



JUDGES MATTER

Judicial Service Commission interviews

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KwaZulu-Natal Division of the High Court

Interview of Advocate I L Topping SC

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Chief Justice Mogoeng: Good afternoon Advocate Topping.

Advocate Topping: Good afternoon.

Mogoeng: Is it correct to say you were an attorney for about three years?

Topping: I was an attorney for six years, two years as an articled clerk and four years as a professional assistant.

Mogoeng: Yes, I excluded the period for articles.

Topping: Then it would be four years.

Mogoeng: I couldn't resist admiring your qualifications – BA Law, LLB, LLM and MBA.

Topping: No, no.

Mogoeng: Is that not you?

Topping: No that is definitely not me, no. I've got a BA and LLB.

Mogoeng: You don't have an LLM?

Topping: No. At the level of my attorney's experience, I did mainly maritime law and then after that I then went prosecuting before I came to the bar. But as far as qualifications -

Mogoeng: For -

Topping: I beg your pardon?

Mogoeng: Did you prosecute for three years?

Topping: I prosecuted yes – I made up my mind that I wanted to go to the bar and I didn't have any criminal experience, so I then prosecuted for three years. During that time I worked a short period in the district court, then up into the regional court and then as what they styled as a specialist prosecutor. I wasn't assigned to a court itself, but did various cases which were assigned to various courts that were of a commercial nature or what was styled as high profile. There was a lot of gang-

related type crimes of rapes and robberies and crimes of that type is what I prosecuted during that time.

Mogoeng: You've been an advocate for about 24 years?

Topping: Since 1992. I did my pupillage at the beginning of 1992 and I passed the bar exam in the June of that year.

Mogoeng: Has it been about 24 years?

Topping: Yes, from 1992 to today.

Mogoeng: For how many years were you a junior?

Topping: I applied for silk in 2012 but the applications were held up for two years because of the challenge to the President being able to sign honours.

Mogoeng: The Masingh case?

Topping: Yes. I think myself and one of my colleagues were one of the first who applied just before that challenge was made. I was handed my letters patent in 2014. To an extent, those two years, there was a lot of stuff that I was doing, possibly as a junior silk, as such.

Mogoeng: You've had several acting stints at the High Court?

Topping: I wouldn't say several. I've had one permanent stint, and then there were follow-ons from part heard's from that, and various appeal applications and so forth.

Mogoeng: Is that permanent one for one month?

Topping: I think it was six weeks.

Mogoeng: It seems to be for one month.

Topping: It was during May last year.

Mogoeng: May, June?

Topping: Yes.

Mogoeng: And then some three days in July, August and September of the same year?

Topping: Yes. I was finishing off a part heard which perpetuated for quite some time, unfortunately.

Mogoeng: In your own words would you want to share some of the additional qualities and experience you have as a practitioner for these number of years which have prepared you for the position you are applying for?

Topping: I wouldn't be here if didn't think could make a positive contribution to the KZN bench and I think I have varied experience as far as my practice is concerned, both in the trial matters and motion court type matters, I've done commercial matters and personal injury-type matters. As far as my personality is concerned, I am not a confrontational type of person, but I will listen and I am prepared to listen and I will defend your right to say as such. I think that those are the attributes I can bring to the bench. As far as I am concerned, a court hearing shouldn't be an argument, it should be a debate. A court hearing should be fair, not a fearful place although there must obviously be some sort of control and decorum. That is my nature. During the acting stint I did get comments from my colleagues that this came across clearly. Although I dealt with things firmly, it was always done in a pleasant manner. One also brings one's life experiences to the bench, no matter what your background. I don't want to take it too far back, but I was born on a farm. My initial friends were isiZulu children on the farm, I can speak isiZulu. I then went to an Afrikaans medium school where I then had to learn Afrikaans up until standard 4. I then moved down to Durban where my parents moved. I left school when I was sixteen because my dad had an operation. You'll see I was a baker at some stage. I completed my matric at night school, unfortunately you will also see that my parents'

business failed around that time, so I had to put myself through university. I am not a person who has possibly been born with a silver spoon in my mouth, and I have made my way all the way through. You'll also note I've always made sure and been confident that I can do something before I do it and hopefully I'm confident in myself that I wouldn't be here if I didn't believe I could give a proper contribution and do the proper functions that I would be assigned to.

Jappie-President Jappie: As I recall you had an acting stint for one session?

Topping: Yes.

Jappie: And that was while you were in the civil court in Durban?

Topping: Yes, save for one appeal.

Jappie: What is your experience as far as the criminal courts are concerned?

Topping: Not appearing in criminal courts, but prosecuting in criminal court at various stages. Also in my initial time at the bar, doing pro deo's. But one follows one's practice and my practice has drifted towards a largely civil practice but I can't say I don't know my way around a criminal court.

Jappie: What do you think that you uniquely could bring to the KwaZulu-Natal bench?

Topping: At the level of life experience that I have just emanated now in my background, I think I have got the confidence of a lot of my colleagues. I get on with all of my colleagues, I've got no bad blood between any of my colleagues. A lot of the attorneys that brief me have confidence to bring their clients to me, and the clients are of all races and so forth. That type of confidence I bring to the bench. People will see me as someone who will try their case fairly, and give them a fair hearing. I think that is what I can bring to the bench.

Jappie: How would your appointment further the cause of transformation, as far as the KwaZulu-Natal bench is concerned?

Topping: I don't know what to say. One can see I'm white. I think that my background and my ability to communicate in isiZulu and also to an extent in Afrikaans. I am able to make people relaxed – I can communicate at their level and tell the odd joke if needs be, and relax people, in both languages.

Jappie: Do you think transformation is important?

Topping: Very much so. It is an aim that we should all aim towards, and curing the ills of the past – yes, very much so.

Jappie: You have practiced in KwaZulu-Natal, you have sat on the bench in an acting stint. In your view what is the main challenge of a judge in KwaZulu, and what do you think you can do about it?

Topping: Sorry I'm not too sure I'm following what you're saying?

Jappie: Well, there is a lot of work. Let's just start there.

Topping: Personally I have a very good work ethic. I don't leave things lying around. Just to an extent, if anything I am light on resources, because I don't need a typist. I produce all my own documents, I work on a word recognition type program which is very efficient. If stuff does need to be taken home at night or done over the weekend, I can produce and do now in my practice a completed document by the next morning. To that level, workload doesn't fear me at all. I have a very strong work ethic, I've been working since sixteen years old, and I don't intend to stop now.

Premier Mchunu: The first question is about transformation. I wasn't expecting myself to ask this, but I'm attracted or pushed to it by your reaction. You declare yourself white immediately when someone touches on transformation, and I'm wondering why you have to declare yourself white when transformation is being talked about, because it's to just about being white or black. When you look at transformation, in assessing it, in terms of speed and quality, what is your assessment on speed and quality? You can make a comment on the first one if you want to.

Topping: There was also a comment made on one of the Advocates for Transformation that there was nothing in my CV dealing with transformation, if I could deal with that as well. But my view is yes, transformation is important, but at the end of the day, the litigant and people coming to court are paramount as far as all of us are concerned. One needs to have a perception that when one leaves court, one has had a fair hearing, no matter who it is. That is why I say judges bring life experiences to the bench and those life experiences have to be wide and varied. It is a delicate balance. One must not draw competent persons away from the bar and the side bar and leave a dearth of persons that want someone of experience to represent them, to take those persons away and put them on the bench. It is a very delicate balance, but over time, and unfortunately we live with our past, it has to slowly change and it has to be at the level of the litigant and the persons coming to court should always be confident that they are getting a fair hearing from both sides, the person hearing it and the person representing them. On my CV, as one understands the comment – there is nothing on my CV about transformation. I don't view it as something to make or gain points on your CV. I have never been in a position where I can actually dictate large policy about transformation or change. But where I have been involved and in a position to advance change I have always done so. You will note from my CV that I was the chairman or chairperson of one of the larger football and running and sports club in Durban. That was at the end of 1980s. When I became chairman it was being run by narrow-minded people at that stage, and I worked hard and I helped transformation by bringing all races and all genders into the club, the criteria being that if you are a good runner or a good sportsman, this is where we are. I also developed teams, I managed teams and did a lot there. Hopefully I improved those lives, I don't know. I was on the governing body of one of the larger boys schools in Durban. At that stage I dealt with disciplinary issues, so code of conduct fell under my portfolio. There was a challenge to one of the other schools in Durban dealing with a nose ring and there was litigation dealing with it. That issue arose at the school I was in, dealing with young learners of the Muslim faith, if they wanted to lead prayers, needed what was styled then as a virgin beard. The first reaction was that we have a code and this is our uniform. I brought in a policy there that all that the persons had to do was ask for an exemption to that code, and on proper grounds and objective grounds the application was made. Many of the young learners who were going to lead the prayers were then allowed to grow beards, and it was accepted and went all the way through. At the bar itself I have always had a pupil. I have helped in training and I have been actively involved in training, I have also formed associations as one could call it with juniors, always where I can introduce people not otherwise known to the larger firms and recommended them. Two of them that I can mention now have decent commercial practices from there. So, although I can never say yes I have done, there's no written document, I would hope that I have helped transform those person's lives. I view it as something that should be done, not to score points on a CV, if you don't mind me saying so.

Mchunu: Thank you very much. What are the two most critical challenges of the bench in KZN currently?

Topping: I have a very positive view of the bench in KZN. The judges there are very competent, approachable. It is a hard question for me to answer. I don't have the answer. I have no complaints about the KZN bench from a practitioner's side of things.

Mchunu: Well I'm aware that we have a shortage of judges, if you look at other provinces.

Topping: Yes.

Mchunu: Now there is the first challenge that you say you are not aware of. I was going to ask you a question anyway, what do you think is the historical cause of the shortage? Is it because the province has a dominance of Zulus who sort out their differences through stick-fighting or something which doesn't require courts?

Topping: I don't think so, I have never seen that, again from a practitioner. Yes there is a shortage of judges. Again from a practitioner, the trial rolls, although the allocation system is a new one and it seems to be falling into place, when one goes up to Maritzburg, the work load of the appeal court there seems to drain away from the trials. So yes, there is a shortage.

Mchunu: That is a challenge.

Topping: Yes that is, I must have misunderstood your question. As a practitioner, there ought to be more judges allocated because of the work load. I think there is a massive work load both in Durban and in Pietermaritzburg. As far as fear of coming to court, no I don't. I think the litigants are quite happy in that court. I have done a lot with personal accident and personal injury cases, acting mainly for plaintiffs, and the feedback from my clients and colleagues' clients, I have heard no adverse comments from anybody.

Mchunu: This much spoken about the reluctance of women generally, and black women particularly, to join the bench. Have you observed anything? If appointed what role, if you find that there is indeed shortage, do you think you will play as a judge?

Topping: It needs to be encouraged, but it goes back to my previous comment. There are some exceptionally competent senior female advocates at the bar, and they are needed there for a time possibly, until further people come through. Because of our past. I have that fear that if all the very competent advocates go to the bench, it leaves a dearth of competence on the bar and not on the bench. It is a balance. But very much so, yes, in, time there should be more females on the bench. We have lost one judge recently who has moved to another division, but yes very much so, I support that.

Mchunu: You said you speak isiZulu?

[exchange in isiZulu between Advocate Topping and Premier Mchunu]

Mogoeng: There is a mistake here. The reason why I thought you had LLLM and MBA, is that there is a nomination of an Advocate Gordon attached to the reverse side of your nomination and this person has been nominated for the Western Cape. I don't know how this happened.

Topping: If I could accept those credentials graciously, I would do so.

Advocate Motimele: Can we continue in isiZulu? Thank you counsel. There is a judgment of yours, the Singh judgment against the Minister of Transport and the MEC in KZN. The one that relates to the rules of the residency. Do you remember that judgment?

Topping: Yes. Very much so.

Motimele: Beautiful judgment, and I enjoyed reading it.

Topping: Thank you.

Motimele: There were three applications in one. The rules application, the spoliation and the trespass.

Topping: Yes, but the rules application encompassed a counter application as well.

Motimele: Yes, but the facts were the same?

Topping: Yes.

Motimele: Very narrow issues. The hearing was on 12 June 2015.

Topping: Yes it was.

Motimele: And the judgment was handed down on 4 February 2016. Approximately eight months. Any explanation why?

Topping: Yes, I can. If you'll note the judgment is quite a lengthy judgment. I finished my stint at the end of June and I was hoping to use the July recess to work on that judgment. Unfortunately I walked into a practice just with urgent applications and matters that I had to deal with. I spoke to both counsel concerned and said that I need time, as it was the type of judgment that one could not write piecemeal, as one needs to sit down and concentrate on it. I said to them that I can only really do that during the December recess. Both counsel were quite happy, they had spoken to clients, and said rather deal with it properly and produce the judgment and you can see, it is over one hundred pages.

That's the reason why I took time because I didn't want to rush it, and I couldn't get to it with sufficient chronological period time because of the pressures of my practice. What has happened, which is not evident from what was placed before the commission, is that there has been an application for leave to appeal sought on the application in convention in the rules application, otherwise there has been no challenge to the rest of the judgment at all.

Motimele: The bulkiness of the application is in part because of the quotation, the verbatim of the rules of the association.

Topping: Yes.

Motimele: That is what makes the bulk.

Topping: Yes, and I had to put that in to make it read sense, with respect.

Advocate Hellens: You make reference to a reserved judgment that you have in the matter of ABSA Bank and Garyson Hardware.

Topping: Yes.

Hellens: It's now February, you said it was reserved as you only received written argument from counsel from January 2016. Does this emanate from your acting appointment in June/July last year?

Topping: Yes, that judgment has been handed down, I completed it and it has been handed down. What happened there is that it became a perpetual trial and went on and on and on. The counsel agreed to give me written heads and not give me oral argument. I received one during December and one during January, and I had to try and try and ascertain from the plaintiff's counsel whether they wanted to reply to the other heads, which I only ascertained towards the end of January. And then I sat down and wrote the judgement and it was finished during February. It has been handed down now.

Hellens: So the hearing – was this a trial or a motion?

Topping: It was a trial, it was a part heard and it went on for a number of occasions. I think it went on in September and on and on and on. I think although the claim is only for R180 - something over a telephone system, there were five special pleas raised on the National Credit Act, and it just turned into a perpetual trial because the defendants challenged every single document, so I had to deal with all that, so it turned into a lengthy judgment.

Hellens: You've answered my question. I thought it was a situation that you only heard it in June or July and only got heads –

Topping: No it wasn't.

Professor Ntlama: There is a complaint from a certain Mr McHendry, which you signed off on 10 June last year.

Topping: Yes.

Ntlama: Has it been sorted out?

Topping: I have heard nothing further since the memorandum but I thought it pertinent to put it up because it was a complaint raised, and I assume it has been sorted out. There has been no come back to me – I don't know if the Judge President might assist, I really don't know.

Ntlomo: Let's assume it comes back and we give you this opportunity. What impact would it have on us as the judiciary?

Topping: If one looks at what actually happened, and I am working from memory so please bear with me, it was a situation where a gentleman that was acting for himself in motion court. There were two files placed before me on the unopposed roll. It appeared from the documents that the papers were not in order, there was just papers stuck in both files, and I had to go through both files to try and work

out what was going on. It appeared that the two had been consolidated at some stage. One was relating to a judgment which had been obtained by default for the sale of immoveable property, there was a rescission application pending, and the two were consolidated, and there was a note on the file that it appeared that both applications had been withdrawn. So when it appeared before me I tried to get clarity on that point, and tried to ask the counsel to listen to the tape to tell me what actually happened, because it was disputed. I explained that it was not on the opposed roll, it couldn't be heard until such time as the record had been listened to and a transcript obtained, which the respondent's counsel offered to make that happen in time. It was for that reason that I adjourned it for that to transpire, and again I don't know what has transpired with the actual application itself. So with respect, I think I dealt with the matter properly. I do recollect that the applicant himself endeavoured to come and see me in chambers afterwards. I let my registrar advise him that it was not appropriate to do so without the respondent's counsel there. I think he then approached the then-civil judge on duty and was told the same thing. I heard nothing further. I received a note saying that there had been a complaint, and I drafted that memorandum. I think it was dealt with appropriately, and I cannot see any come back if the matter is taken any further.

President Mpati: I am just worried about age. Some people can retire at 65 after 20 years service. Your age is 61. Why wait so long before you make yourself available for the bench?

Topping: I think it goes back to that notion that I want to be sure that I can do something before I do it. I always said that I would take silk twenty years into my career. I applied for it in 2012, it was held up for two years. I ought to be a silk for four years now. Age is a concern for everybody, but I have been someone that's has always been younger than my age. I played over-35 league soccer until I was 50, I am one of those types of people. I just couldn't chase the younger people anymore. The day I stop working is the day I keel over, because I have done it my whole life, I am an active person. My children are in their twenties, my wife is younger than me. No, I don't see it as a problem at all. I am a young person and I intend to give fifteen years of service if I can, yes.

Mpati: Regrettably at 75 you'll have to leave anyway.

Topping: Fourteen years of service. But I really don't see it as a problem. I'm an active person.

Mogoeng: You are excused.