



JUDGES MATTER

Judicial Service Commission interviews

4 April 2016, Evening session

Supreme Court of Appeal

Interview of Judge B C Mocomie

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Chairperson (Chief Justice Moengoeng): Good evening Judge Mocomie.

Judge Mocomie: Good evening Chief Justice and Commissioners.

Mogoeng: You've been a High Court Judge now for how many years?

Mocomie: If I start from May 2005 when I started acting in the Northern Cape, it's 10 years and a few months, but if I start from 3 March 2008 when the then President appointed me, it's been eight and something months.

Mogoeng: And you've acted for about 12 months in the Supreme Court of Appeal?

Mocomie: Yes, from 1 December 2013 until November 2014.

Mogoeng: And for another 12 months at the Competition Appeal Court?

Mocomie: That is correct Chief Justice, the Minister just extended my acting appointment at the CAC until next year April.

Mogoeng: Let's go back to the Supreme Court of Appeal, are you comfortable there? Have you settled in, or do you think you are not quite settled?

Mocomie: I am definitely settled Chief Justice.

Mogoeng: That's why you have applied?

Mocomie: Yes.

Mogoeng: Anything you want to tell us in your own words on your suitability compared to other candidates, without referring to them necessarily?

Ms Mocomie: I started my career on 15 August 1988 to be precise. I have been there for 27 years now, I moved through probably all courts in South Africa – the magistrates' court, the regional court, the High Court and then I acted in the SCA, acted in the CAC and acted in the LAC as well. I have done quite a lot of work, I have been consistent in my work. You would find CJ that I did not only confine myself to the courtroom – I participated in other structures outside the judiciary, so to speak, to continue educating our people on their rights, on what it means to be a South African citizen in a new democracy. I participated even in different legal organisations continuing the work I had started even before I became a prosecutor back then. I believe having acted in the Supreme Court of Appeal for the time mentioned has equipped me sufficiently to be appointed permanently to the SCA. In addition to having acted in the SCA as you correctly noted, having acted in the CAC also gave me added value, so to speak. What matters come before the Competition Appeal

Court ordinarily don't come before the High Court, and I think the experience that I have go there can add more, more value to the Supreme Court of Appeal. I am aware that there have been Judges recently appointed who also sit on the CAC, but more people means diversity in thinking, in developing the jurisprudence of that court. As I said, acting in the Labour Appeal Court also strengthened me. The matters that would come to the SCA, not necessarily through the ordinary channels of the Labour Court, do come to the SCA, and I would be able to contribute immensely on the jurisprudence in that aspect. I may also add CJ, I sit on the Hague Convention, what we call the International Network of Judges – it's a big body. You would know South Africa is a signatory to the Hague Convention and on that body sits different representatives from different countries. I attended a meeting recently in May 2015, and on that particular expert group, I was the only African representative. I interacted with very senior judicial officers of the appeal courts from different countries, and I could manage to hold my head up high and contribute to the best of my ability as I know South Africans are capable of. I am certain that the experience that I gained in the magistracy cannot go away – I bring that to the SCA. Generally we don't have people who rose through the ranks like I did, from legal assistant, prosecutor, magistrate, regional magistrate, acting Judge and permanent Judge. I think there is no way the experience I've got throughout my progression cannot rub off in the Supreme Court of Appeal, and I'm certain that is what would distinguish me from others – I don't remember them acting in the Competition Appeal Court, I don't remember them acting in the Labour Appeal Court.

Justice Mpati (President of the Supreme Court of Appeal): How often does the Competition Appeal Court sit in a year?

Mocumie: Four times.

Mpati: And how long are the sessions?

Mocumie: Four hours, two four hours.

Mpati: No, for instance, does it sit for a week continuously on various matters or does it sit for so many days in a week?

Mocumie: Yes, it sits for so many days in a week.

Mpati: Which is usually how many days?

Mocumie: Two days.

Mpati: And of course you've acted in the Labour Appeal Court before you came to SCA, and you spent a year in the SCA – you were appointed acting Judge for six months and it was extended for a further six months. And how did you find the SCA and relationship with other colleagues?

Mocumie: It was intimidating first before I went there, but upon our arrival, I think we were four, three men and me as the only woman then. You invited us to your chambers and welcomed us, explaining to us the unwritten little rules that can make one do stupid things, so to speak. You explained to us, you know, the atmosphere might not look pleasant, because people are never seen in the corridors, but their doors are always open, and we took your advice. From there, it was quite easy, the first few weeks, months, were a bit hectic of course, without you knowing how to match up to the high standard there, but through your guidance and a number of judgements that we sat in, I became confident every time that I came back from court. I took back that confidence that I lacked when I started acting. So it was a pleasant stay for me there, colleagues were collegial, anyone that I sat with I could knock on his or her door, and talk about the judgment that we were to write together. The tea room was much pleasant – go there Wednesdays, lunch for everybody, and it was quite surprisingly pleasant, as the impression indicated out there, was that it was not as pleasant as one can experience it.

Mpati: Your experience sitting in court in the SCA – have you ever felt that counsel was not given sufficient time and opportunity to present their case?

Mocumie: Not at all, not at all.

Mpati: In respect of judgments that were allocated to you, is there an occasion where your judgment was wholly accepted or were all your judgements worked on, changed, suggestions made and so forth?

Mocumie: The one specific judgment that comes to mind is one we did together – the Minister of Police vs.

Metal something. That is one of the judgements that I quoted, where we both wrote the judgement. I started with the judgment but, as you do in the Supreme Court of Appeal, you send, you circulate the first draft to colleagues, colleagues make comments, add here and there, but at some point if it reaches one colleague and that colleague makes extensive contribution, you say no, there was extensive contribution, you don't want to own this judgment, and we did that together. But not wholly, wholly, I do appreciate the guidance there - at least when I read it I recognise there are lines are mine, the kind of English that says it's me and I was grateful for the guidance that you gave me. There was another instance where I sat with other colleagues where we differed in terms of style – how I wrote evidently was not the standard expected of an Acting Judge in the Supreme Court of Appeal, we differed with the colleague in question, but I insisted that even if we differ, allow me to continue writing this judgment and I continued writing the judgment, and the judgment was ultimately accepted by all other colleagues. It's the same one I've added to the questionnaire, *Eskom v Norton* and, as they say, the rest is history.

Mpati: I'm going to ask you something that I don't believe you mentioned to me in confidence. When you finished your stint in the SCA in November 2014, you mentioned to me that you think that you need more experience, you weren't ready for the SCA yet. And the only further experience that you now have, because you didn't act again in the SCA, although you say the experience you got from the SCA makes you believe you are ready for SCA, so the only thing that could have made you ready now is your stint in the Competition Appeal Court, am I not right? Insofar as appeals are concerned.

Mocumie: Not necessarily. Yes and no. I want to believe that sitting as a full bench in the High Court, particularly on a judgment from one Judge we are three, and in the SCA it's plus two, and I'm not saying the work of the SCA is exactly the same as the High Court but I'm saying, once I came back from the SCA, I could appreciate better what is required at appeal level so, what I gained at the SCA, I then put into practice at the High Court. My judgment at appeal level improved tremendously. I wrote and co-wrote a judgment in the Competition Appeal Court, I have been invited again to act in the Competition Appeal Court. To me that is an indication that I am capable of managing the work that goes around in the SCA.

Mpati: So in actual fact it is not correct for you to say your stint in the SCA made you ready for the SCA, it's your further experience that you gained thereafter, if I understand you correctly?

Mocumie: It's a bit of an unfair question, in this context. You see when you ask me something, and I speak to you at a personal level, and I say I don't think I'm ready, but when I reflect, as I'm reflecting now, because I did not anticipate this kind of question, I then have to look at what is it that actually makes me say that I am ready, apart from the fact that I know for a fact that I am ready. I then have to say it's this, and this, and this, and a conglomeration of all this, that makes me say I am ready. Had a gone back to the SCA again, having been invited, I might have shown more of what I was capable of, but I am saying even now, I am ready.

Mpati: You know, when I thought back to that time that you finished at the SCA and said that you're not ready yet, you came to the JSC for the appointment, if you think it's an unfair question you must tell me that it's unfair, you came to the Judicial Service Commission for a position as Judge President of the Free State, and another candidate was appointed. Isn't that the reason that you say now you are ready?

Mocumie: Not at all, not at all, not at all.

Ms T Modise: In your opinion, what are the obstacles to justice in South Africa? That will be the first. My second question would be this one: over the last few years, various commentators have actually made remarks that the judicial system is being abused, either by people who are in power or those who are aspiring to be in power, to further whatever it is that they want to further – what is your opinion on that?

Mocumie: Very broad, I don't think people aspire to do anything of that sort. I would think that the judiciary is one arm of government separate from the others. The importance thereof is that it can hold the others accountable to the extent where they transgress any law but, in the same breath, it also restrains itself from usurping the powers from other branches. Could you repeat the first question.

Modise: In your view, what are the obstacles to justice in South Africa?

Mocumie: Mostly it's money. People who do not have money generally don't have the muscle to go up to the Constitutional Court, for instance. It almost seems as if the law is meant for rich people, which we need to need to seriously take into consideration whenever we deliver our judgements or we have to make judgements within reasonable time, not forgetting that for those people, if they were in court for one day, it might cost them their jobs to come back to court. It's a conglomeration of different issues, but mostly it's about lack of financial means to access courts.

Modise: Before 1994, Parliament was said to be supreme, and the laws made by that Parliament could really never be challenged, and therefore I think what the courts mostly did was to interpret, and try and understand where the legislature was coming from. Today things are a little bit different, so in your thinking, what is the difference between that period and this period we are in, where now it is the Constitution which is said to be supreme?

Mocumie: If you take for example the death penalty that was part of the previous dispensation, that particular policy could not be questioned by any Judge, presiding officer in South Africa. Few Judges, back then, dared go otherwise or different from the facts that were presented. But post-94 we have a democracy, we have a Constitution that outlines values that direct us as a society, and death penalty is not part of our dispensation now – it has been declared unconstitutional. There are other instances that say to us we can independently declare any law inconsistent with the Constitution and to that extent say to the legislature, relook at this particular law, it is inconsistent with the Constitution, and correct it to the best of your ability. It is then to the legislature to do that, go back to the drawing board, and correct that if it believes that it is really inconsistent with the Constitution. So the difference is that previously, people, or the judiciary, adhered to the law doing just as the statute dictated, but now, the values underpinning the Constitution, our history as a country, come in to say to us a judicial officers, you cannot treat an individual, for instance, in this particular way. The Bill of Rights sets out how individuals should be treated, and we respect that.

Advocate Ntsebeza: I see that you claim proficiency in six languages - in what way does that assist you in your duties as a Judge?

Mocumie: In court, for instance, if I sit in Harrismith on circuit court, there's usually a mixture of languages and our interpretation in the country is not so perfect. Now, because of my knowing the different languages it assists me, to say but, that is not what I heard the witness saying, can you allow the witness to repeat what he or she said. Nicely saying to the interpreter you are not interpreting properly. So it comes in handy.

Ntsebeza: Is your proficiency in Afrikaans such that you would be able to deal with a complete record, as an appellate Judge, if it was in Afrikaans?

Mocumie: I do that in the High Court, Free State, predominately Afrikaans speaking people. I did that in the Northern Cape when I was acting there. I come from the Northern Cape, it's, I think, my second language.

Ntsebeza: In the SCA, have you been put in a panel where the record was in Afrikaans?

Mocumie: Not at all.

Ntsebeza: But if you were, you would be competent to deal with it?

Mocumie: I would definitely be competent to deal with it.

Advocate Semanya: The Supreme Court of Appeal looks askance at counsel who would cite more than one authority which makes the same proposition. The Constitutional Court on the other hand, will cite everything in the past that it's said since Makwanyane. Where should the balance be struck there?

Mocumie: It's a complicated one, but I think both read well. The SCA is to the point, they don't repeat, like you correctly point out. The Con Court just loves repeating itself.

Mogoeng: We will examine your judgments properly on appeal.

Mr Fourie: You made the statement that the law seems to be for the rich. Now we know that vast amounts of money is spent on legal aid, the law societies have made pro bono service by attorneys compulsory. That, if you make that statement, doesn't seem to be enough. What, from a practical point of view, can you put forward as a solution to what you perceive to be as the law being for the rich only? What could be done, if you are correct, to alleviate that, or even eradicate that completely?

Mocumie: I think the kind of service people get from Legal Aid Board, Legal Aid South Africa, is not on the same level as that which you get from private practitioners. Most of the time those that come into the Legal Aid just stay for a while, and then go leave the system, just when they have gained enough experience to appear in the High Courts, for instance. The Legal Aid Board then lose those type of skilled people. I think there should be more investment in institutions of that nature, for people to gain confidence, one, in the legal aid system, as well as for members of society to also see from the example that the legal aid members set,

that they can trust them to deal with their matters to finality. The difference that you see in court everyday between these two systems, it's palpable. So I think more investment should be put into institutions of government that are there, that are supposed to give service to poor people that cannot afford expensive counsel as rich people can.

Fourie: Do I understand you correctly to say that you think the standard of legal aid should improve?

Mocumie: Yes.

Fourie: I think that implies much more money, and you say that should be made available to achieve that goal?

Mocumie: Look, not necessarily now under the circumstances that we are financially as a country, but it's a long term investment that will also say to people they can stay in legal aid, instead of going somewhere else. If their salaries can be upped a little bit, just for them to be able to afford a car, just to make it attractive for them to stay on instead of going to private practice.

Deputy Minister T Makwetla: What is your view on cases being televised live, the effect on the witnesses, the accused, even the potential influence on the Judges, because in some instances there are legal analysts that are analysing the case as it is proceeding, so what are your views on that?

Mocumie: We are in a democratic country, the media, like all other institutions, have certain rights as well. We fought hard for the rights of journalists to write and give their opinion on matters which impact society in general. To that extent, I think that kind of exposure is necessary to inform members of the society what is happening in the courts, to a limited extent. The way it was done in Oscar Pistorius matter was too intrusive for me. It made everybody comment on what was happening every day. Like I say, it was more intrusive, there could have been limitations on when and how to do that. But as I'm saying, the right of journalists to inform the public, that is entitled to know what was happening, also needs to be taken into account.

Judge President Kgomo: Judge Mocumie, only on one aspect, you spoke of the question that the courts seem to be more accessible to the rich, but I wonder whether you have lost sight of the fact that bodies like NADEL and BLA represented people for free. Of course there is also the Legal Resources Centre and other bodies but, in particular, from 1992, we served together in NADEL until I was appointed Judge, did you not think that bringing out such aspects would assist the poor and the indigent, in addition to the legal aid board?

Mocumie: It's correct. My answer had to do with what hits you in the face every day in South Africa. I think what we do in NADEL, in BLA, in the International Association of Women Judges, South African Women Lawyers Association, and all other organisations, including NGOs, is to educate, to assist to the extent that we can, but what we see happening in courts is more in your face, if this case is dealt with in this fashion, even publicised internationally but next door there's another case and nothing is said about it – that is the impression that I have a problem with. Its true these organisations do a lot but it is maybe not shown that they are doing something more but like I say, the impression is exactly that.

Mr Notyesi: You make as a factual statement, that's what worries me, the fact that the kind of legal services from the legal aid is different from the private practice. What is the basis for that?

Mocumie: I'm a Judge in the High Court, I was a magistrate for a long time, I was a prosecutor for a long time, I experienced it.

Notyesi: You again suggest that the incentives from legal aid is lower - where do you get that?

Ms Mocumie: Experience.

Notyesi: I'm asking you this question, I'm sitting there in the Legal Aid Board, this is not correct. Factually not correct, but we cannot argue about that. I can even show statistics, and also in terms of benchmarking with other institutions ...

Mogoeng: Commissioner, you are testifying now.

Mr J Malema: No, I wanted to rise on a point of order, because we are asking her questions, she gives her opinion, and it doesn't matter what we think. On the basis of her opinion, we will remain here and make our own reflections, so we must not impose ourselves on her. And I entirely agree with her, the quality – oh ja, we'll engage.

Mogoeng: You are excused.