have abused victims, so there must be some kind of assistance to those people, there are different people in that category. You will find there are abused women and children, disabled people, they are not properly catered in the administration of justice. And furthermore, there must be a sort of information desk, a desk which should be staffed with people who can communicate effectively with the majority of the people using the court. And also, there must be some directions to courtrooms and other service points, to make it user-friendly to the people. And there must be some kind of accountability and transparency, because it could not only be an access if people don't know what is happening there. If there are certain reports of the court functions, programmes, and all other things people want to know, that will help to create public confidence and trust, people will know that the court acts expeditiously, its judicial functions and decisions are expeditious, reliable and fair. You find that the litigants are duty-bound to come to court, even if they are far away, to convene a conference and therefore, means should be provided so that the conference can be conducted through phones or videos, that would help the people who are a distance away, and reduce costs as well. So, all these people should find themselves being equally protected, and enjoying the same benefits of law.

Mogoeng: Very quickly, you talk about taking care of victims. In Norway, government has come up with legislation in terms of which a victim of crime immediately gets a legal representative of his or her own so that as a criminal case proceeds, if there are any damages suffered as a result of that crime, instead of having two separate trials, an effort will be made to get the damages that he or she might be entitled to. What are your quick views on that, and can it work in South Africa?

Madondo: Well, it can work by adding some people who are knowledgeable in certain areas. Like psychologists or other people who'd be able to advise these people who are involved. Some of these people have their first encounter in court, so with that kind of assistance they will be able to see that justice is for all the people, not for those who can afford to do so.

Mogoeng: Now, accountability: Do you think accountability is an enemy of judicial independence? If not, why?

Madondo: Well, accountability is not the enemy, but it is a friend in the sense that the judiciary has to be transparent, so that people must know what is really happening. If they know what is happening it promotes a better perception in the public about the judiciary, which includes access to court because people have trust. If it just closed and the users don't know what is happening, then it is a problem but if they do, it is a friend because you can't explain justice without accountability.

Mogoeng: Well at some stage in your division, there were colleagues, I don't know if the problem still persists, who were opposed to the idea of judges having to account for how slow or how expeditiously they disposed of cases, and how long it takes them to dispose of reserved judgments – particularly those that have been reserved for a longer than three months. The attitude was: we are not public servants, this is another strategy of having the politicians cause us to account to them, and we will not allow this to happen.

Madondo: There are distinctions: there are those areas which purely pertaining to the exercise of judicial functions, where there should be no interference. But, in this case, a judge presiding in a matter must be able to know that people want an outcome as soon as possible. To say within three months, the judgment should be issued, is to make justice more accessible and expeditious. If you as a judge are failing to make that, there is a problem, unless you have a problem to be discussed with the JP or whoever in leadership. And the other thing to put a finger on that, there is a register in court recording all the events, whether the cases is finalised and what happened, and that will enable whoever in the management to see what progress is made in each particular case. So, if it exceeds three months there better be a good reason for so doing, and that judge needs to be assisted. If he is refusing, he must remember that he is accountable to society as a whole, and also that will be seen as if they are acting with impunity, so they have to show some kind of commitment and dedication.

Mogoeng: So in a nutshell as a judge you can't keep a judgment reserved for three years, and some

have kept it reserved for much longer, and then when you are asked to account you say that you are independent.

Madondo: No, that is serious because that is a denial of justice.

Judge President Jappie: Moving on from that, or taking that point further, it has in the past created some tension by holding judges accountable, in terms of the norms and standards. How would you as a Deputy Judge President handle that tension that does arise with some judges in the implementation of the norms and standards, and the judge who then resorts to the call of judicial independence?

Madondo: The first thing I will do is to sit down with the affected judges, and explain the importance of dealing with the work expeditiously, and the benefit thereof, and that as judges they have to be accountable. So, the mere fact that they've got independence doesn't mean they should be indolent, not doing their duty because by so doing, they are creating a problem for the system and for the people who are being served by the system. So I would sit down and find out where their problems are, try to reason with them, to be able to share the same vision with them.

Jappie: The next question deals with what is now common knowledge, that in the KwaZulu-Natal High Court, we do have certain infrastructural problems, certain problems as far as human resources are concerned, and it does get in the way of delivering justice. We of course can't simply sit back and fold our arms, what I would like to know from you, given these challenges, how can we still deliver justice to the people of KwaZulu-Natal?

Madondo: We have to devise means to overcome this without additional resources. We look at ways to deal effectively with problem. As I've mentioned earlier on, we see ways like the simple process of resolving disputes, try allocate the work equally, try to extend the services to other areas where the court services are needed the most. There are many ways to have pre-trial conferences to resolve a number of cases before they come to trial, and try to put the delay mechanism in place. In the delay mechanism, we look at the processing time when the cases are being processed, and discovery time and pleading and so on, and then you see how the rules and how to make use of the rules to achieve that purpose, without additional resources. There are many ways one can engage in order to do justice, because justice must not only be seen to be done, it must be done as well.

Mogoeng: Judge Madondo, where possible just be direct and answer the question.

Jappie: You say there are many ways, give us three ways that it can be done.

Madondo: Well, the first one is to reduce the backlog, because the backlog, we need more resources if necessary. The second way is to reduce delay in dealing with cases, to expedite the resolution of cases. The other way is to have pre-trial conferences as I have said, because in pre-trial conferences a number of issues are discussed, and some of the cases are finalised there. That will encourage settlement. The other way is to set a firm and credible trial date, because by so doing, the parties involved will know if the case is going to proceed as scheduled, before the trial date they will have resolved the cases, because they know for sure that it is proceeding.

Mogoeng: Can I just interrupt there? I had a meeting with the magistrates here, and one of the problems identified that is responsible for the delays is this. Cases that are known to fall within the jurisdiction of either the Regional Court or the High Court are kept for a very long time at a District Court level, like rape, murder and fraud and so on, and they are then processed by very junior prosecutors who don't even know what is required to ripen these matters for hearing. Is it an option to channel these matters directly to the regional court, to be processed there, to be ripened there for hearing, and ultimately to the High Court, obviously subject to amending legislation where this is required?

Madondo: Yes, I have seen those things. Let me start from the High Court side. You find cases which are supposed to be at Magistrates Court or the Regional Court, in the High Court. You find people claiming R300 or so in the High Court. Those cases, from initiation they should be sifted and referred to the appropriate forum. Likewise in the Regional Court, those cases that are High Court material, they should be channelled to the High Court as soon as possible. But not to take all the cases to the High Court, even the cases which are triable in the jurisdiction of the Regional Court. That will help a

lot, because as far as civil matters are concerned, we can also have some penalties, in the sense that even a person who wins the case in the High Court, but given the Magistrates' Court costs, if the case falls within the magistrate's jurisdiction.

Jappie: Two last aspects I would like to deal with. One, as a Deputy Judge President, you will be one of the senior judges in the judiciary, and do you believe it is a requirement of those who are senior in the division to act as mentors for the junior judges? And if you agree, how would you go about doing that?

Madondo: Yes, that is essential and necessary in my submission. We start with acting judges who should be allocated to sit with senior judges, so the senior judge is to give back-up support. Even the junior judges on the bench should work to promote open and free communication, exchange of ideas and sharing of information with a view to keeping everyone informed, and having a feeling of understanding and inclusion. So in that fashion, we will be able to pull together, because we'll know if people have problems, we'll know where to help, if there is open communication and exchange of ideas, so that should be encouraged.

Jappie: That would require a degree of building up collegiality amongst the judges. How would you do that?

Madondo: Well, in the first instance, it's to get judges working as a team towards the achievement of a common goal of the division. That should be developed in the first instance by adopting all inclusive and consultative approach, and the taking of the views of all the colleagues. So, in that fashion, they'll form part of the decision-making process and solution to the problems, because they will know. If you take all the views and opinions, that will create a sphere where everyone will feel there is equality, where everyone will feel that his/her thoughts are valued. That will help to create a conducive atmosphere for the team spirit to thrive. There we create and strengthen the interpersonal bonds, and cultivate a sense of cooperation.

Jappie: One last aspect, which you raised in one of your answers: the equal distribution of work. How would you go about achieving that?

Madondo: The first way of dealing with this, at the initiation where the cases are filed. You see the complex cases, then you look at the case, and the experience of the judge, can deal with that and understanding of that. You allocate that first to certain judges some time ago, so that they can prepare themselves. With the rest, you look, you know what the number of judges is, and who are the judges you have. When you allocate cases, I have done it at the time I was acting as the senior civil judge, you talk to them, you know who has got a heavy load, and you remove the heavy load to other people, and always there must be a back-up judge, if there are so much problems engulfing other judges, there must be a backup judge who'll see to it that work is done properly, and that everybody has an equal share. At times you will find that some people have light loads, and others are battling. That creates disgruntlement and problems.

Premier Mchunu: In the years that you've been a judge, there possibly have arisen situations where there was vacancy in the post of Judge President. Have you ever applied? If not, why not?

Madondo: Well, initially I applied for the JP position, and afterwards I applied for the DJP position. It was only last year when the vacancy of the Judge President arose that I did not apply. Do you want to know the reason for applying or not applying?

Premier: For not applying.

Madondo: Well, in the last instance, it was my feeling, and opinion of many of us, that in order to create a unity in the bench, we have to allow the judge who's presently the JP to proceed. We were happy, and we were satisfied that he's going to be equal to the task, so it was for that reason that I did not oppose.

Premier: How important is unity of the judges in the division, with regard to achieving the highest effectiveness in the judiciary?

Madondo: Unity is foundational to collegiality and team spirit. You cannot have team spirit without unity, and the division must have an objective to achieve. If you do not have that unity, it is very difficult, because you are going to have cliques, and if you have cliques, you are doomed to fail.

Premier: What are the most urgent measures required to get closer to the ideal situation, in terms of efficiencies?

Madondo: With regard to the performance of the judges: the first thing is unity. Second thing is team spirit, and the third thing are the objectives and expectations which we'll want to meet, because if we don't work along those things, all the people must know why do we need this, and what benefit will they derive out of it, and in that sense, they can apply themselves assiduously. As it is now, the level of unity, in my submission, is not that satisfactory to the extent of saying really, we have that spirit, and that spirit is necessary to achieve the common goal for the division.

Premier: What is your view about the imbalance of gender in the division, and how would you change the situation for the better?

Madondo: In order to address that problem, you would need to have a pool of people who have been identified, and those people would be exposed to the demands of justice. They are appointed, and have people mentoring them, and you create an environment where mistakes and failures will be regarded as part of experience. There will be open and frequent communication, exchange of ideas and sharing of information, to ensure that these people are well informed. In that pool, you target people so that there should be some kind of diversity in the pool, addressing all demographics of the population. The other problem when it comes to the blacks or Africans in particular, you find that they don't have sustainable practices. I think government should also assist by instructing and briefing the black legal practitioners, or trying to appeal to the private sector, to help. Because otherwise we'll have that kind of problems, because some people are leaving practices due to the problems they are experiencing in getting legal work. So in order to ensure that the judiciary is reflective of all demographics, those are measures to be taken.

Commissioner Singh MP: I have three questions. You had I had the pleasure of being senators in the first senate of the Republic of South African, 1996 – 1997, and then serving in the KwaZulu-Natal legislature for a few years after that. At that time you were appointed by the ANC. Now I note that you have published a book recently, and I am asking this question in that context. I would like to know, has your political affiliation in any way impacted on your role as a judge, given that this book has just been recently published in 2015?

Madondo: No, it has not, and that is evident also in the province. That the book is published in 2015, it doesn't mean it's only written recently. It has been compiled over the years.

Singh: Thank you for that. I am looking at your particulars of employment since leaving school. Nothing jumps out to me showing that you have had administrative experience. The role of a DJP requires a lot of administrative work. Is that your strength or how will you overcome this lack of administrative experience that I note from your employment history?

Madondo: Well I have been serving in various organisations where I was in the leading position, where I gained a lot of experience. Here, when it comes to this post, in the first instance before becoming a judge, I was also serving in the industrial court and the CCMA, and here also I served as an advocate and now, as a judge. I know the problems, I know things which I think should be done. Also, I will not be working alone, there are colleagues who are well-versed in other aspects, and we will bring those colleagues together and work as a team, it is not a one man show.

Singh: My last question relates to two judgments. One is where you disagreed with two other colleagues, and I would just like to know your thinking on that, where you disagreed with the majority conclusion in *S v Mbatha* about the cultivation of a single or a few dagga plants constitutes dealing in dagga, so that's the one case. And, the second case where the appeal was successful in *Savoi and Other v National Director of Public Prosecution*. The *Savoi* matter has been hanging around for a long time now, and is there any reason that is so?

Madondo: The fact that only one plant constitutes dealing in dagga is not right. There must be some

sort of concrete evidence indicating that someone is dealing with dagga. You may find that dagga seeds fall off somebody walking past or smoking there, and potentially falling onto the premises. If you hold that person liable for that plant with severe penalties, it is not just. With regard to Savoi, there were six orders made there, and five were approved. The sixth one had a reason because there was question of mens rea, and it would be truly and justly sad to have committed the offence negligently or intentionally. In other words, it was not successful. Whether it is still around or not, I am not sure.

Commissioner Singh MP: Chief Justice, just as an aside, after some construction at my home many years ago, I had a social evening where some policemen were there. One of them came to me and said: "are you planting dagga?" and I asked where it was. They pointed it and then I realised that the construction workers had been having a good smoke when they were working there, so I can quite agree with you, Judge Madondo.

Commissioner Notyesi: Do you agree with me that the Deputy Judge President and the Judge President should work together, and they should be complementary of one another?

Madondo: Yes.

Notyesi: How would you describe presently the relations generally between yourself and the Judge President?

Madondo: Well, as far as I know, it's a good relationship, and for the mere fact that I elected not to oppose him, and serve under him. That clearly shows the kind of good spirit, I don't know anything amiss.

Notyesi: And lastly with regard to the question of leadership in the division, one would say the Judge President and his deputy should be in a position to steer, to lead the division intellectually, in terms of jurisprudence that comes from that division. My question is, do you enjoy the support of other judges of the division?

Madondo: Well, I've seen support at the time when I was serving as senior civil judge. I had a lot of support and cooperation. And in this regard, the judges are not allowed to say a thing about this, whether they are supporting or not supporting you. But generally, I do have the support. And it's across the spectrum.

Commissioner Modise: I have two questions, and they relate to what you stated as you answer to item 9 of the questionnaire. Firstly you say: "racial and gender representativity have not yet, despite considerable passage of time since 1994, reached fair and equitable levels. However, whilst striving for optimum levels of representativity on the High Court in our province, this needs to be tempered by the need to maintain and enhance standards of the courts and efficiency as well." Would you care to elaborate please?

Madondo: As I have indicated earlier on, if you create that pool where the people will be given an opportunity to be mentored, to be completely exposed to the demands of the justice, we will be able to achieve that competence and efficiency. Is that what you mean?

Modise: I may have understood it differently, not having heard you say that. But you further on state that: "lack of diversity of the on the bench impacts negatively on public confidence and the legitimacy of the legal system. Diversity is not, however, only characterised by race and gender, but also by culture, religion, ethnicity and social origin." Please simplify it for me?

Madondo: Well, I will not deal with the gender, because they are included. Even in the religion, there are people belonging to various religions, if a person is there representing that sector, that part of the population he or she represents, will see that the justice is for all people. Sexual origin, you find people who are homosexuals, or disabled, those people should be accommodated on equal basis like all other citizens, they should not be excluded simply because of [indistinct]. If you have them, the circumstances should be created to accommodate all kinds of person, so that the justice should be seen to be for all the people concerned, because it depends on the perception, public confidence and trust.

Modise: So Judge, in order to cater for the diversity, and we can take the categories you mention and break them even further, if I go back to your first response, it means that every time we meet a challenge, in order to ensure that standards of performance and competence are catered for, we must then find these categories, and mentor and train people to the levels. Is my understanding correct?

Madondo: It is not correct, in the sense that it is not a rule. But, it is a thing one should think should be in there. Another thing, you look at the potential suitability and the potential of a particular candidate, if those categories are not available, it's not cast in stone that at all times there must be that. But we must strive to open up to other categories as well, and that's what I'm saying.

Modise: And if these categories, diversity which includes race and gender, if they are not there and you say the lack of diversity impacts negatively on the public and the legitimacy of the legal system, you are actually saying we have a big problem as South Africa because of the lack of the diversity – that is the simplest understand I have of what you are saying. Therefore, you as DJP, you probably have been thinking of how you can ensure that legitimacy, and the lack of confidence in the justice system is improved, surely?

Madondo: Yes.

Professor Ntlama: In your experience as a judge, do you have any experience where your court order has not been implemented by one of the other branches, and if not, as a DJP, how would you respond to that in ensuring the credibility of your office, if we do appoint you?

Madondo: Firstly, I haven't had such an experience so far. But, if I have had that experience, then I'll have to find out the reason for it not to be implemented, and see what problems are there, then you take it from there.

Ntlama: Earlier on you made so much emphasis on the unity within the division. Should we be very concerned about the division working in silos, currently?

Madondo: Not necessarily very concerned. But it's one of the essentialities, if you want to achieve, then you must be united, you must work as team. Because as you are there, we have a goal to achieve, to dispense justice equally to all the people. And to have justice accessible to all the people. So in order to achieve that goal, you must move as a team. So if you are not moving as a team, then there is a problem. That's where unity comes in, as a foundation to that kind of activity.

Ntlama: This is not a question, but please look at the case of Williams v Minister in paragraphs 40 and 41.

Mogoeng: You can look at it in your spare time.

Commissioner Schmidt MP: At previous JSC hearings, mention was made of the practice in certain divisions that a list was provided by the judge on a weekly or a monthly basis to the Judge President. Does that practice exist in KwaZulu-Natal? Reserved judgments. A list is provided to the JP by the judge of those outstanding judgments. Are you aware of such a practice?

Madondo: Yes, I am aware.

Schmidt: Is that practice implemented in KwaZulu-Natal?

Madondo: Yes, it is.

Schmidt: And does the JP take up those issues which have not been dealt with or the judgment hasn't been finalised within three months, dealt with by the JP and the judge?

Madondo: Well, I may not be in a position to know what the JP does with those judgments.

Schmidt: And lastly, in terms of your experience and understanding, what are the most obvious reasons for delays in finalising judgments by judges in your division?

Madondo: There are a myriad of reasons. It depends whether it is a criminal case or a civil case. If we deal with the criminal case, there are a lot of things. You find that trying to secure the witnesses, the accused are in prison are not in court, sometimes there are more than one counsel in one case also creates problems, various problems, and all those contribute to the delay. When it comes to the civil one, you find that the parties are engaged in negotiation settlements, or the matter is adjourned for a particular time, or adjourned sine die, and they take their time to bring the matter back to court, and this why we have to intervene early and take control of the litigation process. So, there are various problems which I think happen in various courts.

Schmidt: My question was more related to the reasons why judges are found to be wanting concerning their outstanding judgments.

Madondo: Judges are buried with a lot of work. You find that there is a shortfall of judges.

Mogoeng: But why would a judge take a year or two years to write a judgment? What could be the cause of that?

Madondo: Chief Justice, I may not be better placed to answer your question because my judgments rarely exceed three months. That's my principle.

Advocate Ntsebeza: What has been your experience of the allocation of judges to circuit courts? Is it evenly distributed between judges who are junior or senior, black and white, etc?

Madondo: Well, I can say it is not, to such an extent that at some time when serving as a senior civil judge, I raised that question with one of my colleagues who was charged with allocating those judges. Because you find that there are some people who are purely doing civil work, who are not going out on circuit, and there are those people who at all times in the criminal courts, most of the times. But after that has been raised, the new management, I've seen the change.

Ntsebeza: Thank you for that. The AFT, which has recommended you incidentally, as it has recommended also Judge Gyanda, has made a comment, that Judge Gyanda is an Indian male, the division is headed by a coloured male. Now is that something that we should take into consideration as we consider this position? If so, why? If not so, why not?

Madondo: That may be a difficult question to answer, but if you want to achieve equal and equitable representation of all sectors of the population, that should also be taken into account, in that limited sphere.

Mogoeng: You are excused Judge Madondo.