



# JUDGES MATTER

## Judicial Service Commission interviews

4 April 2016, Evening session

Supreme Court of Appeal

Interview of Judge D Pillay

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

Judge Pillay: Good evening Chief Justice and Commissioners.

Mogoeng: You were a Judge of the Labour Court for 10 years, is that correct?

Pillay: Yes.

Mogoeng: And you have been a Judge of the High Court for six years now?

Pillay: Going on six years, yes.

Mogoeng: And you were here previously for a vacancy at the Constitutional Court?

Pillay: 9<sup>th</sup> of July last year.

Mogoeng: Just give us such information as you believe would be of assistance, just a few highlights, that you believe would be of assistance in relation to this application.

Pillay: Thank you Chief Justice. I've been in practice 37 years and two days to be precise, 16 years on the bench and before that, 8 years as an attorney doing mainly arbitration and mediation, and so in total I have some 24 years of my 37 years of practice serving as an independent and impartial intervener in disputes. Academically I have used the three sabbaticals that I've had as a Judge to advance my academic prowess – firstly I was at Seattle University teaching a course in intentional labour law, then I went to Open University where I prepared course material, and then lastly I was at Oxford University where I joined the group headed by discrimination and equality expert Sandra Fredman. And that inspired me to publish an article, but also to pursue a course towards a doctorate with the University of Pretoria. That, I think, brings everybody up to speed as far as the essentials, I think.

Justice Mpati (President of the Supreme Court of Appeal): I know that you haven't acted in the SCA, and that when you were interviewed for the Constitutional Court I think somebody asked you whether you have acted, and you said ask those two people in front.

Pillay: Not exactly those words, but yes.

Mpati: Something to that effect, referring to me and the Chief Justice. But some time ago you'll recall that I called you and talked to you about a chance to act in the SCA.

Pillay: Retired Justice KK Mthiyane called me when he was acting, and I think it was with your knowledge that he did call me, and it was just before I went on my sabbatical to Oxford, and he said when I come back he would rearrange it, and that was in 2013 for my sabbatical in 2014. When I came back I did drop you an

email to say I'm back in the saddle, to use my words, and you noted it, and that was that.

Mpati: Well, when you said that, ask the two people in front there, I got the impression that you believed that you are entitled to act. Is that perception correct?

Pillay: I don't have any sense of entitlement, Chief Justice, and that is why I am pursuing a degree towards a doctorate, because I do need another challenge, and I'm quite happy if I don't get it from either from the appellants courts, I will get it through my academic pursuits. So I don't feel entitled to anything. If I'm suitable, and you consider me appropriate, I be happy to act and serve in that capacity.

Mpati: Most of your experience is in the Labour Court, am I correct?

Pillay: Well 10 years of my experience there yes, but practising as an attorney in human rights work was quite an unusual experience for most lawyers today, because it's the kind of work that few were privileged to experience, so my experience as an adjudicator yes, 10 years in the Labour Court, and I suppose much of those eight years was also labour related. But I think with a sound theoretical backing from my academic exposure, I should be able to deal with most situations.

Mpati: Looking at your questionnaire, I note that in respect of your matters that went on appeal, nine of them were unsuccessful appeals. Am I correct?

Pillay: The ones that I listed?

Mpati: Yes.

Pillay: Yes, probably you're right.

Mpati: Well, were there more than those you've listed?

Pillay: Well, I think we are required to list about 10, and that's what I did, and as I already had a pre-prepared application, I just tweaked that for this process.

Mpati: I accept that the questionnaire requires nine or ten, but are there more appeals that were unsuccessful than the nine that you have listed?

Pillay: The more recent ones that I haven't listed, and one of which the Johannesburg bar mentions, and that is the Rossiter judgment I think, and there's another one that I've been overturned, it's a full bench decision in a rape appeal, that I'm aware of, so those are the late 2015 and early 2016 judgments that I'm aware of.

Mpati: And in respect of appeals that were successful, number 10 here in the questionnaire. Were there more than 10, or is it only 10?

Pillay: No I'm sure there's more, I try to keep a record. Sorry, which page?

Mpati: It starts on page 15.

Pillay: I did mention that there were more judgments that went on appeal, and I tried to keep track of what was overturned and what was upheld, to the extent that one can do that, but the ones that I had in my application which I retained mostly, are the one listed here, and the application required 10 and I put in 10.

Mpati: And in respect of the successful appeals against your judgements, what was your attitude there? Did you agree that you were correctly overturned?

Pillay: In some of them yes. Take for instance the most recent one that the Bar raises, and that is the Rossiter judgment with Nedbank. The Supreme Court of Appeal quite correctly pointed out that there was a procedural issue to be determined first, and it noted that my judgment dealt with the matter substantively, and the Bar doesn't record that, so the dispute about whether a matter should be dealt with substantively or procedurally is not an easy one, and in fact it had surfaced in the Constitutional Court in the matter of MEC for Education and the Joint Liaison Committee, where the majority took the view that the issue should be decided as if the cause of action arose in terms of public law. The minority said that the senior counsel appearing had expressly disavowed public law, and the commentator Cora Hoexter, analysing this judgment, points out the tension in resolving disputes substantively and resolving them procedurally. But coming back to my judgment, in the case that I had to deal with, this was not a loan from Nedbank to poor individuals for a

bond on their houses. It was a loan of about R11 million to a trust, and they hadn't paid that back, and they raised what in the profession we call a shotgun defence, in other words they stuck at many points in the hope that one would hit home. And I felt that prolonging the agony and the non-payment of this debt, considering also that there had been attachments which hadn't been released, and the Supreme Court of Appeal observed that. So, to cut a long story short, there are different approaches to any set of facts, and sometimes you can say that there's a right and a wrong decision but sometimes you must say that there are different approaches, and in that case there was a different approach. I think the one thing you can say about all my judgments that went on appeal whether they've been upheld or overturned, is that none of them is there any observation from the Supreme Court of Appeal, or even the Constitutional Court, that I was irrational, or that I didn't apply my mind to anything. I have applied my mind to everything that needed to be applied – I might have come to a different conclusion, but we will see and you will see in the article that Cora Hoexter's written in the latest South African Law Journal, how this plays out, even in the Constitutional Court.

Mpati: I ask that question because usually one learns from the higher court's decision if they overturn you, you look at it and you see, yes, that's where I went wrong. That's why I asked if you were happy, when you read those judgments, that you were correctly overturned?

Pillay: Yes, and some of them I am educated about a different way of thinking. But let me draw your attention to another phenomenon that happens, I've been criticised in the MEC for Education matter by the Labour Appeal Court, apparently, and that matter went to the Constitutional Court. Incidentally, the Supreme Court of Appeal, in that matter, refused the petition for leave to appeal, but the issue on which the Constitutional Court decided the matter was not an issue that was argued before me, the Constitutional Court decided the matter on the argument it heard there, and that was section 237 - section 237 of the Constitution wasn't raised before me, so, yes I do understand and I don't have any problems that it was decided under a different point. I am satisfied that my judgment was rational. I would like to point out also that the judgment of the Labour Appeal Court stridently criticised me in the language that I've used, and the Bar suggested I have in an intemperate indignation about some of those issues. I had a careful look at the judgment since my last sitting here, and I notice that the Labour Appeal Court did not look at section 195 of the Constitution, did not look at Njongi, which is a Constitutional Court decision, or the Pepkor decision from the Supreme Court of Appeal, all of which deal with public accountability. And that explains the intensity with which that criticism is levelled at me. The Constitutional Court based its judgement on some of those decisions, and extensively quoted section 195.

Mpati: What you responded earlier when I asked you about acting in the SCA was correct, that Deputy President, then, Mthiyane. called you on my suggestion, but you weren't invited to act in the SCA in the end because, and I would like you to comment on that, the view of colleagues in the SCA was that you are mainly comfortable in labour law, and little experience in other branches of the law – what is your comment to that?

Pillay: I think my judgments speak for themselves. I try to write up everything that comes before me in a way that makes a contribution, and I notice that one of the Bar reports say that I don't have enough commercial experience. If I don't get a commercial case, I can't decide it. You can see from my records of published judgments that I probably have one of the highest number of published judgements, 40 in the High Court, so I do the best I can and if you don't give me the experience, I mean you in the plural, that's it.

Mpati: You mean if you are not allocated?

Pillay: Yes, but I don't feel uncomfortable with acting in that position, because my experience is not limited to labour law. My experience extends to human rights work, my experience extends to constitutional work, and, as the Bar report points out, I raise constitutional issues when even the practitioners don't. So, I am completely tuned in to human rights, the Bill of Rights and to the Constitution so, as I've said in my previous interview, I've been thrown in the deep end before, I set up the essential services committee with nothing to follow, and I served there for five years and I set up the jurisprudence for that, pretty much worked myself out of a job there, but I am not afraid of a new challenge and, as I said, I do want a new challenge and if an appellants court won't give it to me, I will find it in my academic work.

Advocate I Semanya: Judge where does one draw the line - what type of areas require public office bearers to be sanctioned by their voters, and areas where the courts must speak?

Pillay: The courts must speak only when they are asked to, and that means an application or an action is brought.

Semanya: Perhaps if I may try to elucidate, are there issues which are purely political, and others legal?

Pillay: I think Judge Dennis Davis has written extensively on this topic, as have many other academics. Everything is political. The allocation of resources is political. So even when you're deciding a case legally, you have got to look at how the politics plays into it. I'm not talking about party politics – the politics of education, the politics of housing, health, all of that, the Constitution is political.

Semenya: I noticed that in one of the judgements of the Constitutional Court, they elected not to deal with a matter they thought requires the faith-based people to resolve rather than the courts - would that thought be okay with you?

Pillay: Well I'm not familiar with which matter you're talking about, but it depends on the circumstances.

Mogoeng: Let me help, it's a matter whose papers you must read to be able to understand it properly. That is what should have been done at a certain level, it wasn't done, and therefore it could not be resolved by the Constitutional Court – the De Lange matter.

Pillay: Let me respond this way, I think because adjudication is a form of participation, and if there's a kind of participation in that decision making that should have taken place at an earlier step, such as an interested group having an input in the decision, such as the faith-based people, as you've mentioned, then the judgment of the court can be deferred until there has been better participation by the persons involved or interested in the outcome.

Mogoeng: At arbitration level in this case.

Pillay: There you go.

Mr J Malema: Let me understand you properly Judge, about politics – you say when a Judge makes a judgment, must take into consideration politics?

Pillay: Yes.

Malema: Is that what you are saying?

Pillay: The politics of the subject matter. So how, for instance, the budget is allocated, how the political system works, for instance, yes.

Malema: So what is more important in a judgment – its political correctness or its legal correctness?

Pillay: It's not necessarily mutually exclusive.

Malema: Can a decision be politically correct but legally wrong?

Pillay: Well it has to be legally correct.

Malema: Can a decision be politically correct and legally wrong?

Pillay: It has to be legally correct – if the politics inform the legality, then the politics must be taken into account. If the politics is irrelevant, it doesn't inform the legality.

Malema: So in what matters is the legality not politics?

Pillay: Well, there is a matter, in fact, that came before the Constitutional Court, it's a delict, a rugby player was injured on the field, and there was a delay in his medical treatment, so the Constitutional Court awarded him damages, but even there to some extent the politics of health and how the health system works might come into play, but this was purely intellectual and the Court decided to award him damages.

Malema: Will I be correct to say politics have nothing to do with your job?

Pillay: No you won't be correct.

Malema: No, your job is to apply the law and not politics.

Pillay: I don't think you understand Mr Malema that what I mean by politics, I mean for instance, the way the budget is allocated and distributed is political – it is a political process. I am not talking about party political

politics.

Malema: I'm not going to party politics, I don't want to go there, because your CV speaks about where you come from, I don't want to go there. I'm sticking to what you said, and I'm saying the responsibility of a Judge, especially a Judge going to a superior court like the SCA, is to apply the law and have nothing to do with politics.

Pillay: Well that's your interpretation, Mr Malema.

Malema: So you still insist that Judges must apply politics?

Pillay: No, you're not listening to me. What I'm saying, Chief Justice, is that even law is political, the fact that our political system sets up a judiciary, that's political. And the way the judicial system works, that's political.

Ms T Modise: Good evening Ma'am. What are the obstacles in your opinion, to justice in South Africa?

Pillay: Access, in all forms of that word. Resources, to start with, distance from points of delivery of justice, legal aid should be better funded, there are only a few NGOs who are taking up constitutional challenges, and they are dependent on public funding, so all of that, yes, and more, I'm sure.

Modise: Would you agree that sometimes the court room is intimidating, and that could be seen as one of the obstacles to people speaking freely and putting their cases clearly?

Pillay: Yes, I'm sure it must be intimidating to many lay people. But a court room has to be such that the Judge, or Judges, retain control of the environment, that there's respect for those who speak, that the acoustics, when they're bad, can be overcome without any noise disturbances but also the atmosphere must be such that it induces the truth.

Modise: Would you also agree that, when the presiding officer comes across as a little bit impatient, that can also be negative?

Pillay: Sure, yes it can be.

Modise: And would you also remember that in fact the Johannesburg Bar once complained about your seemingly not being very nicely entertaining to people who take a little bit of a roundabout to put their matters, can be intimidating?

Pillay: Well I answered that in my previous sitting here and I answered it this way – that we have five hours of court time, and I must manage it, and if someone is saying something that is not relevant to the decision or to the court or to the case then I must interrupt, but also, I am excruciatingly mindful that a judgment is a product of listening to the proof, the argument and coming up with the reasoned judgment. If I don't get either the proof or the arguments I can't come up with a judgment, so I have to listen.

Modise: What is your understanding of judicial independence?

Pillay: Well, structurally we're independent because we're appointed by the JSC. Institutionally, we operate under the OCJ and in the performance of our duty, we owe allegiance to the Constitution and we take an oath of office to execute our duties faithfully to the Constitution without fear, favour or prejudice, so all of those things go towards independence.

Modise: And about judicial accountability?

Pillay: That we are accountable to the parties we serve, to the Constitution. Our judgments must reflect what is presented to us, to the extent that we agree or disagree with what is presented to us by the way of proof and argument, so that's the first layer of accountability. We are accountable to the parties in terms of delivering a judgment expeditiously, and one that they understand. We're accountable to the development of jurisprudence in a consistent and coherent way. Those are some of the ways through which we are accountable.

Mr N Singh: Good evening Judge Pillay. I'm just trying to understand and correct me if I'm wrong, in your stint as a Labour Court Judge and a High Court Judge, you sat alone and it was your judgment, or were there cases when you sat with other Judges?

Pillay: Well in the Appeal Court we do sit with other Judges, full court we sit with two other Judges, and full bench we sit with one other judge.

Singh: The reason I ask the question because you know my understanding of the SCA is that five Judges sit – I just want to try to get your sense of being a team player. Can you tell us more about being a team player by sitting with more than one Judge to adjudicate a matter?

Pillay: My colleagues will vouch for me, but I offer to write the judgments mostly if we are sitting in full court appeals, some of them which have been reported. I enjoy writing and I try to write persuasively so that I get concurrence from the Judges. I haven't had a problem, and of course, there is one matter on which we disagreed but we agreed to disagree and that was the Mbasa matter which you have before you.

Singh: So in most cases you try and get concurrence?

Pillay: Yes. The two significant ones and ground breaking in some sense, was the Shaw judgement, which dealt with circumstantial evidence, and I found authority in the Dango dog case in Australia to support my view, and the JP at the time, Patel, and another colleague, Lopes, joined me in that judgement. And more recently in the Nundalal private prosecution case, which you also have with you, my colleagues, who were both senior to me, joined me in that judgement.

Mogoeng: Just to round up and following up on that accountability issue that was raised. Purely on the assumption that every human being is capable of making mistakes and serious mistakes for that matter, and therefore just because you are a Judge, doesn't immunise you against making errors which could have been obviated or corrected through a system of accountability, I ask the following: sometimes you hear rumours that some judicial officers, whether they are magistrates or Judges, on Wednesdays, no sitting, golf. Sometimes you hear that there are unnecessary delays in the finalisation of matters, somebody goes on circuit or periodical court, you arrive there unexpectedly and you find the person asleep because you got some tip-off and there hasn't been any sitting. And sometimes you learn for the first time from the media, that there is a judgment that has been pending for a long time, two years or so, and you've never been told as an interested party in the running of these sort of things. What is it, and I ask this question because we don't pay ourselves, the tax payer pays us, we are there to be independent but also to be accountable, what is it that could be done to preserve amongst other things, the integrity, the image of the institution, but also to hold even judicial officers accountable?

Pillay: Chief Justice I think you've started some process of getting that accountability in terms of having weekly reports of what Judges do and how much time they spend in court. I know my registrar is often filling in forms to send to you about me and I believe other registrars do the same.

Mogoeng: Just to interrupt, some view this as unduly policing Judges and interfering with their independence.

Pillay: Well that's one way of doing it, but another way of doing it is to keep an eye on the number of judgments that are generated, how many are reserved and not delivered and how many go on appeal and are overturned, to assess the competence of judges. But going back to the first part of your preamble to the question, and that is about the fallibility of Judges, of course we are all fallible and hence we have 11 Judges sitting in the highest court and a large number in the appellate court. We are also human, and when we're incensed, as I was sometimes criticised for being incensed, I'm not the only Judge who gets indignant about violations of the Constitution. So it's comforting to know that somebody looks over our shoulder, and we have to do the best we can. Chief Justice may I just take the opportunity to clear up any misconception that might have arisen from the last comment that Mr Malema made.

Mogoeng: No, you'll do that, I'm still on accountability. You see the 11 Judges at the Constitutional Court will never be able to pick up the golf match issue. They can only deal with judgments. So what system must be in place to ensure that we all do what we are employed to do, not because we are being policed, but because every human being, no matter your profession, is capable of making serious mistakes to the prejudice of others. So the golf course issue, the sleeping – somebody assumes you are working for the whole week until there is a tip off and indeed they get there, there has not been any sitting and you are just sleeping in your office just as an awkward example. So what is it then that can be done? I don't want to interfere with independence, but also know that the tax payer is footing the bill.

Pillay: Sorry I didn't realise I didn't answer that part of your question. To the extent that I am able to, I think there are two angles to this – the one is that when candidates apply to positions on the Bench, I think one needs to check whether they are applying so that they can secure pension, or whether they're applying

because they have a commitment to public service. And I think that the gruelling that one gets in this forum can go some way to assessing that, but I think the profession needs to be far more involved in reporting on candidates. Not just profession but I think the public – we don't have enough participation, and if you look at the contributions we've had to this round of interviews, it's a serious process, and we've only had a repeat of the last report from the General Council of the Bar, Johannesburg, and we've had a report from the province, and it's not enough. Civil society needs to be more engaged in that process. The second thing I think is perhaps a system of nudging people, encouraging people and giving them the tools to overcome phobias and reluctance to write, and I think the longer you leave a judgment, the harder it is to write it so, from my own experience, I write almost immediately after the hearing, at least my formative thoughts, so that when I come back to it, I have a first impression so it's easier to get back into it. Many people find it formidable and don't get into it until it gets worse and worse. So I think if we encourage that, in fact what I'm saying is put up some carrots instead of hitting with a stick, well I think the stick might be necessary and your committee has a tribunal to set that up. The one thing I can say though is to the best of my knowledge, the colleagues in my division, even those who play golf, don't have a pile of reserved judgements and they are attentive to their responsibilities.

Mogoeng: No I am not accusing anyone, I'm just looking into accountability. But you wanted to deal with Commissioner Malema's issue?

Pillay: He made a remark in passing that I didn't get to respond to, and that is "we know where you come from", in relation to my politics. My politics, for the record, is that as a child, my parents were members of the Unity Movement and when I went to university I was influenced by Black Consciousness. In 1979, when I started practice, other organisations came into my life – Release Mandela Campaign, UDF and the Natal Mass Democratic Movement, and so on and when I joined the Bench, I have not belonged to any political organisation and my independence is unquestioned by the Bar, and I have no qualms about my history – it has taught me how difficult it is to play in that political terrain, and how privileged I am to serve in that independent capacity. Thank you Chief Justice.

Mogoeng: Thank you Judge Pillay you are excused.