



JUDGES MATTER

Judicial Service Commission interviews

4 October 2016 - Afternoon session

Competition Appeal Court

Interview of Judge B Vally

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Chief Justice Mogoeng: Good afternoon Judge Vally.

Judge Vally: Good afternoon Chief Justice and the Commissioners.

Mogoeng: You have been a judge for 4 or 5 years now?

Vally: I will be five years in a few months.

Mogoeng: In your own words, can you tell us why you have applied for this position?

Vally: In my own words? CJ, I would say given my background and experience, I think I would be able to perform. I think I would enjoy the work and I think I would be able to serve in my capacity as a judge of the Appeal - Competition Appeal Court. Let me say this Chief Justice, I have a commerce degree and I have studied economics and business economics, which is where I originally started and I thought I would end up in that area. I think the things that I've learned in commerce degree have assisted me in my understanding of matters related to competition.

Judge President Davis: I would like to understand if you have dealt with the competition questions and matters or competition jurisprudence or competition economics.

Vally: Not competition economics directly, but as far as the issues that are arising in competition matters are concerned, those I have dealt with for the large part of my adult career or adult life. It started when I became an organiser in the unions and

when I was thrown into having to negotiate wage agreements and retrenchment agreements. It was at that time when I came into contact with that, before that, obviously I had the theoretical background to deal with those issues. As you would see from my CV, I got accounts, economics and business economics as my subjects that I did in university, although I was never a keen follower of those subjects, my interest always moved in the sociological directions. I must say, though, my honours' thesis was on capitalism, apartheid and inflation, my Master's thesis was on Marxist theories of crisis. So it was always about political economy and economic theories. So yes, I have not dealt with them in a sense that I have not got specific cases. But as far as the issues are concerned, I find myself on familiar ground to deal with them.

Davis: I'm well aware of the fact of your Marxist stuff, because you and I have had dialectics in the past, but I suppose what I am trying to understand, if you didn't get the job now, I assume you would still be prepared to stay on as an acting judge of the court to get more experience?

Vally: Let me say this about that, I have only been made as an acting judge recently, that is not the fault of mine.

Davis: No, I agree.

Vally: I have been available for long time, in fact, my Judge President asked me to tell this body that he had been pushing for very long time for me to be brought on to that court, for some reasons that didn't happen, he doesn't know, I don't know why it never happened. So, yes I have now been appointed as an acting judge and of course I would serve my term and I intend to be carrying out that calling. I have accepted the calling and I would be loyal to what I have set myself to do. So, yes I would certainly make myself available. To the extent that I may not get it, yes I would leave that to the hands of this body and I believe that they would make the best decision, even if I don't get the position that would be something to be considered in the future.

Acting President Maya: How long have acted in the Competition Appeal Court?

Vally: I acted only in one matter and I've only acted since April 2016. I only sat in one matter, I wrote a judgement on that matter and it did get reported. I concurred with the findings of the majority, but I wrote a separate judgement in that matter, my logic was slightly different from theirs.

Commissioner Nkosi-Thomas: You've responded to a question directed your way about you having acted at the court to which you are applying for, and you said that it was "due to no fault on your part". Are we to hear that as a concern in how acting appointments come about in that division, in that court? I want context.

Vally: Commissioner Nkosi-Thomas, I don't know much about how acting appointments are chosen, I cannot therefore make a comment on whether there is anything incorrect or correct. All I can say is that, I was available and I don't know why I was not chosen, to the extent that disadvantaged me and I accepted that it has disadvantaged me. But, I ask this body not to take that into account because it's a disadvantage that I had no control over. I would love to be judged based on the jurisprudence that I have produced over the five years. I have given the Committee the work that I have produced. I have also given the list of judgments that I have

written. I have produced judgements that I thought were quite good and you should look at and the list of reported judgements. But, coming back to your question, I do not want to evade your question Commissioner Nkosi - Thomas, I wish I had been given a better opportunity to act and to expose my skills, and to develop my skills. The one thing I don't want to create an impression is that I know it all, I know everything about competition and I am going to walk in there and I am going to have no difficulty. Far from it, I would have difficulty, there would be complex cases, and there would be cases where issues would arise which I had not given a thought of, there is no doubt about that. I was not given the opportunity even to practice as the competition practitioner.

Nkosi-Thomas: Thanks Judge Vally, the reason one asks this question is because as a JSC we are seized with that very question of bringing about fairness around affording people opportunities to act. This is hence, one is probing this question and I am going to ask you one last question, namely; if you were to make your views known around the criterion to be applied, what would you say we should do in order to ensure that such opportunities are made available on equitable basis.

Vally: I think one of the ways of ensuring equity is to also improve transparency and of course one doesn't know what happens in some of these things and how the decisions are made, and when they are made and who takes them. There needs to be a little transparency about that. There also – if you aren't acting or whatever - needs to be opportunities, it is no use when appointing people to act if they are not given an opportunity to sit in cases. People should also be given an opportunity to write, because once you got that opportunity to consider matters and to write, then that is where they would develop their skills. So, I do think the acting appointments are an important conduit, important forum within which you can build a repository of people that can be utilised later on. People should be able to feel their way through to the particular area of law and then decide whether they want to be party to it. So, yes I do believe that we should be open it up a little bit more and I do believe that the work should be spread out a little bit more. It is not different from the way advocates complain. It is no use to say I do not have the skills, I was not given the opportunity. Commissioner Nkosi-Thomas, you know that debate, we have been all involved in it ever since we were at the bar. If you don't give people an opportunity then you would not be able to build their skills. So, I would certainly say there should first be more transparency and greater opportunity for people to engage.

Mogoeng: Thank you Ma'am. But, you know it's not all who desire to have the opportunities would have it.

Vally: I would certainly agree with that, but then Chief Justice, with respect, it has to be the person who must say you have been given a chance and you said no. It's a different thing when the person has never even been asked.

Mogoeng: No no no, you can't ask all the judges, they are many.

Judge Vally: I understand that, I would certainly agree with you and I would also accept that the people who make the decisions make the decisions bona fide, they can't know everyone's skills and knowledge as they do not have their CVs with them and they don't know of everyone's past and abilities. And so they do rely on Judge Presidents and rely on other colleagues and I accept that too, of course the system is far from perfect, it has built in impurities, that is life and there is little thing that

anyone can do about that. So, yes Chief Justice and I'm not in any way imputing bad conduct or improper conduct on the part of anybody involved in the process including Judge Presidents or anybody else. I have no desire to do that, I have no basis to do that, Chief Justice.

Mogoeng: By the way, there is also a suggestion in the interest of transparency that even the way the Sifting Committee goes about sifting must be open, must be transparent. So, it is getting interesting and there may be some good points there on questions around how do you people sift? Who do you leave out?

Commissioner Schmidt: Thank you Chief Justice. One issue, I am still trying to determine the basis for your interest in competition as you didn't have a practice in competition law and you were fortunate enough to act for a period in the Competition Appeal Court. Where does it arise from?

Vally: I think Commissioner Schmidt, I would have loved to do more competition work even as a practitioner. I wouldn't come my way, I have no say over that. What is my interest? I have an abiding interest in economic matters, political economic matters and my interest in there started when I went out at the university I had already started in accounting and economics and business economics. I trained in that field of law and I know economics fairly well. I know things about cost theories and I know all those things fairly well. I would love to get that job but it appeared esoteric and it was outside of my reach. I have been involved in complicated matters and I did take an interest in economics and political economy, I have a more abiding interest in sociology. I felt more closely towards sociology for all my life then only later did I realise I could become a lawyer. When I joined the group, in which you were a member, I came in 1996 very late but then I had already done many other things. But always, from the beginning, I saw the interplay between sociological issues and political economic issues and I still believe they are very, very important.

Mogoeng: Can you please be brief and just answer the question and allow whoever is putting the question to follow up if necessary?

Vally: Yes, I do apologise.

Commissioner Hellens: Judge, I see that you've included the case of Nkala and the mines and the whole judgement in here. I seem to remember that at the time the application for leave to appeal was made, the judgment was not available. Am I wrong?

Vally: The application for leave to appeal judgement was written and there was certainly a number of issues as it was written the same day after the arguments were given or the day after, I can't remember. It was then read out because some issues still needed to be clarified, thereafter I lost control of it and I didn't know anything about the case thereafter. All communications were then done through Deputy Judge President Mojapelo. So, I would not be able to answer any further on it.

Hellens: I think I heard that the further proceedings to the SCA had to go ahead without the judgment refusing leave to appeal.

Vally: That wouldn't be correct, I'm not sure if that is correct. Look, I stand to be corrected but I do know that written notes were read out in court. Deputy Judge President Mojapelo was reading from a script that was obviously not the one signed

by us. It was written quite hastily, it was written at the spur of the moment. It was a very complicated hearing and it took an entire day. As you would know, that case involved 40 counsels and I don't think we as a bench, and I speak for the bench not for myself, delayed or held back. We were always conscious about the importance of the matter and the need for the matter to be expedited.

Hellens: An entirely different subject. I would love to understand how the leniency processes in competition law are going to fit with the criminalisation of certain anti-competitive conduct. It seems to me if you seek leniency you make a full breast of it, but at the same time it is a confession and it is criminalized, any thoughts how that would work in practice?

Vally: I really don't know; I wish I knew the answer to that question, all I can say is this, proof required in criminal law is quite high, and as a result, it would be quite difficult once the criminalisation process sets in, for there to be actual prosecutions that would be very successful. I can understand why the prosecutors are keen to try and expedite it or to try and find it other way out of it. I can't tell you how it would work out but I see the problems, I envisage the problems that you point out and I can see them.

Hellens: Because leniency is a full confession, otherwise you don't get leniency, if that is admissible against you that is a confession?

Vally: That is not a matter that would come up before the Competition Appeal Court anyway. So, fortunately for me I wouldn't be having to deal with it.

Hellens: I was just interested in your thinking on it.

Commissioner Motshekga: Judge, do you want us to understand that there are no opportunities within the Judiciary for people who feel overlooked to raise that for consideration and that you have to raise that in a forum like this where, if I'm not wrong, our concern is whether or not the candidates are appointable.

Vally: I think there is always room for improvement and I think there may be some places where people should go and ask and get some answers. But, I don't want to create the position where people must start making complaints against judge presidents because they believe they should have been appointed in an acting post that they have not been appointed. I don't want to open up a process where tomorrow we start getting review applications because someone wasn't chosen as an acting appointment. I am bit concerned about finding the right balance and there is room for improvement but I do think we need to think carefully because I think we need to find the right balance, consider values and consequences that can arise from whatever actions we may take.

Motshekga: Don't you think that kind of approach may create an impression where previously disadvantaged candidates would come here and lament about apartheid and the past and that they didn't have the opportunities and then convert this forum to a grievance mechanism?

Vally: I do not have sufficient information knowledge or background about what happens in these forums, but it is possible that has happened but I can understand if they are aggrieved because some people do feel very strongly about that, their grievances is very strong. Maybe there should be some places where people would

be able to take up their grievances to perhaps the Chief Justice's office. I do accept that people do feel very aggrieved and some of them may have legitimate grounds for doing so.

Mogoeng: But as a person who believes he should have been considered earlier, why can't you articulate some of the factors that you believe must be taken into account in considering people for the possibility of acting? You said there is room for improvement, can't you then as a person who was perhaps not given the opportunity as early as you believe suggest ways to improve the system?

Vally: I would think that people must feel free to be able to approach the Judge Presidents or even the Chief Justice on their concerns as there seems to be no room for that at the moment. I would think that this would, in any event, be attended to if, and I would like to repeat that, if there is more transparency and the person can see beforehand how people were chosen and why they were chosen. There should also be a room where the Judge President would say "I have a number of acting appointments in a certain places, I'm considering people, and would you like to put your name forward?" Maybe that should be a way forward. I get that Judge Presidents are also stifled or hamstrung by the way the process works. But, I don't want to come here and be an apologist for Judge Presidents, I don't want to say everything they do is right, that is my view.

Mogoeng: But, what is stopping you from writing to your Judge President, maybe and raise this at the heads of court meetings, you can say "people are concerned and it looks like you people are not transparent in the manner you are considering candidates". Why is that not possible? Let me give you an example, at one conference a Judge stood up and said, "these Judge Presidents only give acting appointments to people they have particular relationships with", now to avoid that in a democratic country, I cannot imagine a Judge cannot be able, even if it means through the head of court or to the Chief Justice to say, "you people are too secretive. I want to know now and these are my suggestions, this is what I want you to consider..." Why is that not possible? Members of the public write to us all the time.

Vally: I think it is possible and it's a good suggestion and I think it's not a bad one. I hope that from there it doesn't develop into some sort of a legitimate expectation and whatever. I would support that, people should write about their complaints. I should also have written about it but I just continued in whatever work I'm doing. But, I would certainly support and endorse the suggestion.

Mogoeng: So you have been a judge for about four to five years, isn't it?

Vally: Yes.

Judge President Davis: Let me just clarify something, because you've raised it, if I told you, you had been a judge for two years and Judge President Mlambo did raise your name with some others, and at that stage I had enough judges, then the only other time that he has raised it with was in April this year and I immediately appointed you. Would you be able to say that was wrong?

Vally: No, that is exactly what I'm saying, it's a lack of info - that is why I said the issue is transparency. I really am not imputing bad conduct on anybody's part, I'm

merely saying what I know from where I saw it. Yes, if my name was up two years, it does indicate that the judge president in my division had discovered me and founded that I have the necessary skills and they have told me about it from then. It's nothing more I can say about it. What I am hearing from these exchanges is an excellent suggestion from Chief Justice that maybe I should write and maybe I can get an explanation. There is hope that there would be mitigation that would in some way assist in holding people back from being so aggrieved.

Commissioner Notyesi: Thank you Chief Justice. Judge, it would seem to me that you're aggrieved about the number of acting stints that you had been given to that court. The level of you criticising the system and also your insistence on this, am I right?

Vally: No, you are not, and I would like to apologise to anybody here who believes that I'm saying I'm aggrieved. I have identified what I thought was a weakness in the system. I have done no more than that and no less than that. I have been asked if "do I think that the system has built-in unfairness?" I've admitted that it does. I have been asked "what possible solutions could I suggest?" I tried one and accepted the one the Chief Justice suggested. I believe transparency is an important one that is about all I want this thing to be about. I don't want to see it going beyond that. There isn't any sufficient evidence on me to make any more determinative findings; there is just no sufficient evidence on me.

Mogoeng: Any other Commissioner with a question? I agree with you on transparency, there are issues, others are saying even the deliberations of the Commission must be opened up to the public.

Vally: Do you want me to comment on that?

Mogoeng: No, that was a goodbye remark.

Vally: Chief Justice, I acted for this body, I was an advocate for this body when those cases came up and I don't believe that kind of transparency is appropriate. I have put that in the affidavits that I drafted at the time, Chief Justice. I certainly don't believe in transparency for everything.

Mogoeng: You are excused Judge Vally, thank you very much.

Vally: Thank you very much Chief Justice, thank you for the opportunity.