



JUDGES MATTER

Judicial Service Commission interviews

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KwaZulu-Natal Division of the High Court

Interview of Ms B S Masipa

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Chief Justice Mogoeng Mogoeng: Good afternoon Ms Masipa.

Ms Masipa: Good afternoon Chief Justice Mogoeng.

Mogoeng: You hold BProc, LLB and LLM degrees.

Masipa: That is correct.

Mogoeng: Which of the three did you have already when you were a researcher at the Labour Courts?

Masipa: I had a BProc and LLB.

Mogoeng: And what experience did you pick up while you were still assisting the judges of the Labour Courts with research work?

Masipa: I gained experience in drafting judgments, and doing research for the judges, and dealing with members of the public with counsel appearing before the judges as well.

Mogoeng: Had you already done your articles of clerkship then, or did you do articles thereafter?

Masipa: I did articles after.

Mogoeng: You've been an attorney for about fourteen years, am I right?

Masipa: Yes, fourteen.

Mogoeng: And did you do a bit of High Court work then?

Masipa: Yes I did.

Mogoeng: Did you appear personally or with counsel?

Masipa: I appeared with counsel.

Mogoeng: You have also acted in the High Court for about two months. Am I right or am I mistaken?

Masipa: You are mistaken.

Mogoeng: For how long?

Masipa: I have actually done five sessions. I started in July last year, I did a civil session in Pietermaritzburg focussing on appeals and on motion court and other in-chamber applications. I did two successive sessions at the time, finishing in September. I was away for a month back to my practice and was back in November/December, doing a civil session in Durban. There was then a recess session for December/January and I went back towards the end of January and did another civil session, so I have done four civil sessions. And now I did a criminal session.

Mogoeng: All in all for how many months would you say you have acted at the High Court? Roughly?

Masipa: Roughly about five months.

Mogoeng: Why is it that we don't get many women, particularly practitioners, making themselves available for appointment to the High Court and specially courts of similar status?

Masipa: I believe that they think they are not ready for appointments, and at times they are not given the opportunity. I think it goes back to university when they graduate, as there are complaints that they are not getting support in practice to gain necessary experience to ultimately end up on the bench.

Mogoeng: Has the situation changed? Back in my days women were overlooked however competent they may be. Are you getting some work that you desire to develop your forensic skills, and to develop your practice as well? Quality work?

Masipa: I don't believe so. At some point I was fortunate. In the company I had with other male practitioners, maybe that's the advantage I had, to have exposure with dealing with some commercial work and some shipping work, but then as soon as those people left the company that type of work left with them.

Mogoeng: What about advocates who are women and black? Do they get work of the kind we are talking about?

Masipa: My experience tells me no they don't. A couple that I know personally have left practice because they are not receiving the work that they would want to deal with. In fact, some of them left because they had problems having to pay their bar council membership fees.

Mogoeng: Is it because they are incompetent, or is it for another reason?

Masipa: The people that I am referring to are, as far as I am aware, since I also sit as an arbitrator and having also acted in court, are very competent people. I have briefed them. They have appeared for me and they are highly competent. They just need the support which would assist them.

Mogoeng: My experience was even some black attorneys don't brief black people, women don't brief women. Is that still a problem?

Masipa: Yes, it is still a problem.

Mogoeng: Why? What is this about people that they have something against women or black people?

Masipa: For some reason there seems to be a lack of confidence. I cannot say why. That is my observation.

Mogoeng: Could it be something known as unconscious bias? Because it is unconscious you can't confront it because you don't know it is there?

Masipa: That is probably the case.

Mogoeng: Conscious and unconscious?

Masipa: What you have in the legal profession is, it's coming from the background of having a lot of male practitioners and it still seemingly influenced in that fashion. It's like it's some sort of bias. I guess the words that you are using, I believe unconscious, it is in fact both conscious and

subconscious, because some people have uttered words that if you are briefing a female, I am withdrawing instructions.

Mogoeng: Some of the questions I put to you were meant to help you settle you down. When I was being interviewed for the first time for the position of judge, I was trembling but they helped me along. Are you settled, or should I go further?

Masipa: No, I think we can proceed.

Judge-President Jappie: Let's just get this issue out of the way and deal with it. In your application you disclose that you had been found guilty of a disciplinary offence by the KwaZulu-Natal Law Society. Is that correct?

Masipa: Yes that is correct.

Jappie: Could you tell us what was that all about?

Masipa: I was in a Labour Court matter, and I was faced with a situation where having afforded the client the opportunity to provide me with instructions, the client abandoned me in court without providing me with the necessary instructions, and having discussed the matter with other senior counsel to get advice from them, I took a decision, which I had already raised with the client, which I believed at the time was the correct decision. It's because I had about a month before done some research for a colleague on a similar issue, as to whether a matter which had been withdrawn could be reinstated in court. So I took a decision to withdraw the matter in absence of instructions from client because he had abandoned me and I believed it was the correct decision and I had a bona fide belief as well that I had an obligation to my client to take the best decision at the time.

Jappie: Anything as else as far as the Law Society was concerned?

Masipa: As for as the Law Society is concerned no.

Jappie: And when you applied, did you try and get some clarity from the Law Society as to what their attitude is towards your application?

Masipa: Yes I had a discussion with our President of our KwaZulu-Natal Law Society, and he said to me that he does not believe that this case should be a bar to my appointment.

Jappie: What is your view of the matter?

Masipa: My view of the matter is I acted within the requirements of the rules of the Law Society to act in the best interests of my client, to also be courteous to the court, because what was suggested to me during the disciplinary enquiry was that I could have withdrawn as attorney of record, which would have been discourteous to the court and I am required as well in terms of the rules, to notify the client if I am to withdraw the matter. In this instance, since the client had abandoned me and the judge required me to take a decision immediately, I took the decision that I believed was best at the time.

Jappie: You first started acting in the KwaZulu-Natal High Court, you say around September last year?

Masipa: July last year.

Jappie: July. And the emphasis has largely been civil work?

Masipa: Yes.

Jappie: How did you find that work?

Masipa: I started doing appeals, a lot of records to read, in fact I was given the largest amount of documents. It was a different thing because I had obviously never sat as a judge in appeal matters. I was able to carry out the workload as well as the other tasks I had been doing before that.

Jappie: Just to explain, when you do appeals, you usually do appeals with another judge. Did you get on with your co-judge?

Masipa: They were very helpful, they were very supportive. We discussed the matters and I did not have any problems with any one of them. The matters that I sat on when I had to be the scribe - they were very helpful.

Jappie: Did you find the work challenging, and do you think you can cope with that?

Masipa: It goes back to being an attorney. My principal when I was doing articles said to me that he had read an article about somebody who had gone to the US who said that the practice of law is a lifestyle. If you intend on doing that and doing it correctly, you must adopt that attitude. I have since held that attitude.

Jappie: You have done criminal work before? You have acted as a judge in the criminal court?

Masipa: Yes, during the last session.

Jappie: But your practice as an attorney – did that involve any criminal work as such?

Masipa: I did a bit of criminal work when I first started. I did a few bail applications. I have not done a criminal trial, I have done criminal appeals, and before acting in court I sat as an assessor in some of the criminal cases.

Jappie: How did you find that type of work?

Masipa: It is challenging, it is interesting. You deal with people and people's emotions in criminal matters. You get to interact with people, and it's therefore necessary and important that you get the people to develop some trust and comfort in the system, in the manner in which cases are being dealt with.

Jappie: You have acted in the High Court for about five sessions. In your experience do you think people react differently to you as a female judge, and to male colleagues? Do you have any comment on that?

Masipa: I believe so. In the rape case that I did recently, involving persons who were raped as minors, they looked very relaxed, open and free to give evidence in the court in the manner that I'm a female and the way in which I conduct the court.

Jappie: As a female judge, are there any specific challenges that you can think of that are unique to a female judge?

Masipa: There sometimes seems to be some sort of, I would say, undermining from senior counsel appearing before you as a female judge. As an attorney, some of them had an attitude that you don't know your work so you have to prove yourself to them.

Jappie: I'm sure somebody else will ask the question if I don't. Why is it that you want to become a judge?

Masipa: As a young child I used to go to the Maintenance Court with my grandmother, and what I observed is that justice was not being dispensed properly in those courts. As I grew up I told myself that I would become an attorney, and assist people who were not getting the justice that they deserved. As an attorney, I continued to carry out those wishes, assisting members of the public, assisting clients in various areas of the law, and I now believe that doing it at a much higher level would be to the benefit of the entire society or community.

Premier Mchunu: The Judge President asks you about what is reflecting on your CV which you have just explained, the fine by the Law Society. How do you want us to treat this matter, specifically? I want your response to reflect legally – legally, how do you see the case proceeding, because we are told there is a pending decision on the matter? Two, how do you see it with regard to your own conscience? I know that such reflections that call for one's conscience are now very rare. I am wanting to reinforce yours during this session so that you take this opportunity and take us into confidence about your conscience. You have applied for a very, very important position, one that has very very far-reaching implications and to go there with this, there must be something in your

conscience that say this is a minor thing, the application's bigger than this. Now I want that because ordinarily you would have said wait until this thing has clear or not apply at all, but you seem to have proceeded. What is it that drives you nonetheless? I want your response at two levels.

Masipa: In the hands of the Law Society, they have finalised the matter, having issued a fine for me to pay, and that is what my appeal is about, because I believe I took the legal decision in terms of my legal duties as a practitioner and I took the appeal because I disagree with the decision of the Chairperson, whose views seem to have that I took the wrong decision. I believe that I should not be penalised for the manner in which I took the decision, hence I have taken the matter on appeal. In respect of the issue of the conscience, the extent and the nature of the matter is such that the Law Society believes that I can proceed and practice as an attorney, because it is not an issue where they would suspend me so I believe they have the confidence in me to continue as a practitioner. I believe that I can and I have the ability. Hence they have indicated that this should not be a bar. The Law Society has even further to that following the decision in my matter appointed me as one of the examiners in the attorneys practice and procedure exam, and it is a very important function of the Law Society. The South African Law Society has also appointed me in a similar position such that I am responsible for setting exams including, amongst other, attorney's ethics. If they did not believe in me and my ability to carry out the duties, they would not have appointed me in such positions. I believe that I am capable of carrying out the necessary duties or functions of a judge. Hence, I am of the view that even if the appeal does not succeed, all that is required of me is to pay that fine. But I have a very strong belief, I guess because it is my matter and because I am raising the issues, that I will succeed.

Mogoeng: It doesn't go to your integrity or your honesty, it's about your understanding of the law, right or wrong?

Masipa: Yes, that is right.

Mchunu: I understand the Law Society's confidence in you, and they appoint you to do this and that, but I'm wanting to know the smaller voice inside of you – is it saying, what an escape, or is it saying, it should be the case, I am free of any burden in conscience that I did anything wrong?

Masipa: I believe that I am a person of integrity, and that the Law Society also believe that.

Mchunu: The environment in which you are working currently, with regard to dominance by males, which you highlighted, is the environment encouraging for you? Is it discouraging?

Masipa: It's challenging, but I am the type of person that does not shy away from challenge, and hence I have stayed. It is a difficult environment for females. Female organisations have tried to tackle that problem, but they have been unsuccessful. Other institutions have tried to tackle the problem but nothing seems to be happening. We have through the BLA tried to engage your predecessor, and I think there are current engagements with you. I say I think because I have since withdrawn from the sub-committee that was responsible for developing and drafting documents to be submitted to your office and due to my studies had to withdraw from that committee. At that time we had difficulty engaging with the relevant people in government to try and get some sort of support, some sort of assistance. It is very difficult. In the private sector, it is even worse.

Mchunu: So you can refer us to specific cases where you felt challenged more as a woman than to any other lawyer? If you could give us one example?

Masipa: Well the issue that never escapes my mind, in this instance I was sitting as an arbitrator, not appearing as an attorney. I went into the boardroom and sat there, and attorneys walked in and overlooked me, and did not even greet me. I was sitting in a place where anyone I could see that I was a Chairperson or an arbitrator. After a while they came to me and asked me if I was the stenographer, are we waiting for the arbitrator? I felt very humiliated. In the past people have said maybe you need to change the way that you dress. I have tried to change the way that I dress and it didn't work, I still have the same problem where people would just not see that you are there. They have in their mind a certain person who an arbitrator is, and this person is generally an older looking firstly white male or secondly a black male, and I always talk to my colleagues and tell them that they fail to appreciate what a black woman goes through. You get to be looked down by first not being

white, by not being a male, and sometimes you to be looked down by even your own black brothers. I had a case where people came in Pietermaritzburg and they looked at me, and I do look young, but black practitioners were appearing and they were very disrespectful. Some of them I have had to thereafter go and speak to their principals and ask if they were aware that a person in their firm was behaving like this. They had to be told that they were being discourteous and would be reported to the Law Society unless they changed their attitude. It happens, it's challenges and we try to deal with them. Obviously with time when people get to know you they start treating you differently, but when you each time go to a different place, you get to face the same treatment.

Mchunu: So these attorneys, were they males?

Masipa: Yes.

Mchunu: What needs to be done?

Masipa: It is a difficult one because we are twenty years into our democracy, the Constitution professes something but people are acting in a different way, and these are educated people. So I don't know if I could say they need to be educated more if that could change their mind set, but it really needs to be looked at. It destroys the confidence of black female practitioners.

Mchunu: Well I am sure you are quite settled here because we recognised you as a candidate without a problem and nobody has done anything that makes you think you need to change your dress code or something like that. The last question is what are the challenges in society? Maybe using certain values that you identify with that are on the decline or affected in any particular way, that require the judiciary to contribute in a particular way in reviving such values.

Masipa: The issue of equality, the issue of dignity. When you go to the rural areas of KwaZulu-Natal, I am not sure if it's a culture or what, but the way in which the males act towards the females. I am not too sure if the role that the judiciary actually plays would assist. I know that the Constitutional Court pronounces on these things, but whether the information is received is another thing. Some of the people don't have access to TVs, some don't have access to radios and decisions are made by the judiciary relating to issues, relating to people's rights, but whether those are cascaded down to those people is something else.

Mchunu: With regard to social ills, where do we as KwaZulu-Natal seem to have the biggest challenge, which does require the contribution of the judiciary?

Masipa: In respect of our set up in our courts in KZN, persons using the courts would not have the confidence that when they approach the court, they would get the justice that they deserve, probably because whether we like it or not, there is the issue of socialisation. When they try to identify they can't.

Mr Fourie: I unfortunately have to come back to the Law Society issue. If I understand your answer to the Judge President correctly, you said your client abandoned you, and you then without instructions told the court that your client is withdrawing the application, and is tendering the costs?

Masipa: No, that is not correct.

Fourie: What is then correct?

Masipa: The client abandoned me in court, and I had counsel appearing in the matter. I was told that the judge was calling me back to court to finalise the matter. The client had asked that we ask for a postponement of the matter. We had made two attempts, and the judge had indicated that he was not going to adjourn the matter. I looked at two evils that were there – one was I would allow the judge to dismiss the matter, and the one was for me to withdraw the matter. I felt if the matter was withdrawn it would have go on appeal, but if the matter was withdrawn we could still reinstate it. What was communicated through counsel to the judge was that we are withdrawing the matter and we are tendering the costs. It was never said to the judge that those were the instructions of the applicant.

Fourie: But can you withdraw a matter and tender costs without having your client's instructions to that effect?

Masipa: This matter was a bit peculiar in the sense that the client was not financing the matter, and I had previously discussed the issue of costs when matters are to be withdrawn with the insurance company that was financing the matter. They had in the past indicated that I could take the decision in order to do that. It was an issue between me and his insurance company in respect of the costs.

Fourie: The only point, and I don't want to belabour the point but I personally regard it as fairly serious. You say in your own words you were found guilty for allegedly misrepresenting to the court that the complainant had agreed to withdraw his application and to tender costs. What we know from your own version is you didn't have instructions from your client, but you told the court that the application was withdrawn and costs tendered?

Masipa: Yes.

Fourie: But can you, and what further bothers me, Ms Masipa, is that you now, in an answer to a question by the Premier, is that you think you did the right thing? The only thing you could have done under those circumstances was to withdraw.

Masipa: The rules provide that in order for me to withdraw as an attorney I have to advise the client. If he wants to represent himself he can take the decision thereafter on how he wants to proceed with the matter.

Fourie: On your own version, with all due respect Ms Masipa, it was a misrepresentation to the court?

Masipa: What the Law Society was saying was this: the client lodged a complaint and in his complaint he says she told the judge that I gave her instructions and what I then said to the Law Society is that was never communicated to the judge. I never said the applicant's instructions are his.

Fourie: Let's leave it at that, I just want to go further in your answer to the questionnaire, you say misrepresenting to court that the complainant had agreed to withdraw his application and tender costs. Then you say failure to carry out a court directive, and failure to supervise a candidate attorney. On the face of it, it looks to me like three charges. Were you found guilty on all three charges?

Masipa: Yes.

Fourie: What is the issue regarding the failure to carry out a court directive?

Masipa: It is related to the same issue. What had happened was that the reason why we had to seek the postponement was because an affidavit was filed out of the time frame which was set by the court. The reasons behind that were that the legal insurance company had withdrawn their instructions from me before we could comply the court order. Since they were the ones instructing me I did not have instructions to act in the matter. The court order required that the affidavit be filed on the second of November, and the instructions were withdrawn from me about three weeks before that. I could not comply with the court order since I was no longer having the mandate from the insurance company. They then returned the files to me about a week before the matter was in court because none of the other attorneys were prepared to take the matter. It was already out of time in terms of complying with the court order, the condonation application was prepared as required, however when an application or a submission was made to hand in the documents, the judge indicated that he was not prepared to take the affidavit and the condonation application, and was not prepared to listen to submissions in that regard, and he indicated that he was going to dismiss the matter.

Fourie: You saying you didn't have a mandate from the client anymore. Did you then withdraw as attorney of record?

Masipa: At the time when the legal insurance company took the instructions away, I did withdraw.

Fourie: But how can you then be found guilty of failing to carry out a court directive?

Masipa: I'm going to guess it was because the instructions were brought back to me.

Fourie: And the last one – failure to supervise a candidate attorney?

Masipa: It is again in respect of the same issue. What happened was that the candidate attorney was to have obtained a copy of the court order in respect of that filing of the affidavit. We constantly made attempts to obtain a copy of the court order, however the court order was not available from the Labour Court up until we were not on record in that period I was referring to.

Fourie: You say that your appeal against those findings is still pending?

Masipa: Yes it is.

Fourie: Any idea when it will be heard?

Masipa: The Attorneys Act requires for the Law Society to provide the record of the proceedings. The Law Society ought to have filed the record and they have not done so. We have written to the Law Society requesting for them to attend to the filing of the record, and they have not done so. At some point they were even threatened, I would say, with a mandamus to provide the record, but they have to date not provided us with a record.

Fourie: So there is no date as yet?

Masipa: No.

Fourie: Last question, under reserved judgments you list three reserved judgments, one of which you say was reserved on 7 September 2015, one on 5 February this year and the other one on 24 November 2015. Have any of those judgments been delivered?

Masipa: The one for 24 November was delivered. In respect of the older judgment of the 7 September - it is an appeal. I did a draft judgment, I was sitting with a judge that has since retired. I gave him the draft, I emailed the draft having struggled to get his contact details, in December last year. I have followed up with him on numerous occasions and we are struggling to locate him. When I did he indicated that he could not recall the matter and required that a transcript be provided. I am aware that he has since been provided with a transcript and he phoned me last week and said that that he wanted to discuss the judgment with me, but I was in court so I was unable to meet to have a discussion. The one for 5 February is still pending. It was a highly complex matter and I am working on it and finalising the judgment, and it should be handed down next week.

Mr Singh MP: Firstly I would just like to know your practice, how is it doing? I see you are based in Field Street in Durban. What are you more involved in – litigation or conveyancing or what type of practice, how successful is it, and your client base?

Masipa: It is a litigation practice. I think I indicated earlier on it used to be a thriving practice because I had work from parastatals, from private sectors, but then when legal advisors of institutions leave and new ones come in they brief different people. It is doing okay under the circumstances.

Singh: But work has been taken away because of the change of legal advisors and things like that?

Masipa: Yes.

Singh: The other question relates to your financial and proprietary, section 3. Now you list quite a few CCs there, and indicate many are in the final process of deregistration. I would just like to know why now? Is it pre-empting an appointment to the judiciary, and why do you want to deregister from these companies, and in particular, there is a company called Hlopogadi Trading and Projects CC, which is in business. Can you just tell us what business activity is involved here?

Masipa: It is actually not trading, so there is no business activity. I wrote in business because it is still registered, but there are actually no activities.

Singh: In question 2, what steps do you propose to take in respect of your directorships and private business interests if you are appointed to the bench, you say sell and close my practice, which is

Masipa Incorporated CC, and sign over my member's interest to Hlopogadi Trading and Projects CC. Now you say it's not trading, but you want to sign your interests over to Hlopogadi?

Masipa: Yes it's because there's numerous business ventures that we – it's a company that I own with my mother – and there's numerous business ventures that we were contemplating going into. So hence I'm saying I will then sell over my member's interest because I am not the sole member of the CC.

Singh: Finally, the type of activity – are you getting work from the state, is it parastatal work? Are you getting work contracting? I know it is not a legal business, what type of business is it?

Masipa: It has not had any type of work ever allocated to it. It is in fact mainly my mother's business, but I bought into the idea of what she wanted to develop, and she was working on some commercial petroleum things, with private companies and not with parastatals or government. All she has done is to apply for a trading license, and that's it.

Professor Ntlama: On page 6 of the form, you made reference to the Constitutional Court cases where you've assisted the counsels to draft papers? Just two of those, and how have they fared at the Constitutional Court?

Masipa: In both instances there was a need for a condonation application. In the first one, condonation was granted, but the court felt that the decision of the Labour Appeal Court was correct. They granted the condonation and then they dismissed the leave to appeal. In respect of the second matter, we are still awaiting the outcome.

Ntlama: Coming from KwaZulu-Natal, there is critique against the Constitution that it is a western concept, it has come to be imposed on us. In the light of the critique against the Constitution, how would you use, if you do get this opportunity, traditional values to interpret the law in a manner that will use those traditional values as the primary source of law, without offending the so-called beacon of hope?

Masipa: Decision-makers are called upon by the institution to always take into account the values of the Constitution in making decisions. The issues of cultures and tradition is catered for in the Bill of Rights, and when faced with having to make that decision it is always a requirement that one takes into account the traditional or cultural aspects.

Mr Nyambi MP: Do you believe that judges have a role to play to assist the public to understand the significant role of the courts?

Masipa: Yes I do, and that would ordinarily happen in the manner in which judgments are written. If judgments are written in the way that the public can read them and understand them, that would go towards achieving that role.

Nyambi: As a woman coming from a rural province, with your experience in terms of being sometimes undermined, percentage-wise, do you feel a meaningful percentage coming from those that are educated, or rural poor without education?

Masipa: Please could you repeat the question?

Nyambi: You said you look young, of which is true. And you are a woman, and many a times you indicated that men undermined you. And there is an instance where they get to a room and they thought you are something else, yet you are the one who is going to assist with that case. I wanted to check in terms of percentage-wise, are you being undermined by only people who are highly educated, or it's only rural poor, without education?

Masipa: It mainly comes from the educated people. That's the experience that I have had. The poor people coming into the judicial system have no experience in issues that come up, and they seek assistance and advice from practitioners, from presiding officers, from judges. Most of the time I have not had problems. They listen to advice, and they take advice, and they believe that they are given proper advice.

Nyambi: The issue that has been raised many times here, the one from the Law Society. You learn until die. So with your experience from questions that have been asked and how issues have been raised, do you think your understanding before the questions and the engagement, you still hold the view before coming to these interviews now?

Masipa: Yes I do. I have reflected on the issue on several occasions, I have obtained opinions from senior counsel and all of them are of the same view, that having taken a bona fide decision in what I believed was in the best interests of my client, the Law Society ought not to have arrived at the decision that they arrived at.

Mr Notyesi: This appeal will be heard by the High Court of KZN?

Masipa: Yes.

Notyesi: And if you are appointed you will be a judge in that division?

Masipa: Yes.

Notyesi: Is it not going to make some discomfort to your colleagues who listen to this matter? At least to your colleagues and to yourself?

Masipa: I do not believe so, and I say this because during my acting stint in the court I have observed cases that came in that related to the judges that are currently appointed and sitting there, and all that was done was that judges from other provinces were appointed to come in to deal with those matters.

Mr Malema MP: Now this issue of the professional body, does the appeal suspend the earlier decision by the body? So when I look at you now, I look at any other lawyer who has not been found guilty by the professional body, who'll enjoy the same status pending the outcome of the appeal?

Masipa: Yes that is my understanding.

Malema: So it would be incorrect for anyone to want to pursue you on the basis of an earlier judgment because you have made an appeal?

Masipa: Yes. In fact, my initial approach is that the matter is sub judicae, but in order to be transparent to the members of the committee, so that they get to understand what is happening, I felt that I will answer the questions.

Malema: Sub judicae doesn't refer to those things before court?

Masipa: Yes it does.

Malema: So this is not court. It is a professional body. So the matter is not sub judicae?

Masipa: The matter is pending in court.

Malema: The appeal is done in court?

Masipa: Yes.

Malema: Oh okay. Ordinarily, those of us who come from previously-disadvantaged backgrounds, post-1994, when we graduate or finish school, look for jobs, part of what we do is to register companies because we try almost anything for survival?

Masipa: Yes that is correct.

Malema: So your registration was when you were still trying to find yourself, like all of us in the process of growing up, trying law, trying business, and trying all sorts of things?

Masipa: That is correct.

Malema: Now the last question is, having the advantage of looking young and being a woman, if we appoint you does it project this body on a good light? A young-looking woman judge. Does it enhance the image of this body?

Masipa: I believe it does, because young people in the community would also buy into the confidence of the judicial system.

Mr Schmidt MP: I understand that you were shown the comments by the Advocates for Transformation?

Masipa: Yes.

Schmidt: Can I just have your view, because I think it would be fair on you just to comment, and it says in conclusion that this candidate's impediment is a relative lack of the necessary experience to hold a position on the KZN bench at this time. She ought to be given further opportunities to hone her skills on the civil bench, preferably before we can say with any conviction that we support her nomination. Would you like to comment?

Masipa: Yes I'm aware of the comment. I looked at the comment and I felt it is unclear to me in what respect they're saying I lack the experience to hold this position in respect of civil matters and I say that because as I reflected earlier, as a practitioner I've been dealing with civil matters and I have also, acting in the High Court, done four civil sessions. In view of that, I believe that I have gained the necessary experience in dealing with the matters. I think I should add that I sit as an arbitrator, and the procedural requirements that apply to civil matters apply as well. I have also sat as an acting judge in the Labour Court, although there are different rules in the Labour Court, the rules in the Labour Court also refer to the rules in the High Court relating to civil matters, which I am quite familiar with, and have been working with those for years.

Mogoeng: Well to the extent that somebody might have a problem with age, I was 36 when I was appointed to the High Court, former Judge Zondo was 37, Hlophe was 35, Madlanga was 35, Kate O'Regan was 35, so don't worry about that.

Advocate Motimele: I'm now going to test your sense of judgment. You'd know that in terms of the Superior Court, if you intend on suing a judge, you need consent from the Judge President. Is that not so?

Masipa: Yes it is.

Motimele: What would be the rationale or policy consideration of the enactment of that section?

Masipa: The rationale for the requirement?

Motimele: Yes.

Masipa: I believe that the Judge President would be, as a person in charge of the division, would be in a position to determine whether there is a way of resolving the matter in order to protect the integrity of the judicial system, and also to determine whether the matter can be heard in that jurisdiction, or whether the matter must be transferred to another jurisdiction where there would be impartiality.

Motimele: No, it is to protect the independence of the judge and the integrity of the system that judges make decisions without fear or favour. Now, how would that mechanism be applied if you get appointed, you are a judge, but litigation is proceeding and the head of court doesn't have any instruments to do what you and I agree needs to be done before you sue a judge?

Masipa: It is unclear to me what you mean when you say that he does not have the instruments?

Motimele: The section only empowers him to give consent prior to the institution of the matter - for the judge. In your case, if you are appointed, at the time of the institution of the matter you were not a judge.

Masipa: Yes.

Motimele: When you become a judge, the matter is continuing. So that is section won't assist?

Masipa: Yes, it will not.

Motimele: So how do we protect the integrity of the system of the judge?

Masipa: The integrity is protected by arranging for judges who are from outside the jurisdiction to come in and deal with those cases. It has happened that some of the judges that are sitting have personal matters that would not necessitate the Chief Justice being advised, since they are not being sued –

Motimele: Yes, you're repeating, I heard that. Can I ask my next question without debating the issue with you? Had this appeal been heard and the appeal was unsuccessful, would you still apply for the post?

Masipa: Yes I would have. As I indicated earlier on, the Law Society rendered their decision, and their decision was that I pay a fine. If my appeal is unsuccessful all that is required is that I pay the relevant fine to the Law Society.

Motimele: So it is just a commercial arrangement?

Masipa: Yes.

Mogoeng: If it is any comfort, Constitutional Court judges have to come before us about their own matters, and there is another one looming – same judges of the same court before the same court. And there is no one else who can step in. You are excused.