



# JUDGES MATTER

## Judicial Service Commission interviews

4 April 2016, Evening session

Supreme Court of Appeal

Interview of Judge T R Gorven

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Chairperson (Chief Justice Mogoeng): Good evening Judge Gorven. You've been a High Court Judge for how many years now?

Judge Gorven: Seven and a half years now.

Mogoeng: And before then you were senior counsel?

Gorven: I was senior counsel at the Pietermaritzburg bar, yes.

Mogoeng: All in all, for how many years have you acted as the justice of the Supreme Court of Appeal?

Gorven: I acted for five terms, which is 15 months Chief Justice.

Mogoeng: All in all?

Gorven: All in all.

Mogoeng: And have you acclimatised in the environment quite comfortably?

Gorven: I would like to think so. I've enjoyed it thoroughly, the challenge, I've enjoyed the environment, I've enjoyed the work, and I've enjoyed the colleagues.

Mogoeng: You've enjoyed the colleagues?

Gorven: Yes, very much so.

Mogoeng: And you've been here before?

Gorven: I was here a year ago.

Mogoeng: For the SCA?

Gorven: Yes.

Mogoeng: Anything you want to add to what we were able to explore with you when you were last here?

Gorven: I don't think there is much to add. I think with some of the comments that have come, they are very similar to last time. They didn't update the number of judgments that have been reported but that's a minor thing, those have since been updated in my Curriculum Vitae but I don't think there's too much to add, unless people want to hear from me.

Justice Mpati (President of the SCA): Good evening Judge Gorven. When last did you act in the SCA?

Gorven: My last term finished on the 30<sup>th</sup> of September last year, that's 2015.

Mpati: And the 15 months, was actually one stint of six months and then extended, going away and being called again?

Gorven: Yes. The last time I went away, I was back in Kwazulu Natal for June of last year and the need arose to replace Justice Wallis, who'd been called up to the Constitutional Court to act for the coming term and as a result, I started again, instead of from June as one normally does, from the 1<sup>st</sup> of July because I had to fulfil my duties in KZN before I started my reading for the SCA.

Mpati: In fact on one occasion, you had very little time to catch up and read the records. In fact I think it's this occasion, when Judge Wallis was called up to the Constitutional Court.

Gorven: Yes, I had a month less than everybody else did.

Mpati: And the judgments you had written whilst in the SCA – has there been any dissent from them, or concurring judgments, separate judgments?

Gorven: I wrote one concurring judgment for separate reasons, I think at your invitation president Mpati, but for the rest, I've been part of unanimous judgment benches.

Mpati: Your judgments have been mainly unanimous?

Gorven: Yes that's correct – nobody dissented from the judgments that I began to write.

Mr J Malema: What will happen to our democracy if arms of the state, the judiciary, the executive and legislature, were to second guess or deliberately ignore judgements?

Gorven: Well, I think ultimately there would be a failure of democracy, I believe. I think that, as a recent judgment said, all public office bearers are subject to the Constitution and that includes judges, in other words, judges can't go beyond the powers given to them in the Constitution, and of course, it includes the other organs of state, all of them.

Malema: Does it include politicians?

Gorven: Oh yes.

Malema: Does it include ministers?

Gorven: Yes.

Malema: Does it include presidents?

Gorven: It includes everyone who lives in our country, Commissioner Malema.

Malema: Does it include President?

Gorven: Yes.

Malema: Now, what happens if one of these categories act inconsistent with the Constitution, or is in breach of the Constitution? What happens if a Judge, President, Minister, Member of Parliament, or any South African doesn't uphold, defend and respect the Constitution?

Gorven: Then they are subject to declaration, under section 197 of the Constitution, that there has been such a failure, and a court has the discretion to grant further relief relating to that person.

Malema: Can a court grant a relief that says this political figure is unfit to hold office on the basis that he failed to uphold, defend and respect the Constitution?

Gorven: I would be surprised if a court would ever be in a position where it could go that far. I think the declaration of the situation, and the setting aside of any actions taken pursuant to an unlawful use of power,

are as far as the court can go.

Malema: So the court can't declare an elected official unfit to hold an office?

Gorven: I am not aware of any provision where that could happen.

Malema: Do you know the Simelane case?

Gorven: I have heard of the Simelane case and I've read it, yes.

Malema: Did you know that the court declared him unfit to hold office?

Gorven: Well, I'm not sure that formed part of the order – I think part of the reasoning said that, but the order itself did not go that far.

Malema: So a court can't declare an individual unfit to hold office?

Gorven: No, I don't think so.

Advocate Ntsebeza: Good evening judge. Whilst you were acting at the SCA, did you act at a time when Judge Mhlantla was also a judge in that Court?

Gorven: I did.

Ntsebeza: And you are aware now that she has been elevated to the Constitutional Court?

Gorven: I am aware of that, yes.

Ntsebeza: If the two females who have applied here, if they were found to be appointable, would that be a factor for you?

Gorven: Would that be a factor for me?

Ntsebeza: For you, for your positions. Two vacancies, two females, one of the positions to be filled in is a position that was occupied by a female.

Gorven: Well I think it's obviously a factor for the Judicial Service Commission to consider. It's not my decision, obviously.

Ntsebeza: Last question, do you speak any of the African languages?

Gorven: I don't. I can understand a bit of Zulu, but I don't speak any of the African languages.

Mr Nyambi: Do you think Judges have a role to play to make the public understand the role of the courts?

Gorven: Yes I certainly do.

Nyambi: How?

Gorven: Well, I think by writing judgments in a clear way, that people can understand, in other words normal, accessible language. I think Judges also are entitled to clarify sometimes the role of courts in a general sense – I don't think Judges should try to clarify their own judgements, I don't think that would be right, but to clarify the role of courts, and to be part of public fora which explain how courts function and operate.

Nyambi: Share with us your understanding of judicial accountability.

Gorven: Judges are obviously accountable under the Constitution for fulfilling their duties, and obviously they're accountable to this body by way of disciplinary proceedings. They are accountable to the general public at large to make decisions, on matters that come before them, and to give judgments as quickly and accurately as they possibly can.

Mogoeng: What if they haven't written a judgment? How do they account for their failure to write a judgment? How do you account for taking too long to finalise what could have been finalised expeditiously? How do you

account for taking too long to deliver a judgment that ought not to have taken you years to deliver? I'm battling with the concept that it's only through the judgments that Judges can account. What if the judgment, through which you are supposed to account, had not been written and how would it explain your lateness?

Gorven: That's why there's a Judicial Conduct Committee which is part of this Commission, and I think it's absolutely crucial that Judges are held accountable. We are ourselves service providers – we provide the service of dispute resolution in the judicial forum, in the court forum, to people who come before us and ask us for decision. It is unacceptable to delay, beyond a reasonable time, given the complexity and other kinds of things of the judgment.

Mogoeng: But you know that there are Judges, not just in South Africa but throughout the world, who believe that accountability is irreconcilable with independence? Or are you not aware of that?

Gorven: I am aware of that. I disagree with that position.

Ms A Ndoni: I would like to talk about your judgment in competition law, in Premier Food v Manoim. In that judgment, you said because Premier was not cited as a respondent, the chairperson of the tribunal could not issue a certification. Would your decision have been different if the leniency applicant was made to sign a consent order?

Gorven: Yes, a consent order would have entitled the Tribunal to make it an order of the Tribunal, because consent orders under section 49 allow for that, and therefore the declaration would have been appropriate. Because remember, Premier was initially cited in the complaint, they simply weren't referred as part of the complaint by the Commission to the Tribunal. So they were initially part of the complaint.

Ndoni: So are you saying the consent order would have been tantamount to a referral because, if I understand your judgment, you're saying that, because Premier has not been referred to the Tribunal, they could not issue the certificate, so you're saying the consent order would have met the requirement of a referral?

Gorven: That's correct, because in fact one of the other three parties was also not referred, but did make themselves party to a consent order, and the consent order then gets referred to the Commission, for it to be made an order, sorry to the Tribunal. The Commission can't make orders. The Commission can enter into consent agreements, and then refer them to the Tribunal, in which case there is a referral, but only for the purposes of the consent order, not for the hearing as such.

Professor Ntlama: Good evening Judge. Can you please share with us your opinion about the tone and the language of the court, when it reasons in giving the judgments. For example, the recent Constitutional Court judgment, when it was conceptualising the concept of the rule of law, it talked about the sword that is ready to chop off the head of the stiffened necks. The Supreme Court of Appeal, in the king's case, talked of a despotic king who was tyrannical. So, how does that language contribute to the fairness of the manner in which the courts deal with the litigants before them? As I understand, that you don't have a background on customary law, how is your background going to assist the court in the infusion of customary law into the general framework of the law in the interpretation of the law?

Gorven: The first question relates to tone – I think it's very important that when one writes a judgment, that the tone is one which is not hostile without a proper basis for being hostile and using hostile language. I think if one can draw an inference from facts which support the kind of metaphorical use of language that you've given examples of, that might be appropriate. I think courts need to be quite careful, because once a court has said something, particularly if you're the final and apex court, there is no recourse to having that corrected. In lower courts, there is a recourse to having that corrected by way of an appeal. So I think the tone and use of language is of critical importance so that you're communicating very accurately and with restraint, findings which are valid in law, and which can be made a result of the facts placed before you as a Judge. As regards to the development of customary law, I don't have a background, at the Bar I was involved in a number of cases involving customary law. As with any other branch of law, it is important, particularly since the development of customary law is part of what our Constitution encourages, to make oneself completely at home with those concepts. So one would read widely, one would ask for where to find the relevant aspects of customary law that need to be applied, and one would attempt, as much as possible, to be sensitive to the customary law context in which you're bringing out a judgment. That happens in all areas of law, actually. The competition law that was earlier talked about was a matter where I was not at all versed in competition law – I had been involved in a single matter in the provincial area which involved competition law, and on a very narrow issue, but one had to read widely, one had to think carefully and one had to reason in an exact kind of fashion to try to get to the right answer and I would do exactly that in a customary law

matter.

Ntlama: But would it be appropriate for the court to defer its authority when the matter before it is considered sensitive or political to other branches?

Gorven: I have expressed myself on the matter of deferring before, which has a separation of powers ring to it. I don't believe that any branches of the branches of state, or organs of state, should defer to the others. I believe every one of them must defer to the Constitution. That's the proper deference is that we will not go beyond what we are entitled to do under the Constitution, and that applies to everybody, including the court.

Mogoeng: Should we tolerate the culture of impunity, when we deal with it, or when we deal with, say, corruption in general? Should we be soft so that we don't sound too harsh to impunity or corruption as a general concept, and to what end?

Gorven: Chief Justice, we are not to be soft. We are to draw very firm lines relating to what is acceptable and unacceptable conduct under the Constitution. There is absolutely no room for manoeuvring or being soft on people who go beyond the powers, or simply ignore the powers, or the obligations, the Constitution places on them, and that's true of everybody.

Mogoeng: And of course even tone must be contextualised, you don't just find a word and run with it, should you?

Gorven: Absolutely, I think that's quite correct.

Mogoeng: Yes, I think that's important. Lawyers must do that.

Mr Fourie: Good evening Judge. I assume you've read the comments of the GCB, because you've said it's much the same as it was last time around?

Gorven: I have, yes.

Fourie: I just want to point you to one or two aspects dealt with by the GCB and hear your comments and, if possible, your assistance. The first is on paragraph three on the second page thereof, the question posed is whether the candidate's appointment will help to reflect the racial and gender composition of South Africa. The GCB says that the candidate is a white man. Currently the Supreme Court of Appeal comprises of 21 permanent judges - five are black women, 10 are black men, one is a white woman and five are white men. It is apparent therefore that while strides have been taken to address racial representivity, gender representivity still lags behind. Given the current composition of the bench, the appointment of a white man will not advance the transformation of the judiciary from a race or gender perspective. That's the one side of the coin. And then if you go further, almost the last page, paragraph 17 and paragraph 18, it says the candidate would if appointed strengthen the SCA, not only with the breadth of his legal knowledge and experience, but also with his commitment to constitutional values. Then 18, the message that the candidate's appointment would send to the community at large – the candidate's appointment would send a message to the community that white male judges who show commitment to the values of the Constitution, and to substantive justice are valued. Now that's the other side of the coin. My question to you is, taking section 174(2) of the Constitution into consideration, have you got any assistance to offer as to how we marry those two?

Gorven: I don't believe that they are entirely irreconcilable. Obviously if one looks simply at what I am by way of gender and race, then clearly looking at me does not contribute to the numbers as it were adding up, but I believe that one can make a contribution along those lines in that court by standing alongside of people who may not have had the kind of background and skills that I have, to assist, support and be collegial towards people who represent a gender different of mine, and a race different to mine. And I do believe that a contribution can be made even though I am a white male, and I do believe that, or else I would not be here, that a contribution should be made, and I would like to make that contribution.

Deputy Minister T Makwetla: I only have one question Judge. There is a term being bandied around every time there are differences in interpretation either between the organs of state or the branches of state: "constitutional crisis". According to you, what would constitute a constitutional crisis?

Gorven: A constitutional crisis would be constituted by people deciding that they would, a systematic fashion, act outside of the Constitution and taking charge of things generally, probably, by way of force, I would think. So a crisis of the Constitution is when people simply ignore, and can afford to ignore by way of the position

they occupy and the power that they occupy, where they say we are no longer subject to the Constitution and we are basically abolishing any need to defer to it.

Mr N Singh: Good evening Judge. I note that you've had just over 37 years of legal experience starting as a public prosecutor, 20 years as an advocate but my question relates to your High Court appointment, which is about seven and a half years. What would you say to the experience, vis-a-vis your qualifications for a SCA appointment?

Gorven: Well I've been very fortunate, even at the Bar, to have had a very wide general practice in most areas of the law. I have been fortunate on the Bench also to have a wide range of cases that have come before me. I have been involved in a wide range of appeals, applications, trials and so on, and I've had very fortunate strong collegial connections on the Bench both in KZN and the SCA. I'm not quite sure how much further I can go than that. I've also had the opportunity to write judgments which make some sort of contribution to the range of our law, which have been found suitable to have been reported, 35 to date.

Mogoeng: Judge Gorven you're excused.