



JUDGES MATTER

Judicial Service Commission interviews

4 October 2016, Afternoon session

Competition Appeal Court

Interview of Judge O Rogers

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Chief Justice Mogoeng: Good afternoon Judge Rogers.

Judge Rogers: Good afternoon Chief Justice.

Mogoeng: Let me afford you the opportunity I have afforded others why you? Take your time, why you?

Rogers: I am a very diligent person, I prepare very thoroughly for hearings. That means I can engage properly with legal representatives during a hearing, assist in focusing issues and it also assists me then to produce judgements promptly, which is something I do. Secondly, I believe I have been unfailingly courteous as a judge, I think courtesy with everyone one deals with whether it's the lawyers, or witnesses or court staff is absolutely imperative, I think it is an important judicial attribute and it enhances the esteem in which members of the public hold the administration of justice. Thirdly, in regard to appellate Courts, I think I am a good team player. I may not be regarded as the most sociable person on the bench, but I deal very easily with colleagues, I have very good relationships with them. In the nearly four years that I have been in the Western Cape High Court, I have not had a single unpleasant incident with any colleague, no bad relations. When I have served on appellant panels of the Western Cape High Court and in the Competition Appeal Court, I have always been able to deal easily with my colleagues, debate issues openly. I am not possessive about judgements if I am the draftsman, and take contributions and suggestions in very good spirit. If somebody else is the draftsman I convey my opinions in a way which I believe never gives offence and I do not try to imprint myself on somebody else's judgement.

Fourthly, in regard to the Competition Appeal Court, which is a specialist appellate tribunal, I think it is an important, or at least very useful attribute, that a Judge should have experience and expertise in Competition Law. I practised for some years when I was at the bar in the sphere of Competition Law. I acted both for the Competition Commission and for private firms in a number of large cases before the tribunal, and also in the Competition Appeal Court, and I believe I can bring that experience and expertise to bear if I were appointed to the Competition Appeal Court. I have also had now, some experience in sitting on that Court. I have sat in about eight cases I think over the last two or three years. I know Judge Davis very well and can work very easily with him. He actually lectured me at University and we had had a lot to do with each other even before I was appointed to the Western Cape Bench.

Finally, I think it is difficult just through self-discipline to carry on the work of a Judge. That can't always see you through. I have a very deep interest in the law and I believe a passion for the administration of justice and to see it upheld in the eyes of litigants, lawyers and members of the public,...I believe that has also played its part in enabling me to my work at least thus far to what I think is quite a high standard.

Mogoeng: Thank you Judge Rodgers. Judge President Davis?

Judge President Davis: Perhaps let me start-off by saying I certainly think you are being a bit modest in relation to the point about your collegiality. You have been a wonderful colleague to all of us on that Court. I want to start by asking you this: you are somewhat unusual in the sense that all the people that have come through, including myself for that matter, that you practised for quite some years in a number of very complicated, as I understand it competition matters, I think both for the Commission and on the other side?

Rogers: Yes

Davis: That included cases like the Mittal excessive pricing case, and I know you are smiling because we had a rather robust exchange in the middle of that, but the truth is that is so.

Rogers: Yes, I acted not in the tribunal in that case, but I was brought in as part of the team for Mittal in arguing the appeal. In the tribunal, one of my first cases was the liquor merger between Distillers Corporation and SFW at a time when I had to learn not only about Competition law but liquor, because I was a teetotaler then.

Davis: I can confirm that, after hours we've had a drink. Could I then also - the Sasol case, which is a second excessive pricing case - I know you could not sit in it because from my understanding is at some point you were actually counsel, you had given advice.

Rogers: Yes, I led the Sasol team until shortly before the hearing started in the tribunal, there was a postponement of the tribunal hearing. Between that time and when it came on in the tribunal, I was appointed to the High Court.

Davis: On one or two final questions from my side, I notice in the documents that you have put the McNeil case; you have mentioned that you have done a string of other cases for the Competition Appeal Court.

Rogers: Yes, I think of the eight cases in which I sat, I wrote four directly, I wrote most of the fifth and as you know you and I worked quite a lot together on the breweries case.

Davis: Yes that was a joint - and that case by the way is now effectively set the law for many questions as I understand it in abuse of dominance, vertical and horizontal to put it more accurately.

Rodgers: Yes.

Davis: Finally can I just ask you, your view about a specialist court and the issue of economics and its relationship to Competition law, and how you see that?

Rogers: I think one must draw a distinction between what can be regarded as the procedural or jurisdictional aspects of the Competition Act, and the substantive aspects. On the procedural and jurisdictional aspects, I think it is a fairly conventional process of statutory interpretation, and I think a distressingly large number of cases which have come to the tribunal and even the Competition Appeal Court have been concerned with those matters. When one turns to the substantive issues, the prohibited conduct and merger assessment, one is dealing with concepts which are far more pregnant with economic ideas because by the time our Competition Act for real - and I am talking about the 1998 Act - was drafted, there was a long history of jurisprudence in Europe and the United States and our draftspeople drew heavily on the evolving jurisprudence in those areas, so that when one talks about fixing a price or allocating a market in the case of collusion or when one talks about an excessive price being something which bears no reasonable relation to the economic value of goods, it is very difficult just to look at those provisions and say well I am going to give them their ordinary meaning, because they represent a tip of an iceberg of economic and legal jurisprudence spanning a good number of years in Europe and in America.

Commissioner Singh: Thank you very much Chief Justice. Just two questions. I see on my records here that you have three reserved Judgements. One on the 25th, the other 27 July and one on the 1st of August. Has there been any new information that you can give us?

Rogers: They were all delivered in the first half of September.

Commissioner Schmidt: Thank you Chief Justice. One of your articles attached where you make reference to in page 4 of the questionnaire in particular (c) it says; 'Silk: why it should go'. I remember you being asked extensively about it four or five years ago at your interview. Have you changed your view?

Rogers: I haven't changed my view, I think at that stage the Chief Justice said we shouldn't talk about it too much because I think there was still litigation ongoing there. I have lost the legal battle and the battle for the hearts and minds of people in

the legal profession. There seems to be no significant support for abolishing silk. So although my views have not changed, and interestingly in the context of competition law I personally regard it as undesirable that one should have a system, even worse one in which the President of the country is co-opted, which provides some sort of certification of the special merits of particular advocates when in all other professions and all other areas of economic activity, we trust the market to decide who they think is worthy of their custom. I see no place for it, but I have given up the fight.

Mogoeng: I don't see any smile on this side (laughter). Any other question Commissioners? Thank you very much Judge Rogers, you are excused.