



JUDGES MATTER

Judicial Service Commission Interviews

7 October 2016, Afternoon Session

Limpopo Division of the High Court

Interview of Ms M C De Klerk

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Chief Justice Mogoeng: Good morning Ms De Klerk. When did you work for the first time?

Ms De Klerk: In 1988

Mogoeng: Yes, what did you do then?

De Klerk: I was a judge's clerk.

Mogoeng: What were your responsibilities?

De Klerk: Basically at that stage because the judge was the retired JP and he only did the criminal court, I accompanied him every day and sat with him in court, and I also did his personal things for him.

Mogoeng: Who was he?

De Klerk: It was Judge Klopper.

Mogoeng: Was it a rewarding experience?

De Klerk: It was an amazing privilege, thank you Chief Justice.

Mogoeng: Did you have a law degree already, or not yet?

De Klerk: Yes, I already had a law degree and then I was busy with my honours at that stage.

Mogoeng: Did that experience fire up in your heart the desire to be a judge one day?

De Klerk: Absolutely, without a doubt. What I remember is my judge said to me that you will have to work twice as any other man to make a success. It was just a wonderful privilege to work as a judge clerk.

Mogoeng: The prejudice against women was just as strong back then, or stronger?

De Klerk: That was his perception at that stage, and that was the advice that he gave me.

Mogoeng: What was your experience? Were women being treated like men, or were they discriminated against?

De Klerk: That was in 1988, so there were not, unfortunately, not a lot of women, I mean I was there for nearly two years, that appeared in court as advocates, so there were not a lot of women practising law at that stage.

Mogoeng: And just tell us, what qualifications do you have, academic qualifications?

De Klerk: I have got a BProc and then I did my Honours in politics...

Mogoeng: Politics?!

De Klerk: Yes, I received a bursary, but it was all about the Constitution. Well I did it on the ANC, at that stage there were no material in South Africa because the ANC was still banned, but the struggle for the Constitution, that was ...

Mogoeng: Well on a lighter note, some judges you know, after retirement go into politics, like Chief Justice Dumbutshena of Zimbabwe, he tried politics unsuccessfully. Are you threatening to go that way after retirement?

De Klerk: Not at all, not at all. I'm not interested.

Mogoeng: Now, practice, when did you start practice, or its only BProc that you have?

De Klerk: I have only got the BProc and the Honours as degrees, those are the only two degrees.

Mogoeng: And what else did you do?

De Klerk: I did, in '91 at the University of Pretoria there was a course in human rights, and I did that course.

Mogoeng: And what work have you since done, what jobs have you performed ever since you ceased being a clerk?

De Klerk: For a short period of time, while my then husband was finishing his military commitments, I was at Home Affairs in Pretoria, but from there on I moved to Limpopo, and for the past 22 years I'm an attorney, first a candidate attorney, and now for 22 years an attorney in Limpopo, first in Louis Trichardt and then for 22 years in Polokwane now.

Mogoeng: And for how long did you act as a judge, and where?

De Klerk: I did three stints. The first stint was in January - February 2014 in Pretoria, I did two stints last year, four weeks in Pretoria, and two weeks in Thohoyandou during the one stint, and the second stint I think also four weeks in Pretoria and two weeks in Thohoyandou.

Mogoeng: Were you given the support you needed?

De Klerk: Absolutely, the only thing is in Pretoria, the judges are wonderful but they are so busy, so you are basically on your own. If you ask them they will gladly assist, but Thohoyandou was amazing. I enjoyed that.

Mogoeng: Who was mentoring you in Thohoyandou?

De Klerk: Luckily Legodi Phatudi was there, and Legodi was a candidate attorney and I was a young attorney, so we know each other for 22 years, so Legodi was the person that I looked up to.

Mogoeng: Did you enjoy your acting stint?

De Klerk: It was absolutely amazing. Thank you for the privilege.

Mogoeng, Chair: Are you settled now? Are you comfortable? On that Chair?

De Klerk: Thank you Chief Justice.

Mogoeng: Thank you. JP?

Judge President Makgoba: Good Morning Ms De Klerk. Your acting stint comes to cumulatively three and a half months. Would you say that it is enough to expose you to court work at the High Court, as a judge?

De Klerk: It was valued experience, I think it can never be enough but I am ready at this stage.

Makgoba: Mainly what type of cases did you deal with during your acting stint?

De Klerk: I did a lot of civil matters, I only did in Thohoyandou, I did criminal and two urgent applications in Thohoyandou, but the rest were in Pretoria it was civil matters, opposed motions, unopposed motions, trials and appeals.

Makgoba: I realise that you have a reported case. I recall when you wrote that judgment I was in Pretoria, you brought it to me to peruse and I advised you to mark it reportable. Indeed it was reported. How did it feel, first acting stint you're able to produce a reportable judgment?

De Klerk: I'm really humbled by that, it was not planned. I must explain that during the first stint, the one judgment that was reported, I only found out later on. But the second one that I asked to you to read, that was reported later. But I'm humbled by the experience, I never expected to have the opportunity to write two reportable matters.

Makgoba: You have indicated in your CV that you were instructing attorney in a matter where a judge was sued for maintenance. Would you say that you did have to gather bravery to take that step, or did you take it as something in the normal cause of your duties?

De Klerk: I did it in the normal course of duties. I've got so much respect for the bench, but this was about a child and there were merits in the matter, and that is why I took it on. For no other reason but because it was a deservable case, on the merits.

Makgoba: One more question. Am I correct to say you haven't been exposed much in criminal work at the High Court, criminal trials at the High Court? And how would you, if you are to be appointed now, how would you go about gathering the working knowledge in this regard?

De Klerk: When I did my articles, and initially till 2000, when I worked for Booyens Du Preez and Boshoff, I did a lot of criminal work, in Limpopo, all over Limpopo. So that foundation is still there, and when I acted in Thohoyandou, we actually went on trial on two criminal matters, and I read up, and I gave complete judgments, and I also wrote a few criminal appeals. I like criminal law in a certain sense and I will read up and I will ensure that I am absolutely up to date, and I will be ready to do that.

Mr Singh: The JP asked you some questions from which two pieces of information came out which I've written down here. Firstly your time as acting has been minimum, and secondly the type of matters you've dealt with, he's asking about the amount of work you've done in criminal law, also came out to be a little bit less. Do you have any strengths that you can say to this committee that you have that you'll be able to deal with the shortcomings?

De Klerk: I'm very humble, but what I want to say is I really have the respect of my peers, my colleagues and my community. Thank you.

Commissioner Motimele: Good morning Ms De Klerk. May I direct your attention to the covering letter dated the 12 th of February 2016. It's a very short letter, second paragraph says 'I attach hereto, my written consent, detailed curriculum vitae and the standard completed questionnaire. I can't find the nomination form. Where is your nomination form? Were you nominated?

De Klerk: Yes

Motimele: OK. Because the second page, you then say, I consent to the appointment. Who nominated you? You're not attaching it.

De Klerk: How I understood, if I can just explain, I was informed that at the end of January the positions were advertised, so I applied for the position, and then I was shortlisted, that is what I know about the process.

Motimele: So you were not nominated, you applied?

De Klerk: No I was not nominated. I applied, I apologize for the misunderstanding, I applied.

Motimele: So Ms De Klerk, you understood that you need not be nominated? So when you accept the consent, what are you consenting to? That you may be appointed? Look at the following page, Kindly take note that I the undersigned, and then it's your full names and ID, hereby consent to the appointment. So you just came on your own, no nomination?

De Klerk: According to the application, this was one of the documents required, so it was said you must attach a consent, so yes, that is the only reason why I attached the document.

Commissioner Singh: I'd just like to know, from the chair and other commissioners, what is the import of not having been nominated in dealing with the application or an applicant from a process point view?

President Mpati: Shouldn't we rather bring that up when we deliberate?

Singh: We could do, President, but I was just wondering whether the applicant is here on a basis which is wrong? I was just trying to clear that in my mind.

Mpati: Well that will part of our deliberations, I can't give you an answer straight away.

Singh: Thank you President. I would just like to ask Ms De Klerk, what languages are you proficient in, well we're hearing English, are there any other languages that you are proficient in, in speaking and in writing and what importance do you place on languages in the courts that you are applying for?

De Klerk: I can speak Afrikaans and English. Language is very important, it's a Constitutional right, and myself I know for a fact, all my papers, whether my clients are Afrikaans or English, are in English so that is the language what we use in court, because most South African know the language, but if there is any problem with that, there is always provision for interpreters to assist.

Singh: And from your short stint as an acting judge, are you satisfied with the standard of interpretation in our courts?

De Klerk: In the High Court, definitely. I must say to you that we only had, if I can recall quickly, one matter with a woman from Mozambique where we needed interpreters. The rest of the cases were 99% conducted in English.

Singh: In terms of access to justice, there's always people complaining about access to justice, from a financial point of view, location point of view, etc etc. What is your view on access to justice to the ordinary person, and what do you think can be done differently to make justice accessible to ordinary people?

De Klerk: The reason for the Limpopo Division is absolutely access to justice. This is a dream for the Limpopo province coming true. What, unfortunately in a certain sense, my experience is that the Legal Aid Board is not always there, but another thing is, if a person appears in court unrepresented, I've seen so many case law that the judge presiding will then ask the Law Society or the Bar Association to appoint somebody to assist, so you will never ever, if a person appears in person, not assist that person or get somebody to assist that person.

Singh: Have you yourself done any pro bono work, and to what extent?

De Klerk: Yes. In Polokwane I've done a lot. I've been contacted by social organisations, by magistrates, by people from the court who refer clients who don't have money and I make time and I assist. So I've done High Court matters pro bono, I've done maintenance and children's cases pro bono.

Commissioner Schmidt: From your questionnaire, in particular page 6, paragraph 6.1 and page 8, paragraph 6.2.5 you create a very strong impression that you concentrated and appear to be somewhat an expert in family law. And I'm trying to read further, on page 7 for instance you indicate, I

handled an attempted murder and a fraud case in the past two years. Is it a fair assumption to say that you seem to be a reasonable expert on family law, but lack experience in criminal, and possible civil motion and criminal trial experience?

De Klerk: I do a lot of family law, and I'm very humble but I know family law, and I'm so humble if I say that. But I also do a lot of civil work, a lot of motions, and criminal work as I already explained, that is my background, that is what I did during my articles and my first ten years, and it was still wonderful to do some criminal, but yes, due to circumstances, and our firm specialize in a sense, so we've got somebody who's doing the criminal, who's doing labour, but I do a lot of civil. Although my passion is for family law, and I've got a good knowledge of family law.

Commissioner Semenya: One of the cases you cite as significant is the *Cilliers v Cilliers* matter. And just for the record, the Semenya AJ there is not me. Why do you consider that significant, though?

De Klerk: That matter was since reported, in the law reports of March of this year. The importance of that matter is because of punishment and a moral judgment. That in brief is what I am saying. It's not for the court to listen to the conduct of the parties as far as the breakdown of the marriage is concerned, and then to make a moral judgment and to punish a party. It's not in accordance with the development of the law in our country anymore.

Semenya: I understand section 9 of the Divorce Act to have a very internal instrument in it, which is whether or not a party is unduly benefiting out of the dissolution of that marriage, no?

De Klerk: That's correct. It is all about contributions. If you are married for 30 years, and you've been a good wife and good mother, and you contributed in the traditional role, or assisted in the business, or worked, and now after 30 years the marriage break down and you are having an affair with somebody else, what you've contributed in 30 years cannot be taken away because of that one step. And the law is quite clear that normally both parties are to be blamed in the lesser or more severe extent.

Semenya: Or if you're a husband who's at home all the time, he shouldn't be punished I guess?

De Klerk: Absolutely.

Semenya: Your understanding of the rule of law, what would you say it is?

De Klerk: It's about the community, what is the community's morals, and in terms of the rule of law, that is what you are entitled to.

Commissioner Fourie: Commissioner Motimele asked about your self-nomination. For purposes of these proceedings, being an attorney you require a certificate of good standing from your Law Society. Now that is a pretty standard document that merely says there are no proceedings pending against you, and that accordingly you are in good standing with the Law Society. I am curious that you however, despite the fact that that's standard document that I think any attorney knows what it contains, you wrote to the Law Society requesting such a certificate, and you said [*quoting in Afrikaans*] 'The questionnaire must be accompanied by the standard clearance certificate (certificate of good standing) which the candidate is required to obtain from his/her professional body, regarding the candidate's professional status within that body; his or her suitability for appointment to the bench; and any disciplinary proceedings completed or pending in respect of the relevant candidate. To this the Law Society responded, correctly, by saying [*quoting in Afrikaans*]

De Klerk: [*Responds in Afrikaans*]

Mogoeng: I think you forgot both of you, the commissioner started with Afrikaans and led you into Afrikaans, I'm sure you're not insisting?

De Klerk: I apologize profoundly. To explain two things. First of all let me start, there was two questions, the first question is, when I was acting in Pretoria, Judge Cynthia Pretorius asked me whether I'm going to apply for the position of a Judge in Pretoria and I said to her no, and she said you must consider that. And I must also say that my JP also asked me at a certain stage, are you

ready. So I'm not arrogant to apply for this position, please, I'm really humbled by that. The second question as far as my Law Society is concerned, the advertisement said that you must attach a consent and a letter from the Law Society. So this was as a result of that. Later on, recently the Law Society sent me a recommendation. But once again, please, it was just to make sure that everything that they asked for was attached to the application.

Fourie: My question is just, did you think that the Law Society is required to comment on your suitability for appointment to the bench, because that's what you requested them to do? Did you think that is part of their obligation, to provide you with such comments?

De Klerk: To comment, whatever positive or negative.

Commissioner Modise: Just to follow up on the questions from commissioner Fourie. Is the sum of R171 that was paid then for this certificate that then becomes part of the documents, that says that you of suitable for placement?

De Klerk: Yes

Modise: So you paid R171 to get the Society to recommend you?

De Klerk: No, to give a certificate, negative or positive.

Modise: To give a certificate that recommends you?

Ms De Klerk: Yes, to give a certificate.

President Mpati: Ms De Klerk, I've just asked the secretariat to bring us the advert that you were referring to. It says that the Judicial Service Commission invites nominations to fill vacancies as judges in the following courts, and then it lists the courts. And on page 2, it says nominations must be accompanied by the candidate's written consent, etc. Did you misread that?

De Klerk: Yes, because the written consent, that was the document, that is the consent that –

Mpati: No no, all I'm saying is that the written consent, according to the advert, must accompany the nomination, did you miss that it must accompany the nomination rather than the application?

De Klerk: Yes.

Mogoeng: You are excused Ms De Klerk.