



# JUDGES MATTER

## Judicial Service Commission Interviews

8 April 2016, Morning session

Western Cape Division of the High Court

Interview of Mr S J Koen

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Chief Justice Mogoeng: You hold BA ,LLB degrees from UCT?

Mr Koen: That is correct, Chief Justice.

Mogoeng: And if we exclude your experience as a candidate attorney, you have been an attorney for more or less 30 years?

Koen: I think I'm in my 29<sup>th</sup> year, Chief Justice.

Mogoeng: Yes, that's why I say more or less, because its 29 plus.

Koen: Correct.

Mogoeng: And you've had more or less an acting stint of about eight terms?

Koen: I completed my, its eight complete terms, I did half a term on two occasions and I completed my ninth stint this year, so this is my tenth, this is the tenth year of acting stints.

Mogoeng: And have you had reserved judgments and if so for how long, what is the longest?

Koen: I certainly have picked up reserved judgments over the time. I can't honestly tell you what the longest one was, generally speaking they are out promptly, I know certainly in the last term I didn't take longer than 2 weeks with any judgment. But I have found in the past that where I pick up a reserved judgment at the end of a term and then go back to practice that is complicating, and I'm sure I've taken longer in those situations.

Mogoeng: Yes. Did it take you long to settle down as an acting judge of the High Court, or was it a relatively smooth transition from being an attorney to sitting as a judge?

Koen: Well, it is quite a big difference between being an attorney and sitting in a judge and when I started in 2007 it was a very steep learning curve, if I may say, but I did find that I received considerable support from all of the judges in the division, and I think I settled down quite quickly.

Mogoeng: Thank you. JP, DJP?

Deputy Judge President Traverso: Thank you, Chief Justice. What type of matters did you sit on mainly during all your acting stints?

Koen: I think I've been exposed to just about every kind of matter that there is in the division. I've done criminal cases, I do the usual criminal appeals and section 309 petitions, reviews, and the whole broad spectrum of civil law work I have been exposed to, I think.

Traverso: Now, I think something that might be raised with you is the fact that your firm, you are still with Bissets is that correct?

Koen: Yes, I am.

Traverso: And that your firm historically, I don't think they anymore, but historically, did a lot of work for the Law Society, and that you were the person to deal with that work, is that correct?

Koen: I have done a lot of professional discipline work, mostly for the Law Society and also for the Bar Council.

Traverso: I see. And I think it was asked of you at your previous interview, were you personally responsible for the striking of any black practitioners, and I think perhaps if you could just explain your role, as an attorney, in the process?

Koen: Yes, I think the Law Society would confirm that I am a careful lawyer when it comes to matters like that, I stick to the facts, it has never been my style to play the person or to conduct Law Society litigation in an antagonistic or aggressive way. Ultimately the society is a messenger or sort of a *pro forma* prosecutor, whose job it is to bring instances of misconduct to the attention of the courts, and it's for the courts to decide what to do with a practitioner who has misconducted him or herself. I know that when I draft papers I never say we pray for a striking off, I say we recommend that a striking off order be granted.

Ms Stewart: Thank you, Chief Justice. Mr Koen, you said you had a steep learning curve when you started your acting appointments in 2007. There's a far greater pool of attorneys to draw from for acting appointments than from the Bar in the Cape, especially if you are going to follow a transformation agenda. Do you think that attorneys should be encouraged to do acting appointments, and if so, what is the steep learning curve that litigation attorneys face which Bar Council members don't?

Koen: You know attorneys, of course, do work across a very wide range, so many attorneys don't do litigation work at all but are engaged in commercial work. Those who do litigation, which is what I've done my whole life, amongst those are some who don't exercise their rights of audience in the High Court as well. I wouldn't know what the numbers are, but I suspect that very few attorneys really exercise, on any regular basis, rights of audience in the High Court. In my firm, I've always encouraged our juniors who work for me to do that when it's appropriate. I think appearing in court is the essence of being a litigation lawyer, if you like, and it's good and rewarding work and people should be encouraged to do it and to be brave enough to start and to get going. For me, the learning curve was steep in the sense that I'd never been behind the doors of the court, in the corridors of where judges sit, and you know you learn things like the senior judge enters court first and that as you go along, because there's no hand book that I know of where those things are written down. So it was a steep learning curve for me in that sort of practical way. Deciding cases, I mean, the law is the law and I think I know more or less what to do there.

Mogoeng: Thank you Ms Stewart. Just so everyone understands what you mean Mr Koen, what is the difference between never asking for a striking off and recommending that a person be struck off?

Koen: Well the role of -

Mogoeng: In substance.

Koen: Well, I mean, one needs to understand the role of the court. The court is the repository of disciplinary jurisdiction when it comes to attorneys, not the Law Society. The Law Society has no right or power to strike an attorney off, or the Bar Council has no right to strike an advocate off. The court makes that decision. What the role of the Law Society or the Bar Council would be in disciplinary matters is to explain what it is that you've established on the facts that the lawyer has done that you say is wrong, and to recommend to the court that in the light of a particular set of facts, dishonesty for example, a striking off order would be appropriate.

Mogoeng: No that I understand. I just needed to understand the difference between never asking for a striking off and recommending a striking off. What, in substance, is the difference?

Koen: There, I mean there isn't, there is a difference in the sense that it's not as if you're pursuing a money claim where you say, "I want the court to order somebody to pay me R100 000", what you're saying is "I want the court to exercise its disciplinary jurisdiction in respect of a particular practitioner and I recommend to the court, because the authorities have made it clear that the court expects from the profession a view about a matter, and I recommend that that is the sanction that should be imposed.

Mogoeng: It a minor thing, but when you ask, when you ask, is it not the same thing?

Koen: Well, I suppose, it's a very nuanced distinction I'm very happy to concede that, Chief Justice.

Mogoeng: Thank you, Mr Koen. Commissioners? Commissioner Notyesi?

Commissioner Notyesi: Thank you, Chief Justice. The attorneys' profession has now adopted the new Uniform Rules. What has been your role in the process leading up to the adoption of those new Uniform Rules?

Koen: Yes, thank you. I was asked to chair a Law Society subcommittee involved with the bringing the different sets of rules which each provincial Law Society had adopted, to uniformity. I came in at a very late stage and there were really only a few matters where my Law Society took a different view to the other provinces. I drafted the disciplinary procedure section of the Uniform Rules because we, our committee, felt that what had been put up could be more efficient and fairer, and there were two other instances, I think, in respect of which there were differences and that is that we felt that the right to be represented by proxy at a general meeting was important, given the vast territorial area of the Cape provinces, so that members could participate in the profession, and when it came to disciplinary proceedings, the Cape Law Society has had a rule that, in relation to particularly serious, or matters where a fine of over R5000, I think it is, is imposed, that is published, because we felt that the previous criticism that disciplinary proceedings were conducted in private was valid, and we had to respond to that in some way.

Notyesi: Also, you understand there is a commitment by the Cape Law Society in particular on transformation, and as part of the firms that are listed or are doing work for the Law Society, how many African counsel that you have briefed, or the instances, are there instances where you have briefed the African counsel?

Koen: In the Cape, certainly as far as my firm is concerned, we haven't briefed counsel in a Law Society matter for years, we ask the attorneys who are dealing with the matter to exercise their rights of audience and to deal with the matters. I don't know what happens in the Eastern Cape, I haven't been involved in an Eastern Cape or a Northern Cape matter for many years, there have been counsel briefed in Law Society matters in my time, I've briefed counsel that, I think the last case was the *Berrange* matter, and that was more than 10 years ago, and I was told who to brief in those matters.

Notyesi: Lastly, your firm generally what is its commitment on transformation? Your firm, not only on the matters of the Law Society, generally, work by your firm?

Koen: Yes we have for a number of, for more than two decades, been careful about the appointment of candidate attorneys, we have appointed many black and female candidate attorneys in the last 20 years. One of them has risen through the ranks to become a judge, others conduct their own practices, successfully as far as I know. When I started in my firm in 1987 the lawyers were only males, as far as I can remember, more than half the professional staff, the lawyers in my firm, now are females and I think a quarter to a third are black people. So we are committed to that, the country must change and to the extent that we are able to make a contribution, small as it may be, that's what we do.

Commissioner Singh: Thank you, Chief Justice and thank you, Mr Koen. I note that you've been chair for subcommittee in the Cape Law Society that dealt with norms and standards and things like that. I would just like to know from your experience as a member of the Law Society, if there is a member of the Law Society that's been sanctioned for unprofessional conduct, for example for failing to file a notice for notice of withdrawal, do you think that kind of sanction should be held against that individual if that individual applies for more senior positions in the judiciary?

Koen: We all make mistakes, and to err is human, and it would be silly to contend otherwise. I think that if a practitioner exhibits some form of appreciation of the fact that they've made a mistake, and shows a commitment to improve themselves, then what you've sketched to me wouldn't be a proper basis to hold it against a person forever.

Singh: So you consider it an administrative error?

Koen: Well it depends, I mean, the courts are very often inconvenienced by attorneys who withdraw at the last minute, so it's not entirely innocent to do that, and there are rules about withdrawing. Withdrawing at the very last minute is very disruptive, you know, but mistakes do happen, people overlook things, I suppose one would really need to get a grip on the factual context, the detail of it to be able to express a proper view.

Advocate Hellens: Just almost a comment more than a question. Mr Koen, I see that when you've acted you've acted for a term at a time except once when it was a half term, that's correct?

Koen: Once or twice, I can't remember, but yes.

Hellens: That has a tremendous impact on private practice, because a term is essentially three months, it takes a chunk out of your earnings?

Koen: Yes. Yes that's correct.

Mogoeng: You are excused, sir.