



JUDGES
MATTER

Judicial Service Commission Interviews

07 October 2016 – Morning session

Eastern Cape Division of the High Court

Interview of Adv E Crouse

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Chief Justice Mogoeng: Good morning Advocate Crouse.

Advocate Crouse: Good morning Chief Justice.

Mogoeng: Are you well?

Crouse: I am well, thank you.

Mogoeng: I thought, since you were here previously, we were going to shoot straight to the point. But let's take it easy. What are your qualifications?

Crouse: I have a B Juris.

Mogoeng: From which university?

Crouse: From the Nelson Mandela Metropolitan University. It was then called University of Port Elizabeth.

Mogoeng: When did you acquire it?

Crouse: I sat for it from 1981 to 1983, but it was bestowed on me in 1984.

Mogoeng: Yes?

Crouse: I also have an LLB from the University of Stellenbosch. I sat for it from 1984 to 85 and it was bestowed on me in 1985.

Mogoeng: Yes?

Crouse: Unfortunately, that's as far as my academic qualifications go.

Mogoeng: What did you do thereafter?

Crouse: I had a state bursary. So I worked as a clerk for the Department of Customs and Excise for six months until there was a prosecuting position in Wynberg. So in about June 1986, I prosecuted until 1990. I then had the grand scheme that a mother shouldn't work. We had our first child in 1990, and I stayed at home until 1992. During that time, I did work at a homeless shelter, and I did pro bono work at the family advocate that was just starting. There wasn't a family advocate, so I went in once a week to read their papers and stuff. In 1992, I realised I wasn't a stay-at-home mother. I then went to do my pupillage.

Mogoeng: Where?

Crouse: At the Port Elizabeth Bar, Eastern Cape Society of Advocates. I stayed – I finished my pupillage and I commenced my practice. I started with criminal work because that is what I knew. It later progressed. At the time I left the Bar in 2004, I had a fairly substantial middle junior practice.

Mogoeng: Which areas did you pay particular attention to at that time?

Crouse: At that time, I was involved in divorces, in delicts, in contractual work. The State Attorney also gave me some water work to do and I must say that I found that most interesting. I would say that I had a very good motion court and civil practice at the time I left. Some of the juniors also asked me to lead them in some cases at that stage. In 2004, I then left the Bar. I started the High Court Unit at the Legal Aid South Africa. I was the first High Court Unit Manager to be appointed there. I was the High Court Unit Manager until 2009. During that time, I was primarily involved in the running of the High Court rolls and I must say that we – together with my colleagues at the DPP – we did an excellent job. In 2009, the Legal Aid South Africa created another post for senior practitioners who didn't want to go into management but court work and I became the senior litigator of the Eastern Cape. So my work was now broader than Port Elizabeth. It included the whole of the Eastern Cape, from Juventina on the Western side of the Eastern Cape until just after Mthatha, up to Natal.

My work is primarily – 15% has always been part of training, and the rest is doing physical cases. I do all full bench civil and criminal appeals which the Legal Aid handles. My work is to look for cases that impact on the lives of people, in order to see how I can change that. Currently, on a daily basis, between three and ten practitioners would ask me for advice and I would give

opinions on court work. My work is very much like that of a silk at the Bar and I must perhaps, I should also mention that in May last year, I was recommended for a silk appointment or nomination. I am informed through a question that was posed in Parliament that those applications are now with our President. That in a nutshell –

Mogoeng: They are now?

Crouse: With the President to sign off.

Mogoeng: Yes. And you have appeared all the way up to the Constitutional Court?

Crouse: Yes, CJ. I have appeared seven times in the Constitutional Court in six cases. I have appeared by myself, I wasn't led by a senior. It is daunting to appear before 11 clever people. I have also appeared in the SCA quite a number of times. On one occasion, I have been led by a senior, he pulled me in, but I didn't ask for his guidance.

Mogoeng: Very briefly, there was a stage when members of the public were not keen to be assisted by the Legal Aid counsel. But I have noticed that there has been significant change even in terms of the performance of lawyers who are permanent employees, so to speak, of Legal Aid South Africa. What explains the change? What explains the improvement? Very briefly.

Crouse: CJ, I think there are lots of checks and balances in place. Our performance is monitored on a regular basis. Each matter, each file is perused by a senior practitioner. I must say I have been extensively involved in training Legal Aid South Africa lawyers both in the Eastern Cape and in the Free State. And what I always say to my colleagues is that people that come to us are poor people, and by definition, poor people, in life, are not given choices. So when they come to us, they gain in their situation. They don't have a choice. So I encourage, and also my motto in life, I want to give them a better service than they would have when they pay for their own service. So the thing that I want my colleagues to do, which I dearly try to do is to uphold their dignity and make them feel that they are empowered by the service that we render.

Mogoeng: Yes. Very well. Deputy Judge President?

Deputy Judge President D. Van Zyl: Thank you, Chief Justice. Ms Crouse, Judge Van Zyl, the Deputy Judge President. Ms. Crouse, is it correct that you've been a candidate for quite a few number of occasions? Correct?

Crouse: A candidate for appointment?

Van Zyl: Yes.

Crouse: It's my third time that I am here.

Van Zyl: Third time. And this round you were also nominated, you accepted the nomination in Gauteng?

Crouse: No; I wasn't nominated. I've been acting in Gauteng and my home situation has changed to the extent that my husband isn't bound to the Eastern Cape. So I applied for the position. I wasn't shortlisted for Gauteng; I was shortlisted for the Eastern Cape.

Van Zyl: You accepted the nomination for Gauteng?

Crouse: Yes; I did.

Van Zyl: As you'll probably be aware, the office of a judge requires a lot of commitment from an individual. In fact it is a position that consumes your own life, so to speak. It requires dedication and commitment. And if you speak to any head of court, they will tell you that that is the type of judge they require – that they would like to see appointed. The other side of the coin is of course that the position also comes with financial perks. It gives you financial security. And experience has shown that if you choose the position for the wrong reason, that commitment is not there. And you have applied on several occasions and again, you have accepted the nomination. What is your motivation for having once again accepted the nomination?

Crouse: If I can perhaps deal with that in dealing with full characteristics I think I have, Justice Van Zyl, and then give you an example of why I say I have each of those characteristics. If I may do that, maybe I can answer your question better?

Van Zyl: Yes.

Crouse: My first characteristic that I think I have is I have the ability to understand law and legal principles and how to apply that in court. At this stage of my practice, I know what I don't know, and I think that's a good starting place. And I know where to get the answers that I don't know. An example of that is perhaps my reported matter of *Buchell v Anglin*. In that matter – that is a matter that has been reported, it's my only reported judgment as a judge in the law report. That was about private international law. And at the time that matter started was – I started hearing the matter, I knew nothing about private international law. If you look at the heads of argument that was presented to me on that *res novo*, it was a novel point. It hasn't been decided in our law as yet, about the conflict – which jurisdiction the delict of defamation should be heard in. The heads of argument didn't assist me. I had to research, do everything – mostly myself, totally myself in respect of the *res novo*, but heads of argument assisted me in other things. After I gave the judgment, Professor Tom Bennett of [University of] Cape Town wrote me an email saying that for 40 years, he had been waiting for such a judgment on the onus to start and on the choice of law. I think he was instrumental on getting that published because I

don't know how else it was published. Later on, after it was published, it was discussed in Forsyth's on International Law, and on academic – Obiter, an academic publication. And it was also quoted in a SCA judgment. So what I am saying is that I have shown that I can look at law and decide on those law. And I have now acted for 34 weeks all in all. None of my judgments has ever been on appeal – none of the appeals has ever been upheld. So that's my first characteristic that I wanted to deal with.

The second characteristic that I want to deal with is that I have a good work ethic and I work hard on a constant basis. On average a day, I work 12 hours – no, not on average; I don't work less than 12 hours a day. I work Saturdays. It's a matter of integrity I think that I work hard. I've never not finished work that was placed before me. I am quite sure you are aware in motion court in Port Elizabeth, you get a motion court matters on Thursday and you have Thursdays and Fridays to finish it. At the beginning of term and end of the term, at the time that I practice, the matters weren't limited. I remember once at the end of a term, there were lots of matters. And I remember, not as sometimes happens, that the judge says – well, I won't get to this, I am pushing this up. I finished each argument and I gave judgment in each of those matters. I think I finished at 5 o'clock on a Friday. So what I am saying is that I have a good work ethic. I have just acted in Mpumalanga. I did the criminal circuit there – and in that circuit you have a proper case as well as a stopper. During my time in the circuit, I finished all the proper cases before me as well as the stoppers and I still had a week left in which I could return to Pretoria, and I did a special motion and civil work at that time. I also understand that a judge should not pass work along to other judges. If you've read the file, you should preferably finish it. An example of this is when, in Johannesburg, unopposed motions, one of the fairly lengthy matters, counsel asked for a postponement to further file papers. I realised that it was important that further papers be filed for that purpose. But I kept the matter with me while I was doing the appeal and finished it while I was doing appeals. So I understand that judicial resources should not be wasted. So I am not the type of person that will pass along anything.

If I could then also – my third characteristic which I would like to refer to is my passion for justice. I've always seen the law as justice – I've always seen the law and justice as the same thing and that as a judicial officer, you could make a change in people's lives. The first example that I want to share with you, Judge Van Zyl, is that when I was a junior, I sat as an assessor for one of the senior judges. And during the trial, a child was clearly in need of caring and protection testified before us. And when the judge wanted this child to be left – to leave the witness box – I asked for his ear. And I explained to him; I reminded him that as the guardian of this child, he can't just let the child go. We need to get a social worker to look into this child's life. So that was before our [1996] Constitution. Our Constitution has made it much easier to protect the poor and vulnerable. If I can perhaps refer to my first case probably dealing with the Constitution was a matter in 1995 where I raised before Judge Nepgen the issue that a child's confession can never be proper without the assistance of his guardian. Now, today, it makes proper sense; at that stage it still didn't. And

the reported judgment is in the bundle, where I successfully raised that. And as a result of that, the practice of the then murder and robbery squad of just taking confessions without parents has ceased. Also, in the matter of Sarrahwitz [Sarrahwitz v Martiz N.O. and Another 2015 (4) SA 491 (CC); 2015 (8) BCLR 925 (CC)], in which the Chief Justice gave the judgment. The High Court and the SCA didn't assist in this point of protecting a vulnerable woman's right to have her home registered in her home. What was happening is that the trustee of the insolvent seller was trying to evict, and eventually we, I took the matter to the Constitutional Court where we eventually got justice for this woman. So that's my passion for justice.

And just lastly, the fourth characteristic which I would make – the reason why I would like to be a judge, which would make me a good judge – is my passion for training. At the Bar, I had a number of pupils. I've always been a mentor to other junior practitioners. Since, as I said earlier to the Chief Justice, I am constantly involved in training. 15% of my time is in training where I write training modules, where I do power point presentations, where I present them. On a daily basis, at least three practitioners in Legal Aid, throughout South Africa and outside South Africa, and also some magistrates would phone me for some advice. Some days, it is as much as 10 or even more that would phone me. I don't know all the answers; but I then look for the answers and give it to them.

Mogoeng: Before you proceed, Ms Crouse, Judge Van Zyl, you can indicate when you are happy with an answer. Otherwise you must understand she's at liberty to give you as much as she has, which could be the whole day.

Crouse: Could I just lastly say that when I acted, it was in Middelburg, two advocates appeared before me. It was the first appearance; it was a two-week matter – first appearance in a high court. Because I have this passion for training, I saw all the mistakes they were making. And after the matter was finalised, I invited them with the prosecutor and asked them whether they would like some trial advocacy training. And after the court case, I trained them for about five hours on trial advocacy. Thereafter, I emailed the power points to them. So at least they had a basis to stand on. I have trained extensively in the Education Department. I've trained in the Mental Health Board. I have trained family advocates. I have trained the regional magistrates. What I am saying is that a person that is passionate about training is also not a harsh judge because you understand everybody's learning and you are therefore kind to the people that you are training. I would say that's all my characteristics. I can promise you I won't be coming back here if I wasn't serious about this appointment.

Van Zyl: Another aspect I would like to raise with you is the following: you last acted in the Eastern Cape in 2008 as I understand it. Is that correct?

Crouse: That was my last four months. I had the Burchill matter that I had finished in April 2009 –

Van Zyl: When was the last time you were asked to act in the Eastern Cape?

Crouse: Last year, yes.

Van Zyl: Yes. You mostly appear in Grahamstown and Port Elizabeth. Is that correct?

Crouse: I think most of my work is done in Grahamstown and Mthatha, not Port Elizabeth, yes.

Van Zyl: Do you agree with me that the judges in those courts would be able to comment on your demeanour and your ability? Is that correct?

Crouse: I suppose so.

Van Zyl: Having seen you appearing before them?

Crouse: Yes –

Van Zyl: Ms Crouse, the issue with regard to your judicial temperament – being a judge requires a lot of patience in the first instance. There are a whole lot of qualities you have to have as a judge, one of which is patience. And the other two of course is to be able to listen to people – to listen to both sides. There are always two sides. Its inherent in our legal system that there are two sides and you have to be able to listen and consider both. Another quality that one should possess is the ability to treat people with respect – both litigants as well as your own colleagues, whether they are at the Bar or judges. It has been reported to me – and I am going to ask you to comment on this – that you have a tendency to get too personally and emotionally involved in your clients' cases. You lose perspective of your duty towards your client and also your duty towards the court in order to assist the court to arrive at a just and fair decision. And that when issues arise with you in court that you become quite belligerent and you are disrespectful. That is a matter which is of concern to me and to colleagues. Would you like to comment on that? Do you think you have the qualities to be a judge as afar as your temperament is concerned?

Mogoeng: Before you comment, is it fair to assume that you were favoured with these comments in advance?

Crouse: No, I wasn't. I am totally taken aback. I have appeared before Judge Van Zyl many times. I can't think of –

Mogoeng: These comments – were they sent to you so that you can prepare a response?

Crouse: It was not.

Mogoeng: So you are hearing it with us for the first time now?

Crouse: That is so, Chief Justice; and I must say that I am totally taken aback.

Mogoeng: I can imagine.

Crouse: Any person who has appeared before me – I have looked at the silks' comments on my email today. I have looked at the many judges who have said to me they are holding thumbs for me. I am totally taken aback by this.

Mogoeng: Why is she being ambushed like this, DJP?

Van Zyl: Chief Justice, I don't think it was my intention to ambush Ms Crouse.

Mogoeng: But the normal thing to do, knowing how terrifying an interview is, particularly for someone who has tried twice before but was not appointed. She's worried; she doesn't know what's wrong or what is perceived to be wrong. She deserves an opportunity to be told of the concerns against her in advance. You can just imagine how dislodging it must be. You come prepared thoroughly, all of a sudden, boom! 'This is what the judges have to say about you' – judges for that matter. Should this be allowed? I don't think that should be allowed.

Van Zyl: Chief Justice, I'll leave it there –

Mogoeng: You should have afforded her the opportunity

Van Zyl: I'll leave that with you if you think -

Mogoeng: Please –

Van Zyl: The candidate should have been given an opportunity before, so be it.

Mogoeng: Please.

Crouse: Chief Justice, I feel I should answer this. I think I should say –

Mogoeng: Well, if you are confident that you will do justice to this question, it is up to you. But know that you open yourself up to that. We will assess your ill-prepared answer to this well-prepared question. The choice is all yours.

Crouse: Thank you, Chief Justice. I must just say I am totally taken aback by that. I am –

Mogoeng: Are you leaving it there or you want to venture an answer? It's your choice.

Crouse: I can just tell you that –

Mogoeng: Well, are you answering? We are going to take that as an answer; we will accept that you are now happy that you are being asked now. It is up to you.

Crouse: Err, Chief Justice, I will let it be. Thank you.

Mogoeng: Proceed with other questions if there are other questions, DJP.

Van Zyl: Nothing else, thank you.

Mogoeng: Thank you very much. Premier?

Premier [of Eastern Cape, Phumulo Masualle]: Thank you very much, Chief Justice. Advocate, one of the critical issues of our time is the whole question of access to justice. An impression that justice is accessible to those well to do. What's your disposition on this, and also –

Crouse: Sorry Premier, I just missed your previous sentence that justice –

Premier: That justice is only accessible to the well to do. The poorer you are, the less access to justice. In a way, what's your sense – what's your disposition towards that, but also, as a judge, or potentially to be a judge, how would you contribute towards this restoration, so to speak, if necessary.

Crouse: Thank you Premier. Firstly, Premier, I have written an opinion piece with other senior litigators on that aspect, and we came to the conclusion that with Legal Aid South Africa, that is not mostly true because of the checks and balances that we've put in place. But I must also say that our Constitution means absolutely nothing – the rights in our Constitution – unless they are being – that have value to the persons. And I've seen in our rural areas that things are not going as they should. Its vast areas – I've just been to [unknown] that's in – you know in the Eastern Cape. I've just been four days there last week. And although we tried to get all the stakeholders together in to assessing the needs, especially of children there, it's still not there. And I am involved in an organisation called 25:40, we try in the rural areas to, at least, get to vulnerable children. So as a judge, I would still be involved there. As a judge, I would, if I am appointed, I would also keep on with my advocacy for constitutional rights. I do that as a matter of course. Thank you Premier.

Mogoeng: Thank you Premier. Doctor?

Commissioner Motshekga: Chief Justice, I heard Ms Crouse saying law and justice are one or the same. Is that correct?

Crouse: I was falling out of my words. I think that justice is higher than law. But you can use law as a tool to achieve justice.

Motshekga: I think that is very helpful. Because under apartheid, there were laws, and I was going to ask you whether those laws were the same as justice. But I think you have covered me. Also, under the current system, Parliament makes laws, I was going to say: are those laws the same as justice? And if so, why – is the judiciary allowed to strike down laws. But I think you have helped me.

Crouse: Thank you Doctor.

Motshekga: Have you heard about the maxim *Umuntu ngumuntu ngabantu*?

Crouse: [Shakes head].

Motshekga: Have you read any judgment which –

Crouse: Did you say *Ubuntu*?

Motshekga: *Umuntu ngabantu*

Crouse: Yes; yes of course, yes. I am sorry, I yes–

Motshekga: What does it mean?

Crouse: It means that you are a person because of the people around you. But I spoke to people the other day and I said *ubuntu* means more. My understanding is that you will protect the rights of others more than the rights of yourself.

Motshekga: You are right. Now, our three systems of customary law in the country – Roman-Dutch Law, English Common Law, and Indigenous African Law – do you believe that they are all equal in status?

Crouse: Our Common Law is protected in the Constitution as far as it gives our – the right to the judiciary to change it. But Customary Law is protected in the Constitution more than the others. I must say I haven't thought about it, but I would say they are all protected in so far as they are constitutionally viable.

Motshekga: Have you studied any indigenous African law or Xhosa Law?

Crouse: At University, we did customary law. I remember one of the *IsiXhosa* lecturers from the indigenous languages gave us a talk on how *lobola* negotiations went on and I was fascinated by that. I have appeared before Justice Maya in a customary marriages act, I have written pieces on the marriage regimes applicable in the Transkei in respect of statutory – civil marriages as well as customary marriages. I have addressed, traditional leaders, as well as communities on the new –

Motshekga: I am happy with your answer.

Crouse: Thank you.

Motshekga: And I was impressed by the fact that you could deal with private international law, which you had not studied.

Crouse: Thank you.

Motshekga: Which means you are a good researcher, and therefore if a matter comes before you involving customary law, you would be able to research it.

Crouse: And I have done so. And I must say, Doctor, if I may that my Xhosa speaking colleagues in Mthatha often ask me to discuss these matters with them.

Motshekga: Thank you.

Crouse: And I have done that; thank you.

Motshekga: Thank you, Ms Crouse.

Commissioner Masutha, Minister of Justice: You alluded to a matter where you had to do a *res novu* in relation to a delict. Was this a civil delictual claim or was it a criminal defamation case?

Crouse: Minister, it was a civil defamation case, coupled with some other civil matters as well.

Masutha: And you are saying specifically the *res novu* related to jurisdiction?

Crouse: Choice of law, yes.

Masutha: That's the part I am particularly interested in. What's the – what were the jurisdictional circumstances involved in the issue?

Crouse: What had happened – it was a farmer in the Eastern Cape that had a hunting outfit, and his clients would all be sourced from America, from Nebraska to be specific, from America, but they had big conferences in Nebraska. And the American defendant had, in writing and verbally, made defamatory allegations in America, which had an effect on the business in South Africa.

Masutha: And how did you eventually resolve that? I suppose you used comparative law as well? I am just trying to get a sense of – where did you draw your legal resources to resolve the dispute?

Crouse: I had a lot of regard to international law. I looked at the English – I think my judgment also deals with the English way of handling it and the American way of handling it. And then I came to the conclusion that it was the Nebraskan law that was applicable, but only in so far as it passed constitutional muster in South Africa. Later on, we then dealt with that. But as you know, foreign law is deemed to be the same as South African law unless parties, by way of experts, prove the difference. So at the end of that big matter was that I used South African law to determine defamation.

Masutha: In fact, don't they use the Common Law in America as well? I suppose you are [indistinct] confirmed that aspect as well.

Crouse: Minister, it was some time ago I wanted to read the judgment again. I think I glanced through it.

Masutha: It's just a question in passing, you don't need to pursue it. I was fascinated, and this comes into the picture as well, as Professor Motshekgha indicated, in what seems to be your exposure to diversity of sources of law, I mean an example of your exposure to comparative law. And earlier on, you told us about how you have dealt with various aspects of South African indigenous law. Are we to draw from this as truly anecdotal or is it something worth us taking serious consideration of – and that is that you are a lawyer or has been exposed to different sources of law and applied them? And that gives you legal experience and level of diversity?

Crouse: I would like to say that is true – that I have that.

Masutha: I see. Tell me something about the transformation of the profession in South Africa. Would you, or would you not agree that 20 years into democracy, our profession – the legal profession generally – remains largely untransformed from a racial and gender point of view specifically?

Crouse: I – I am not sure, Minister; when I started at the Bar many years ago, I was the only woman there. And now in court, sometimes the judges are women and all the parties are represented by women. I think that is changing. I don't think there are enough senior women around. I don't think there is enough – let me rather start at the positive side. In an organisation like Legal Aid South Africa, I feel we are transformed and we have great regard for the diversity in our organisation. I think the things that I have learnt from my senior Xhosa speaking colleagues have enriched my life tremendously. At the same time, there are not enough senior black practitioners in our courts, I think, and that needs to change. An organisation like Legal Aid South Africa, I think, is changing those perceptions. That's my take on it.

Masutha: Well, I suppose Legal Aid as an institution has itself played a significant role in injecting a lot of the transformation in the profession itself. But let's talk about the period prior to your joining Legal Aid South Africa. Have you personally, in any way, contributed towards the change of that landscape, given

the fact that, as you put it, when you started, you were the only woman there? Did you ensure, when you were in private practice, that more women came in? And what about blacks?

Crouse: Minister, I must concede that I didn't do much in getting women and black practitioners into the Bar. But once they landed there, I think I have fully supported – at the stage when I did the State Attorney's work, the perception was that if you want to appoint a junior, they are not going to pay for it. So you had to give part of your fee – you would ask for the whole fee but then say this third part must go to my junior and then you appoint a junior. In all the matters that I could, I have appointed a junior – I have appointed either a black or a female, no, no. I've not appointed only a female; it was a black female that I appointed. In all the matters where I acted, I had given away a third of my fee and acted with a junior. One of the matters I finished after I was at Legal Aid South Africa, and I remember the emotion when I went into his office to consult and he gave up his seat for me. It was a very emotional moment for me.

Commissioner Notyesi: You mainly appeared in Bisho and Mthatha?

Crouse: No, I very seldom appear in Bisho, but I do appear there from time to time, mainly appearing in Grahamstown and Mthatha.

Notyesi: And you don't often appear in Port Elizabeth?

Crouse: I appear in Port Elizabeth, but most of my work is in Grahamstown, and then Mthatha, and then Post Elizabeth, and then Bisho.

Notyesi: You will agree with me that it is a constitutional obligation that the Bench should be reflective of the society in terms of demographics?

Crouse: Absolutely.

Notyesi: Do you know how many judges currently are in Port Elizabeth?

Crouse: Yes, there are six as far as my understanding is.

Notyesi: In fact seven – generally. Alright.

Crouse: I counted it three times and I only found six. I am not sure which the seventh one you are referring to?

Notyesi: No; you are right. They are six but the seventh one is the commissioner. Right; in Bisho, currently we have two white male judges, and two female white judges –

Crouse: I thought there was only one male judge –

Notyesi: Port Elizabeth! I am talking about Port Elizabeth.

Crouse: Oh Port Elizabeth, yes.

Notyesi: Port Elizabeth we have two white male judges, two white female judges, one Indian judge, and one black male judge. If you are appointed to that division, you will be the third female judge.

Crouse: Yes. The third female or the third white female?

Notyesi: Both.

Crouse: You want to say both?

Notyesi: Yes.

Crouse: Thank you Commissioner. Yes, that is absolutely so. But the Eastern Cape Bench is a Bench that whether you are in Port Elizabeth, you are acting in Mthatha, and whether you are in Mthatha, you are acting in Port Elizabeth, so the Bench is one. And from the 27 judges currently, only eight, only nine are female. The rest are not female. But if I may just say in so far as Port Elizabeth is concerned, this Commission appointed four black practitioners to the Port Elizabeth Bar, to the Port Elizabeth judiciary. Two judges that were black judges swapped with two white judges. If – maybe I should tell you which ones: Judge Goosen and Judge Makaula changed. Judge Makaula was appointed there. Judge Beshe was appointed there and she and Judge Revelas changed. So I hear what you are saying. But should I be penalised for that change?

Notyesi: No, no, no. You see, your problem is that you don't stick on questions that are being asked and simply answer those questions. I did not talk about any appointments. I was just reflecting on how that division of the Eastern Cape currently is composed. I was just reflecting on that.

Crouse: I agree with you on the reflection.

Notyesi: Yes. Now, my next question would be: having said – I mean indicated your commitment to transformation and your desire to ensure that – your evinced determination that we must accelerate transformation in the Bench, if now, at this stage we make additional appointment of judges from a group that is already over represented in the branch, would that advance transformation in your view?

Crouse: Are you saying that my being a white practitioner or being a woman practitioner?

Notyesi: In either way – whether as a female or as a white practitioner – currently as reflective of the demographics as reflected in that branch. Your appointment right now would be consistent with advancing transformation?

Crouse: Commissioner, in so far as being a woman, it would – it would help to transform – it is only two women judges there. So in so far as I am being a woman, yes. As far as I am a white person in Port Elizabeth, no. But in so far as the demographics of the whole of the Eastern Cape Province, I can't do nothing about either my race or my gender but that being so, I think that my heart is transformed enough to make a difference.

Notyesi: Thank you. Now, let's revert to the question of the application of the customary law that you were asked – about the indigenous law. I didn't get your answer properly because you seem to be suggesting that it is– are the courts obliged to apply the constitutional law?

Crouse: Of course

Notyesi: Or they can apply the constitutional law?

Crouse: Of course. That's the highest law of our country. Of course they must apply constitutional law.

Notyesi: Yes. And you also said you have been involved in writing or being advising about marriages in Transkei.

Crouse: And on something that I've only learned the last two years – that was customary adoptions. That was something I didn't know; but I have done a case and an opinion on that as well.

Notyesi: Now, it often arise that black South Africans, they would first marry in customary law, complete a marriage there; but for other reasons, like their Christian beliefs, their religious beliefs, or a desire to have certificate, they will immediately conclude civil marriages – that they would go to a church and conclude a marriage means that they would be in a – they will be partners at the same time in two marriages– that is marriage under customary law and civil law. What do you think – which of these marriages should be given preference, in case of dispute?

Crouse: There was a recent case, I think in the Eastern Cape where it was raised that if you want to get divorced, you should be divorced on both civil and customary marriage. If I understand the judgment correctly, and if I remember it now correctly, the judge said no, it's only the civil marriage that was then ended. I need to look at what would happen if it's the other way round but I think it would still be the same. It's only one marriage.

Notyesi: Which one?

Crouse: Either one. It's still one marriage and in terms of our law, even a customary marriage must be ended by a court case. You have to ask for a

divorce at a court. So that is a difficult question that has come to the fore, and I must say that I would like to consider it fully.

Notyesi: Can you speak any of the languages that are generally used in the Eastern Cape other than English and Afrikaans?

Crouse: Mostly in the Eastern Cape, it is IsiXhosa.

Notyesi: Yes.

Crouse: I know words and phrases. I would be very careful to use that as an expression of myself.

Notyesi: Do you agree that language has an impact on the legitimacy of the adjudication process?

Crouse: The language which is used in court?

Crouse: Yes.

Notyesi: And do you accept that generally, practitioners and judges – it is advisable that they understand the language of the area in which they are practicing or be appointed?

Crouse: Of course, Commissioner. Yes.

Notyesi: Lastly, let's talk on the Constitution. A question was previously asked from you in your previous interviews that if Parliament in its own wisdom says with a majority that it wishes to amend the Constitution, particularly – let's say they want to amend section 2 of the Constitution, would they be entitled to do that?

Crouse: I would submit not.

Notyesi: Let's say they have 75% or 85% majority and say: 'we want to amend this section'?

Crouse: I would still say no.

Notyesi: Why not if they have the majority, they are amending the Constitution, which has provisions for them amending the Constitution?

Crouse: Because –

Notyesi: The Constitution prescribes the manner in which it can be amended. And yes, Parliament has majority – more than 2/3 majority. Why must it not amend the Constitution if it so wishes?

Crouse: Yes, Commissioner, they can amend, but it would be an unlawful amendment of the Constitution because of section 8 of the Constitution.

Professor Ntlama: Can you link this face to wherever?

Crouse: Can I –?

Ntlama: Can you link this face?

Crouse: I can't even recognise my own children on the sports field, so *[laughing]* please excuse me, I cannot.

Ntlama: Its ok. Relax. You've been appointed as an adjunct professor?

Crouse: Yes.

Ntlama: And in that position, you've published – in fact you are one of the contributors to a book?

Crouse: On constitutional law, yes.

Ntlama: On introduction to human rights law.

Crouse: Yes.

Ntlama: The second edition of that book.

Crouse: Yes.

Ntlama: Let me just say, both editions of that book, chapter 24 of that book, the name that you see being referred to there is me. My question is: what is the impact of publication for social change? Because I've seen that you've also published in other journals as well.

Crouse: It's very good to have a debate. I think it is necessary, if there could be an exchange of ideas. Sometimes when you hear an idea for the first time, you think it's not for you. By the time you hear it the third time, you realise the merit in that. If I had time, I would have published more, I think, but it's very difficult to publish. But yes, of course it is important.

Ntlama: What qualifies you as an adjunct professor?

Crouse: I can't tell you that. What happened, I think how this came about was that in the matter of - in one of the Constitutional Court matters, the one on strict liability, my junior was an advocate from Mthatha and he had a problem the day of the hearing. He could not go with me. I needed an expert with me, so I asked

Professor [indistinct] to accompany me to the Constitutional Court because it was short notice – it was few days. And at the hearing, Justice Moseneke – we lost that case; no, that was another case. In any case, Justice Moseneke said to me while Professor [indistinct] was recording it: ‘every time you appear before us, your work is of a high quality and we enjoy your research.’ And I think that opened some door because I am not an academic. I don’t think I’ll ever be an academic. I don’t think I am clever enough. So it was just by fluke that that happened, and I think that’s the reason how it happened.

Ntlama: Let me follow up on that one. I am a professor of constitutional law, and my follow up as well is on the question that was asked by Commissioner Notyesi on whether Parliament has a right to amend section 2 of the Constitution. So as a judge, we have section 74 of the Constitution that gives Parliament the right to amend, as long as they had the majority. But your answer is of course they can but it will be unlawful. Why would it be unlawful if the Constitution says section 74 grants that authority to Parliament. So should we be very concerned as this institution that the interpretation of the law or how you interpret the provisions of the Constitution will be suspect?

Crouse: I would submit not. Our Constitution section 8 says that this Bill of Rights is – the legislature is subject to that, and – I am not sure whether you are asking me about separation of powers at this stage, but I think that you can’t do – whether as the legislature or the executive – you can’t do unlawful acts. Okay, the court has the ability to, err, it could go to the Constitutional Court and I doubt if the Constitutional Court would leave that unturned.

Ntlama: Okay, let me take you on this: we have section 74 Bills, 75, 76, and mixed bills. So Parliament has the right to amend this Constitution.

Crouse: Yes, of course.

Ntlama: So are you saying with confidence that Parliament cannot amend the Constitution itself?

Crouse: No, not at all. I think there has been 18 amendments already. No, not at all. I am not saying that they are not allowed to do unlawful amendment of the Constitution.

Ntlama: But what we are saying is section 74 – that’s what I am putting to you – section 74 of the Constitution. You have it. Look at mine. It’s very old. Bills amending the Constitution – its section 74, section 75, section 76. Those are the types of amendments where Parliament is given that authority to. Are you saying that Parliament cannot amend section 2?

Crouse: Yes, of course they can amend section 2.

Ntlama: Excuse me?

Crouse: Of course they can amend section 2.

Ntlama: Of course they can amend now?

Crouse: It must still pass the test of whether it was a lawful change. That's the only thing I am saying. Of course they can amend, but it must be a lawful change and the Constitutional Court would be able to judge whether it is a lawful change or not.

Ntlama: Advocate Crouse, this is the context within which we are asking this question: that Parliament, within its powers, not because it is unlawful –

Crouse: If it is within its powers, of course it is possible –

Ntlama: Yes. This is the context where we are asking you that Parliament is passing this law lawfully and –

Crouse: Yes of course. I think Commissioner was referring to whether they can pass the law that section 2 is taken out of the Constitution. And that the Constitution will no longer be the supreme law of the land. That's how I understood the question.

Ntlama: Let me leave it there. One other question which I would love to follow up: you made reference to the fact that civil law may trump customary law when it comes to dissolution?

Crouse: No, I said there's only one divorce. Sorry Commissioner. If you married in two ways, the current court case that I am aware of is that there's only one divorce even if there are two marriages – a customary law and civil law.

Ntlama: So do you mean that there is a co-existence of marriages?

Crouse: Sorry?

Ntlama: Do you mean that there is a co-existence of marriages?

Crouse: I am sorry I don't understand the question.

Ntlama: If you are saying that in civil marriage there's only one system, what I am asking is whether customary law marriages do not have a constitutional existence –

Crouse: Of course it does –

Ntlama: Over civil marriages, if you say that civil marriages that will be considered.

Crouse: The court case that I am referring to, Commissioner, was – and this is the question that I am not sure whether is answered in our law yet – is if there are first a customary marriage and then a civil marriage and the parties want to get divorced, that the court case I am aware of, and if I interpreted it and remember correctly, was to say there's one divorce and a civil divorce. So your customary marriage is not surviving once you have asked for a civil law divorce. And in any case, customary marriage can only end in divorce now through the courts.

Ntlama: That is what you are saying. Okay, in the interest of time, let me leave you there.

Crouse: Thank you.

Ntlama: We will talk about it at home.

Commissioner Schmidt: Advocate Crouse, you were at the Bar for approximately 12 years before joining Legal Aid. There seems to be, I read some form of concern. What particular reason did you join the Legal Aid after being at the Bar for 12 years?

Crouse: It was for two reasons. Legal Aid South Africa was clearly getting their house in order and they were clearly protecting poor and vulnerable persons. The other reason is that I was working 18 hours a day. My children were teenagers at the time and I needed to spend a little bit more time. So it was a win-win situation for me if I helped out poor and vulnerable people.

Schmidt: So you were concerned that it wasn't to do with the viability of your practice –

Crouse: No, no, no. My practice was strong and I think I left some place for others to fill at the Bar.

Schmidt: The other thing that raises some bit of concern – not a concern but a question mark – is, you acted on the Bench for the period 2007 April to June, July 2007 to August, and then of course January to February 2008 whilst you were a High Court Unit Manager, which is more administrative. Am I right or am I missing the point?

Crouse: High Court Unit Manager was a dual position. You would do high court work and manage. In fact, I did quite a number of cases while I was a high court manager but that's the perception that it is more administrative. And your question? Sorry, I got side-tracked.

Schmidt: The question basically is that there seems to have been a period since 2008 where – you only actually acted in 2015 – approximately seven years after

becoming a senior litigator. So there seems to be a break – any – would you like to comment on that?

Crouse: Yes; at that stage, I understood the Legal Aid South Africa policy to be that you could act for three months in five years. That policy has been changed now. And also, you probably know that you are only asked to act. You don't present yourself for acting positions. That's the reasons I can think –

Schmidt: Because your acting stints seems to be in two time periods. The one is 2007 - 2008; 2015 - 2016?

Crouse: Yes. The policy has now changed that you can act for a longer period now with a shorter break in between, as I understand it.

Commissioner Mlambo (Judge President): Thank you very much, Chief Justice. Advocate Crouse, I just want to get a feel of your experience when you were acting. I think you stated that you've acted for a total of 34 weeks in the two divisions – Gauteng and the Eastern Cape. Is that correct?

Crouse: Yes. Thank you, Commissioner.

Mlambo: What work did you do? In fact, let me state this: in Gauteng, you only acted for a total of nine weeks in the civil section. Am I correct?

Crouse: That is so.

Mlambo: The other ten weeks was the criminal circuit?

Crouse: That is so.

Mlambo: Where you said you finalised all the trial-ready matters available in stopper cases. How did you achieve that? Because judges struggle to finalise their trial-ready matters, let alone when you act in stopper cases.

Crouse: JP, I've learned a trick when I acted, and I think all judges do this, but I don't leave court at the end of a court day without making summaries of what the witnesses say and in evaluating that. So I don't sit with a problem I don't know what is going on in the case, and you can give better direction also when you do that. Maybe I was lucky, but I worked very hard to make sure that that would happen.

Mlambo: Part of that acting stint was in Kwaggafontein. I think it is also referred to as Mkobola.

Crouse: Yes.

Mlambo: You remember me telling you that you made history? That you are the first judge to sit there – ever? Because it was a new circuit I had established in Mpumalanga?

Crouse: It was a wonderful experience, JP. I might also say that I made history because it was – I heard the first urgent application in Middleburg for that circuit. So it was – sorry it was in Ermelo – because the civil circuit had just started when I started.

Mlambo: Let's come to the civil work you did in Johannesburg. Am I correct that you did two weeks in the criminal and civil appeals? You did a week in the opposed motion court? You did two weeks in the unopposed motion court?

Crouse: Yes.

Mlambo: And you did three weeks in the civil trial court?

Crouse: That is so.

Mlambo: And you finished your circuit roll a week earlier, and you offered your services to DJP Ledwaba in Pretoria?

Crouse: Yes; and I did a special motion that was set over two days.

Mlambo: So when he called you, you did a special motion?

Crouse: Yes.

Mlambo: Now in the Eastern Cape, what did your acting stints cover?

Crouse: I had three weeks of criminal appeals. I had 13 weeks of civil trial. I had – in the Eastern Cape, we don't differ between opposed and unopposed motions, so that's four weeks of motions, and I had two weeks of a criminal trial.

Mlambo: Okay. And you last acted formally in 2008, and you were never invited again?

Crouse: That is so, JP.

Mlambo: Alright. When you finished acting in the civil side of Johannesburg of the Gauteng Division, did you have any reserved judgments?

Crouse: No, no JP, I didn't.

Commissioner J. Malema: I just want – I am worried that this question of the Constitution, you canvassed it in the last interview with Advocate Semanya and

it looks like we are not arriving at a common understanding. What is the supremacy of the Constitution?

Crouse: It means that that is the highest Act in South Africa and that all conduct and other laws will be subject to that.

Malema: And what is parliamentary supremacy?

Crouse: Parliamentary supremacy was part of what we had in 1994 when Parliament could make laws and judges applied it without interpreting the law.

Malema: Now, if we want to change chapter one of the Constitution from supremacy of the Constitution to parliamentary supremacy, what will it take? Because remember the Constitution is not bible. Don't treat the Constitution as if it is a bible. It is not a bible. It is a working document that we can change. Do you agree that we can change the Constitution?

Crouse: Commissioner I agree that we have changed – or Parliament has changed the Constitution.

Malema: So what would it take to change from a supremacy of the Constitution to a parliamentary supremacy? What are the practical steps that we need to do since we now agree that it can be done?

Crouse: No, no. I never said that it can be done. Sorry.

Malema: It can't be done?

Crouse: I don't think that it can be done. I think that –

Malema: No, it might not be –

Crouse: As it stands, it doesn't allow for it to ever go back to that because we have the power of the Constitutional Court to oversee certification of the Constitution. I would perhaps need to properly do a – I say second year students and candidate attorneys should perhaps give an answer – but my prima facie view at this stage is that it can't happen.

Malema: So are you saying – sitting here – you want to be a judge and you are telling me the Constitution cannot be changed?

Crouse: No, Commissioner. I've never said this.

Malema: What are you saying?

Crouse: I am –

Malema: I am saying to you: tomorrow, we are going to change this Constitution to a parliamentary supremacy?

Crouse: And that decision of Parliament will then be subjected to our Constitutional Court scrutiny if it is brought to the Constitutional Court. And my prima facie view at this stage is that it wouldn't hold water. Or I pray that it won't hold water.

Malema: Which Constitution would the Constitutional Court be using because we would have amended that Constitution already? And they must use the amended Constitution to judge whatever case before them? They don't make the Constitution?

Crouse: No, they – I beg to differ. I am sorry.

Malema: Oh, the judges make the Constitution?

Crouse: Sorry?

Malema: Is that what you are saying – that judges make the Constitution?

Crouse: No; I am not saying that – really I'm not saying that -

Malema: No we – and that's where we are going to fight with you big time. Because now you are interfering in the powers of another sphere of the State. We who have the power to amend the Constitution, we amend the Constitution and judges must use the same Constitution to determine if what we have done is constitutional. Which Constitution would they be using because it is amended?

Crouse: Commissioner, I think that they would use the first Constitution to determine whether that change is constitutionally viable. I am sorry that we have to differ about it. But I hope that you don't have any plans to change to a –

Malema: No, no. You see, that's your problem: you are addressing fear. You are not addressing principles.

Crouse: [*Laughing*] No; I am sorry. I am addressing principles –

Malema: Because you must not be overshadowed by – overwhelmed by emotions. I know it's a scary thing, especially when it is said by me: that we will move from constitutional democracy to a parliamentary democracy. But all I am saying is that we ought to agree that a constitution can be amended.

Crouse: I've got no problem with that.

Malema: And whilst that constitution can be amended through meeting the requirements of that constitution amongst others, 75%, it is done; it is correct; there's nothing more left.

Crouse: So Commissioner, if I understand you correctly, you said when Parliament has changed the Constitution, all hands of court are off? That's what you are saying?

Malema: Once we have amended the Constitution, there's a new Constitution.

Crouse: I –

Malema: And then you are going to have to, moving forward, interpret every law based on that constitution – the new one. Because if that was the case, then the judges would have to use the apartheid constitution to determine the current matters before them. Because you seem to be saying to me: even if we adopt the constitution through proper process, we are still going to have to use the previous constitution before the adopted one. It means you can use the apartheid constitution to determine the current matter now because there is a new constitution before you – whether you like it or not. It is here; it has been passed through a proper process. You can't use any other law.

Crouse: Commissioner, I think we would have to agree to disagree on that aspect. I am sorry but maybe the courts will give us a clearer answer if that were to happen.

Malema: Alright; thank you.

Mogoeng: Thank you, Ms. Crouse. You are excused.