



JUDGES MATTER

Judicial Service Commission interviews

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Supreme Court of Appeal

Interview of Judge E D Baartman

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Chairperson (Chief Justice Mogoeng): Good Evening Judge Baartman.

Judge Baartman: Good Evening CJ. Good evening members of the panel.

Mogoeng: I'm sure you are relaxed.

Baartman: I'm fine, thank you.

Mogoeng: You've been a Judge of the High Court for how long now?

Baartman: For seven years.

Mogoeng: And for how many terms did you act as a Judge of the Supreme Court of Appeal?

Baartman: I started on the first of June last year, and I'm still acting.

Mogoeng: I've heard a few Judges complain that it's not quite easy to acclimatise to the Supreme Court of Appeal environment – is that your experience, or did you experience it differently?

Baartman: My experience was fair, I had more problems acclimatising to Bloemfontein, but at the Court I was fine.

Mogoeng: Is it the heat problem?

Baartman: Yes.

Mogoeng: And the support from colleagues?

Baartman: Excellent. You took one of my greatest supporters, Judge Mhlantla, away from me. I had excellent support from colleagues.

Mogoeng: Well apart from the few questions I've asked you, just in your own words, impress us a bit, why you...

Baartman: Because I have spent my entire life, working life, in the courts. I started as a prosecutor, then I was a magistrate, a Regional Court prosecutor, then I was at the People's Family Law Centre, which took me a bit out of court but I was working in the court environment all that time assisting women and children with domestic violence, maintenance and giving advice. Then I started at the NPA where I was then drafting for the High Court, appearing in the High Court, and then I started as an acting Judge and remained a Judge until now. I have the ability, I most certainly have the years of experience, and there's nothing wrong with my work ethic.

Mogoeng: What is it about the Supreme Court of Appeal, or the way it goes about its business, that you think requires some improvement?

Baartman: The Court itself is very structured. Improvement in the sense of, I think, the way people work, the way people interact with each other, and new people, new blood always brings a different attitude towards the work, but most certainly the one thing you do need is the ability to work hard consistently, and that I bring.

Mogoeng: And has a term ever gone by without you delivering your judgment in the SCA, in line with the established practice?

Baartman: There was one judgment where we deliberated in the next term, there was a lot of research that needed to be done for that judgment.

Justice Mpati (President of the SCA): Good Evening Judge Baartman. What is it in the SCA that you believe that happens there that you don't like, and what you like?

Baartman: It's very different to sitting in your own chambers and writing a judgment and delivering a judgment. It's very different – you have three to five people who have an input in your judgment. That takes getting used to, getting used to people's different styles and attitudes towards your way of writing, but that is nothing one can't overcome. I have the people skills to deal with that.

Mpati: Anything you don't like that you'd like to see improve?

Baartman: The only thing that I would like to see improve is when one is during recess, at the High Court you have access to chambers and a proper library – that would make the reading this side much easier.

Mpati: The SCA is all about reading records, heads of argument, sitting in court, listening to argument, participating and so forth – what would you say has your experience been with regard to the hearing of an appeal in the SCA? Have you been allowed to participate to the fullest?

Baartman: Yes I have. In fact after my second term, one of the senior Judges came to me and congratulated me on the way that I have been participating. Sometimes you get a bit ahead of yourself, because I'm used to being in the Court by myself, but you learn to live with the other people on the Bench. It's like every day is a full Bench instead of only Fridays, like we have in the High Court.

Mpati: What do you mean to say sometimes you get ahead of yourself?

Baartman: When I say sometimes you do get ahead of yourself, you interrupt Counsel, and just wait your turn to ask the question. Speaking for myself, when you have a question you want to get it out there so the question is answered.

Mpati: And then you come out of Court having participated and go to Senior Judges Chambers – how have you found deliberations there?

Baartman: I have fully participated in it - sometimes I had to start first. It's difficult when you're the number five and you're the last person to talk. If you agree and you don't have a different view then there is very little to say, but I've been fortunate on cases I've been asked to start.

Mpati: I personally haven't sat with you on many occasions – in fact this last term I was on leave, so I didn't sit with you at all or with anybody else, but I suppose you realise that then comes the writing of the judgment – your judgments that you have written, have they been acceptable to colleagues? Have they been criticised? Have they been worked on? What is your experience there?

Baartman: In every judgment, a colleague has a comment. Some of it I have accepted, some of it I have not. On some occasions, I've differed from a colleague on what a colleague would suggest. I've then discussed the issue with the colleague, and we've always been able to amicably resolve the issue.

Mpati: Have you ever had an occasion where you've written a dissent, or been in the minority?

Baartman: Yes I have. The last judgment that I wrote, two of us dissented. I was the scribe and part of the dissent.

Mpati: You wrote the judgment and did somebody else then write?

Baartman: For the majority yes.

Mpati: Let me ask it this way, was the dissent already apparent at the discussions? Or was it rather after you had given your first draft?

Baartman: No, the dissent was apparent in our deliberations – two of us were going one way and the rest, the other. Because I was the appointed scribe, I then had to write first. The two of us couldn't convince the rest, and then somebody else wrote another judgment for the majority.

Mpati: And what do you think now, do you think the minority was correct? Tell us more about the judgment.

Baartman: Yes I do. A farmer killed a farmworker with a hay hook. The regional magistrate found that he had committed murder. The matter went on appeal and two Judges of the Kimberly High Court found that it was murder. The matter came to the SCA, two Judges of the SCA found that it was murder, and three Judges found that it was culpable homicide. So I write my judgement that way. The senior who concurred with me wrote a concurring judgment.

Mpati: I understand you saying that you and another senior colleague found this was murder, and the others found that it was culpable homicide. Besides the conclusion that it's murder / culpable homicide, where did you differ in the reasoning before you got to this is culpable homicide?

Baartman: I think we were always on different sides all through the reasoning.

Mpati: I'm trying to establish what was in the reasoning that you differed with.

Baartman: In order to get culpable homicide, and that they could get to it easily, we were quite convinced, and I still am, that if you just look at the weapon that was used, the manner in which the assault happened, that subjective foreseeability was there, and there was reconciliation with it, and that gives you murder in the form of *dolus eventualis*. The other three had a completely different view. As I said, there were five of us.

Mpati: I wasn't there this last term, so I've canvassed the views of colleagues, with regard to all the candidates, and the view that I have is that you still need some honing, some more acting stints – what would you say to that?

Baartman: I absolutely don't agree, otherwise I would not be here. If you look at my years in the court itself, and I'm not talking about the SCA, I'm talking about the courts, I literally grew up in the courts. The fact that I differed on this one does not mean that I need more honing in the SCA. I wrote a well-reasoned judgment, I can today still justify my reasoning in the court.

Mr Nyambi: Good evening Judge Baartman. Could you share with us your individual contribution to advance the contribution of female advocates, particularly the disadvantaged?

Baartman: Good evening. I got an email from one of our researchers who is, I got it last week, she is in London at the moment. With mentoring, helping and assisting, she is now in London doing her Masters. She wrote me a long email and said your guidance, your assistance has helped me, thank you very much. As an advocate in the NPA when I was at the Asset Forfeiture Unit, it was my duty to guide young advocates, help them draft, take them to court and I did that for a very long time. Also, on the bench, you had the duty to assist young counsel.

Nyambi: Do you believe in judicial activism?

Baartman: Judicial activism, as long as it stays within bounds of the law. The Constitution makes provision for the court to do that and, where necessary, I have done that.

Advocate Ntsebeza: Just one question – there are two positions, and there are quite a number of people who have made themselves available. I just wanted to find out whether you are proficient in any of the African languages?

Baartman: Unfortunately not, only English and Afrikaans.

Mr N Singh: Were you invited or did you apply to the SCA?

Baartman: I was invited.

Singh: By the President at that time?

Baartman: Yes, by the President at the time.

Singh: Do you think you have enough experience, having been a Judge for just seven years?

Baartman: Yes I do, because bear in mind that before that I was also a magistrate – all my working life was in the courts, and the Supreme Court of Appeal gets their work from the lower courts. Every judgement that was dealt with there was dealt with in the lower courts.

Singh: But you said earlier, on that it's a different environment.

Baartman: Yes it's a different environment. The High Court was also for me a different environment from the magistrates' court.

Mr J Malema: When I heard that people coming here were Judges I was very happy, because it gave me an opportunity to ask questions where I'll be educated about some concepts which you guys are using, and some of the colleagues I work are deliberately trying to distort them. I want to understand, when they say a person has behaved inconsistent with the Constitution, what do they mean?

Baartman: When you behave inconsistent with the Constitution, you've done something against the direct precepts of the Constitution.

Malema: And then when you have breached the Constitution? Is there a difference?

Baartman: You've done the same thing – the Constitution tells you to do one thing, and you've done something else.

Malema: What does the oath of office mean for Judges? What are the issues that are raised in the oath of office for Judges?

Baartman: The oath of office for Judges obliges them to uphold the Constitution, which is the highest law of the country, without fear or favour and without prejudice to anyone.

Malema: So if I say to you, you failed to uphold, defend and respect the Constitution, I effectively mean you have breached an oath of office?

Baartman: Yes.

Advocate Motimele: I marvel at your sense of judicial independence, that you have the strength of your conviction, as an acting Judge, to differ and dissent from three sitting Judges ...

Mogoeng: You are commending her, please just test her suitability, put a question to test her suitability.

Advocate Hellens: There are some, and I don't make this my own accusation, but there are some that would say that a hearing at the SCA is not only unduly comfortable, which maybe is justified, but blunt, and counsel are not given the opportunity fully to develop their arguments without being overly interrupted – if that accusation were to be made about the SCA, what would your response be?

Baartman: It differs from hearing to hearing. There are times, I've been there, when the issues are very narrow, and the presider gives the direction that those are the issues when counsel would have wanted to do something more, but then it's upfront told to counsel that these are the issues as the Court sees it.

Judge President Kgomo: Judge Baartman, you've done the aspirant judges course which lasted for a year and six months, would that be correct?

Baartman: That is correct. I was in the first course.

Kgomo: Did you find that beneficial?

Baartman: It was very beneficial, pursuant thereto I started acting, and then never left the Bench.

Kgomo: The State vs. Van Schalkwyk, I read the case. Your approach, and the approach of Judge Willis, was that after the concession by the appellant's counsel, what remained was the version of the State – would that be generally correct?

Baartman: That is generally correct, although the concession only related to whether the accused subjectively foresaw that the weapon could cause a fatal injury. What needed to be decided was whether he reconciled himself with it, and it was myself and Judge Willis who said we don't even need that concession, but with that concession, that is the rest of the argument that needed to be dealt with in the judgment.

Kgomo: A last aspect on that, the instrument itself, the weapon that caused the death of the deceased was photographed, and the majority suggested that part of the reasoning was that that is not ordinarily a weapon, like a knife or some other weapon that an assailant attacks someone with. What did the minority say about that aspect particularly?

Baartman: I have a photograph of the weapon with me in colour, if you'd like to see it?

Kgomo: To save time – and that is the last aspect.

Baartman: Judge Willis' argument, with which I fully agree, was that stones were not made for killing. There are various weapons with which people are killed, that are not made for killing, the same as this weapon was not made for killing, but to use it in that manner, you cannot not subjectively foresee that it can be fatal.

Mr Notyesi: There's always a term used by the SCA, why is it necessary to refer to a judgment from the High Court as a judgment from the court below?

Judge Baartman, For one, it is the court below, and it very often is not the court in which the trial was conducted – the trial court could be a regional court, like the Van Schalkwyk matter, and the appeal court was the court below and that is how it is referred to. When dealing with the three courts, it's easier to identify which court you refer to.

Notyesi: There has been over some time some outcry that the judiciary, in the course of interpreting the law, overstamp itself, and enter into the terrain of the other arms of the government - what do you think should be the necessary curbs that must be applied in order to safeguard such perceptions, or to ensure that that doesn't happen?

Baartman: We really have it all in place – the different arms of government, and everyone's duty is quite clearly distinguished and spelled out in the Constitution. It is the judiciary, for that arm to make sure that other arms and any piece of legislation conforms. I don't think we will ever quite be 100 percent on the same side, especially if a judgment goes against a party.

Mogoeng: Thank you Judge Baartman you're excused.