



JUDGES  
MATTER

## Judicial Service Commission Interviews

07 October 2016 – Morning session

Eastern Cape Division of the High Court

Interview of Mr T Malusi

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Chief Justice Mogoeng: Good morning Mr Malusi.

Mr Malusi: Good morning Chief Justice and honourable commissioners.

Mogoeng: Are you well?

Malusi: I am well; thank you, Chief Justice. How are you?

Mogoeng: I am very well, thanks. Just, in your own words, bearing in mind what transpired previously, just tell us [about] your readiness for appointment now.

Malusi: Chief Justice, the main issue when I was last here was the issue relating to the delayed judgments. To be frank and honest, I should thank the Commission because I am the better for it. What had transpired is that I went back to the Eastern Cape. The Judge President offered me further opportunities to act. When I got there to act, most of the judges there – because they held the view that my difficulties with the delayed judgments were neither due to incompetence nor indolence, just about everyone came to assist, to say that it would be best if you approached it this way: what works for me is this; what works for me is that. I gained incredible experience. With respect and humility, I believe I am a better person now. The judgments are delivered on time. I was acting this past term. As I speak, all the judgments from the term have been delivered, Chief Justice.

Mogoeng: And there is no problem that could impact negatively on your prospects of appointment?

Malusi: Chief Justice, a matter came up. After the shortlist, and the shortlist was publicised in the local papers in the Eastern Cape, the Commission has received a complaint. But this complaint relates to a matter known to this Commission.

Mogoeng: Yes.

Malusi: I am an officer of the court and an attorney.

Mogoeng: Maybe you could start off by just saying: this is the complaint; this is my response. You know it, I am sure.

Malusi: Chief Justice, the complaint relates to the civil matter, which I have disclosed to the Commission when I first came here on the 8 October 2014. When I next came on the 15<sup>th</sup> of April 2015, Commissioner Singh – because he didn't see that civil matter – asked pertinently, what had happened to it and I addressed the Commission then. The complaint is that the plaintiff's representative in that matter, he has set out his case as he testified in the civil trial. What had transpired is that the matter went on trial. The Regional Magistrate who heard the matter delivered the judgment. He gave absolution from the instance, effectively saying I did not need to testify on the complainant's, on the plaintiff's own evidence. She was not satisfied that a proper case had been made out. The judgment was delivered on the 27<sup>th</sup> of October 2014. The complainant sat on it for nine months. On the 2<sup>nd</sup> of July 2015, he noted an appeal. The appeal was only heard on the 17<sup>th</sup> of July this year. The learned judges delivered their judgments on the 27<sup>th</sup> of July this year, effectively saying that the Regional Magistrate had used a wrong standard to grant absolution. The matter must go back to the Regional Court and proceed from there. That's the essence of the appeal. The plaintiff in that matter wrote to this Commission to say in his view, I cannot – or I should not be appointed because of this pending matter, which I differ significantly with the plaintiff, Chief Justice.

Mogoeng: Deputy Judge President?

Deputy Judge President Van Zyl: Good morning, Mr Malusi.

Malusi: Morning, Deputy Judge President.

Van Zyl: Mr Malusi, I see you've acted in Port Elizabeth, as I understand in the last term. Is that correct?

Malusi: That's correct.

Van Zyl: Do you have any outstanding judgments?

Malusi: No; I do not, Judge.

Van Zyl: Just to confirm that I have spoken to the senior judge who has confirmed that your last three judgments were handed down last week. As I understand it, your outstanding judgements? Is that correct?

Malusi: Yes, that's correct, [Deputy] Judge President.

Van Zyl: Yes; an issue which I have to raise with you, Mr Malusi, concerns the civil case that you've just addressed. I'll tell you what – the concern is that in light of the appeal, the matter now has to go back to the Magistrate Court for the trial to continue as I understand it. And it seems to me if I read the papers, which I have been given, is that the issue between you and the plaintiffs in that matter are of a nature which would require the magistrate to make factual findings, which may involve credibility findings. And it seems to me that the crux of the dispute is as to whether or not the plaintiffs negotiated with you with regard to a contract, which they allege – which they say exists. That being the case, and the magistrate being required to make credibility findings, don't you think that is a matter that should be of concern; that would impact on your integrity. Would you like to comment on that?

Malusi: Thank you, Deputy Judge President. Indeed, it is expected that there would be credibility findings because the version they are presenting to the court and the version I am presenting are mutually destructive. Unfortunately, I am precluded by the Sub judice rule from discussing fully the merits of the case. I can only say the Commission can get an idea from the fact that the Regional Magistrate granted absolution from the instance without me having to testify. I am not concerned at all that there may well be or there is a probability that there is going to be a credibility finding against me. The High Court that heard the matter made the ruling that the wrong standard was used – that this is not the time to make a credibility finding against the plaintiff's witness. That was the main issue.

Van Zyl: Yes, thank you. The other issue that I want to raise with you – your practice as an attorney is based in East London?

Malusi: That is correct, Judge.

Van Zyl: Your wife is also an attorney in the same practice. Am I correct?

Malusi: That's correct.

Van Zyl: If you get appointed to Bisho, the fact that your practice is situated in, and you are obviously residing in East London won't pose any difficulties.

But if you were to be appointed in Port Elizabeth, do you plan to relocate to Port Elizabeth? Isn't that going to create difficulties for you, seeing that you would leave behind your wife and your practice? What exactly are your plans? I will tell you the reason why I am raising this is that we very often – unfortunately in the Eastern Cape, the courts, judges are very quick to take appointments to a certain station while living somewhere else. And it creates problems. Judges tend to want to start their weekends early and tend to arrive late on a Monday. And it is caused by, exactly by that problem. How do you, if you are appointed in Port Elizabeth, how do you intend to address this matter?

Malusi: If I were to be recommended by the Commission to the Port Elizabeth post, without sounding presumptuous that I am making assumptions out of the Commission, but it's a matter I discussed with my wife. We had agreed that we will have to relocate to Port Elizabeth. Without making light of the situation, in the last couple of weeks, she's been telling me about the house prices in Port Elizabeth; what are the better suburbs there, that sort of thing. So it's a decision that I have discussed with her. She is agreeable to it, and arrangements have been made with a colleague of hers for her to resume her practice in Port Elizabeth. But as I say, Deputy Judge President, I would be misleading the Commission to say absolute decisions have been taken. If the recommendation comes, it is a possibility we have considered. I certainly will relocate.

Premier Phumulo Masualle: You did say that as an officer of the court, you've got certain responsibilities certainly and I am just pursuing the question the Judge President has made on this matter, which again, you cannot be able to speak on it in detail. I am trying to think this body is – should be somewhat in an invidious position, having to consider and make a determination whilst there is a matter that is pending, so to speak. If you were to put yourself in the shoes of the Commission – I know it's a bit difficult in that you are an applicant – what can you say to allay the fears, if there are?

Malusi: Thank you, Premier. Premier, my view is obviously a biased view because I am an involved party in the matter. But my view is that the matter has been before an independent tribunal. A procedural error has been made – as found by the High Court – but on the facts, on the merits, without me getting into the merits, I can assure this Commission, Premier, that on the merits, there is absolutely nothing -

Premier: Alright –

Malusi: The one concern is as raised by the Deputy Judge President, is that it would impact on the judiciary if a credibility finding were to be made against a sitting judge in a court of law. That I accept. But all I am saying to this Commission, with respect, is that that is a possibility because I am a defendant in the matter. But when we now look practically on the issues involved, the fact that the Regional Magistrate, without even hearing, made

this determination, I would say the Commission ought to take comfort from that.

Premier: My last question would be to do with a – really a view that exists out there about access to justice. I am happy about the matter that was raised before about delayed issuing of judgments has been attended to. But generally, the notion that justice is accessible to only those who are well to do, is it – does it hold any merit with you? Can you comment on that, and if so, what would you do – what is your contributions in creating conditions for greater access to justice?

Malusi: Premier, the issue of access to justice in our country is a valid concern. There is access in the sense that we are a fully-fledged democracy. People are free to vindicate their rights in courts of law. The government have gone a long in making sure that courts are available in all areas of our country. But a creeping problem is that it is becoming prohibitive for ordinary litigants to vindicate their rights in court. It is an issue that has to be addressed because for an ordinary citizen to instruct either an attorney or counsel is becoming well beyond their means. But the Legal Aid Board, is in my view, Premier, doing sterling work in that regard.

Commissioner Hellens: Mr Malusi, would you agree that a judge remains an ordinary member of society in terms of his obligations to his fellow man in society?

Malusi: Indeed, indeed, Commissioner.

Hellens: So you are also required not to drive negligently; you are required to pay your electricity bill; you are required to honour all the obligations of a normal member of society?

Malusi: Indeed, Commissioner. Our Constitution says that no one is above the law. Even if you are a judge, you would have to obey the law.

Hellens: Now there was civil litigation against you. We've read the complaint and I have listened to your answers. Were there any postponements of the case before it got to the absolution stage?

Malusi: Indeed, there were, Commissioner; a number of them.

Hellens: Were any of those postponements due to the fact that you were unavailable by virtue of you being an acting judge?

Malusi: Commissioner, there was one I remember distinctively a postponement because I had been acting. What had transpired there is that apparently there was a change in policy of the Department of Justice or the Office of the Chief Justice in that a candidate was forwarded by the Judge

President who was practicing in, I think Natal or Gauteng. And this person could not come to the Eastern Cape because there apparently had been a policy change that you have to be practicing in the Eastern Cape to be appointed to act in the Eastern Cape. There were these cost saving measures. I was phoned by the Judge President, Sangoni, on the Sunday morning to say he cannot get anyone else to act. Would I make myself available to act? And when I indicated that amongst the issues I have was this upcoming matter, he indicated that he would prevail on the plaintiff's attorneys because there were these difficulties of him not getting anyone to act and the term starting the following day. But beyond that, I cannot recall any other postponement because I was acting.

Hellens: I don't want to drag the Judge President Sangoni into the matter as he then was. Did you regard it as proper to say to a fellow member of society who was litigating against you, who had a court date, and who was entitled to take you to court on that date, that he should forgo his right to litigate against you because preterm, for that day, you had become a judge?

Malusi: Commissioner, it was the exigencies of the situation.

Hellens: Now, but the exigencies of the situation – did that elevate your status from being answerable to a plaintiff as a defendant to not being answerable because you are a judge?

Malusi: No; I did not regard myself as being in any way different because I was a judge.

Hellens: But then on what basis was the postponement obtained?

Malusi: The postponement was obtained because on the appointed day, I was not available.

Hellens: No, you were, like anyone that's got a job has to say to his employer: I can't be at work that day; I've been sued; I've got to go to court; I've got an obligation as a defendant; my job as a judge has no greater importance than the job of a cleaner or motor mechanic; I am also an ordinary member of society; I am not elevated above any other status; sorry JP, I can't just be there on a Monday or a Tuesday; I am a defendant; I am an ordinary man.

Malusi: If I may say this, Commissioner Hellens, I had given Judge President Sangoni my word. What had happened in our division is that before this incident that I mentioned, as part of NADEL, we had had a meeting with the JP because – Deputy Judge President Van Zyl would know about this – there was a time when there were fewer judges than there ought to have been. I would not know the reason; but what would happen is that a judge would have to travel from Bisho, go on postponement to East London, and then back to Bisho. Because, as practitioners, we were not happy with this, we had had a

meeting with Judge Sangoni. I was one of the people who said: 'this ought to never happen again. If the court finds itself in this difficulty, we should be informed; we would make ourselves available.' I am not in any way suggesting that the fact that I was acting made me to be special in any way. I am not suggesting that.

Hellens: But it did. Mr Peter Pape [spelling?] and his wife, Lizanne Pape were told: 'you can't go to court against this man on that day; he's a judge, Peter.' That surely is wrong? I want to know whether you think it's wrong or you don't think it's wrong, because I have to test you for suitability.

Malusi: Commissioner, it is wrong.

Hellens: Then why did you do it?

Malusi: I was going to say in hindsight, now that you ask me, I know now that it is wrong. But at the time, what was of primary concern to me was that the Judge President had asked me – there was this difficulty – I had to assist. But as I said initially, when this request was made, I had mentioned that I had this issue and another issue.

Hellens: But still you participated in that decision. Did it not occur to you until I raised this with you that what you did was wrong? To elevate your importance as a judge above the ability of a fellow man to take you to court on a day?

Malusi: Commissioner, I had not looked at it the way you are raising it with me.

Hellens: When I test you and your suitability, I must know that inherent in you is an inability to see that you have no greater importance other than when actually performing your duties or function than an ordinary man. Let me put it the other way round: do you realise the impression of the judiciary you would have created – and I get this from this letter, and I can understand it readily, here's a man wanting to sue you, and the justice system says to him: sorry my man, not today. This guy is a judge. It gives a very poor impression of the judiciary.

Malusi: Commissioner, as I said, what was uppermost in my mind at the time was to assist. I had been called upon to assist. That was what was uppermost in my mind at the time.

Hellens: Mr Malusi, I won't belabour the point. But even the late President, Mandela, when he didn't have to, he went to the Gauteng court in Pretoria, subjected himself to strong cross-examination, kept his dignity, upheld that constitutional principle in his own mind that all men are equal before the law, and he was subjected to an ordeal, let me tell you. And you, for a matter about a trailer and money, deigned to use the office of a judge to avoid your responsibilities in litigation. I find it astonishing.

Malusi: With great respect, Commissioner, I did not take up the appointment to avoid going to court in this matter. If I have my office file with me, I will produce more than half a dozen letters where we are pleading with the plaintiff to attend, to say 'let's get this matter to court. Let's not delay this matter.'

Hellens: I am not suggesting you used your office to avoid it. But I am saying you used your office to obtain a postponement because you thought it was right you were above the law.

Malusi: Not at all, Commissioner, with great respect.

Commissioner Motshekga: Mr Malusi. Would you - I think that you are leading us into temptation and putting us on trial. Would you agree?

Malusi: I – I do not understand. Perhaps, Commissioner if you can expatiate so I better understand your point. I am sorry.

Motshekga: You heard the Judge President referring to integrity, which I believe is a fundamental quality of a person desiring to be appointed as a judge. Would you agree with that?

Malusi: I agree fully, Commissioner.

Motshekga: Now, would you agree that for this Commission to recommend a person whose integrity is suspect would damage the image of this Commission?

Malusi: Commissioner, may I make this distinction? My understanding of the Deputy Judge President was, when the matter proceeds to trial, if there is a credibility finding against you, then at that point, there would be the consequences you outlined.

Motshekga: Now my point now, question is – it's an independent question – and it says: would the recommendation of a person whose integrity is suspect by this Commission not damage the image of this Commission?

Malusi: I would agree with you fully, Commissioner, if the integrity is suspect. I'll only say this, Commissioner: in these circumstances, we are not dealing with allegations that have not yet been tested. The allegations have been tested in court; there has been a ruling by the magistrate, which was overturned by the High Court on procedural grounds. That's all I am pointing out to the Commission. Beyond that Commissioner, I cannot say anything more.

Motshekga: Would a finding that a person appointed as a judge has integrity problems not affect the image of the judiciary?

Malusi: It would, it would, Commissioner. I don't want to sound disrespectful repeating the same thing again. All I am saying is that on the facts of this matter that is highly unlikely.

Motshekga: If there is a potential that the image of this Commission, and the image of the judiciary can be, affected by a finding that the integrity of the person appointed was problematic, would it not be advisable for the aspirant judge to allow the law to take its course first before presenting him or herself before the Commission?

Malusi: If there was, I would agree with you, Commissioner. I would again, Commissioner, point out that you are saying it potentially. All I would ask the Commission is – I know the Commission is in a difficult position in that the facts are not before it, but on what is known, on what the complainant himself has said, I would say, this is very unlikely.

Motshekga: So –

Malusi: It is a potential or possibility. If we are speaking of a probability – this is what is likely to happen – then I would have withdrawn myself because my personal interest or my appointment as a judge, I cannot allow that to tarnish the image of the judiciary as a whole. I wouldn't be here.

Motshekga: But do you also believe that justice is something that must be done and be seen to be done? Now do you believe that the complainant in your matter would believe that justice is being done if the eminent lawyers sitting here recommend you for appointment as a judge and the President appoints you as a judge whilst there is a member of the community that is aggrieved?

Malusi: Commissioner, one of the things I had considered before coming here, after I had received the complaint, was exactly this question. My view is that since I had disclosed this from the very first time I came here exactly two years ago, this is a transparent attempt to try and influence the decision of this Commission. This gentleman, when I first came here on 8 October 2014, exactly the same reports were in the same newspapers as mentioned. It's – it's not a new thing.

Motshekga: Don't you think that a person like yourself, who is young, brilliant, should simply say, let me step aside; let the law take its course, and then I'll come back and present myself?

Malusi: Commissioner, if there was a matter that impacted on my credibility, I was saying – let's say I was charged criminally, Commissioner – a criminal charge regardless of the merits, then I would not have accepted the nomination. My point is that I would again ask the Commission to look at the ruling by the Regional Magistrate. I am not at liberty to outline all the steps I've

taken to try and get this matter heard and finalised. But the plaintiff is delaying the matter. The magistrate ruled in October 2015 in my favour. For nine months, he did nothing. He only came in July to lodge an appeal.

Commissioner Notyesi: Thank you very much, Chief Justice. On this particular matter, I have not seen what the judgment of the magistrate and the appeal court is. But from you – if I understand it – that the appeal court set aside the order of the magistrate and remitted the matter back to the Regional Court?

Malusi: That's correct, Commissioner.

Notyesi: In terms of the proceedings that are there at the magistrate court, they have reached a stage where all the plaintiffs and witnesses have given their evidence; they've testified?

Malusi: They have closed their case, Commissioner. What had happened is that they led all the evidence that they wished to lead. At the end of that, my legal representative then applied to say, on the evidence they have presented, there is no case against me; I don't have to answer. And the magistrate agreed with that submission. She wrote a judgement to say they have not made a case.

Notyesi: Alright.

Malusi: But when the judges looked at it, they said the ruling she made was on the basis as if the entire case had been completed. She did not use the correct standard, which is the standard for absolution from the instance.

Notyesi: Alright. Now, as things stand now, when you go back to that court – I mean hearing the concern of the commissioners and the JP – it's about you testifying. Are you, do you intend – I am sorry to venture into your case –

Malusi: Yes.

Notyesi: If you cannot answer me, you can – do you intend testifying in the trial that is to come?

Malusi: I don't intend to, but I am led by senior counsel. If Advocate Zilwa is of the strong view that I must testify, then I would have to testify. But in my assessment, what ought to happen is that we would say that's the defendant's case and the magistrate would have to apply the same standard that she had applied incorrectly in the absolution.

Notyesi: I think in the Act, it is envisaged that civil proceedings can be brought up against judges. Is it something that you have a civil case against

you – is it something new? Is it something that is embarrassing on its own that there's a civil case against you?

Malusi: I am gratified that Judge President Mlambo is here because I had read this judgement whilst there had been an adjournment in court. You know when you are doing a matter in court [and] counsel asks for a few minutes, you don't know how long it's going to be; but there's a judgment of the Gauteng Division Judge President Mlambo wrote. It involves a judge of that court – I believe it's a Judge Khumalo, I am not certain. But it is reported in 2016, volume 1, or 2015 the last volume last year, where the honourable Judge President went into detail [on] what needs to be done when there is a request to act against a judge, and he quoted a number of previous judgements. It is something that is known to our law that it happens. It is a regrettable thing. I would not want it to happen to me or any other judge but it's a fact of life that, regrettably, judges, at one time or another would get embroiled in this type of thing.

Notyesi: There is a concern about the last time when the matter was postponed. That you, you – it was postponed because you were a judge and all that. Can [a] plaintiff or plaintiffs in any litigation – is it not that it is open to him or her if he does not want a matter to be postponed to oppose postponement and have court ruling on that particular matter? What was the type of postponement in this matter we are talking about? Did you agree? Or was it the court? Or was it after the court ruling? What was it? Because I just want to check whether you had not been delaying that matter or whether you had been using the position of you as a judge when you were acting. I just want to get a sense out of that.

Malusi: What had happened is that shortly after my appointment, we had written – my attorney had written to the plaintiff's attorneys and informed them that there is now this difficulty. I am hoping to still make myself available but I could not be available because the people who had come to the High Court it would cause far greater damage, in my estimation then, to the image of the judiciary for people to be told that I wasn't there and I was attending to my own personal matter. But the, the postponement itself – it was not ordered by a court; it was by agreement. We had tendered the cost of the postponement because it was at my instance.

Notyesi: Lastly, I have looked onto the comments made by other bodies. Of course I also note that you disclosed this civil case in your questionnaire. But nonetheless, you have been – they have supported your appointment. What – how does that, how should we view that as well – I mean when we decide on your application?

Malusi: As tempting as the invitation is, Commissioner, Chief Justice, I would respectfully decline to be heard to be judging my own case or – I can only say that I am humbled by the comments by my peers with regard to my candidacy before this honourable Commission.

Commissioner Stock: Chief Justice, before I proceed to pose my questions to Mr Malusi, I think I just need to make one *bona fide* confession – if you allow it. That confession relates to – you know it's not the first time that Malusi appears before us. And then there's an issue that pains me personally as a commissioner, that there's a lot of potential in the candidature of Mr Malusi. He's also a young man – a vibrant young man. But every time he comes to the Commission for an interview, there's something that follows him to the interview. I think that's what pains me, and I thought I must make that confession. Mr Malusi, the last time you came for the interview last year in 2015, one of the reasons why you were also not appointed was the fact that there was an issue about your directorship of four companies. So I want you to take us into confidence. Since the last time and your acceptance of the nomination to avail yourself for the interview for this vacancy, what is the status quo? What has changed? Is there an improvement? Because I will tell you why I am asking this question to you: the complaint that is laid against you, one of your companies was actually involved in that complaint. So can you take us through? What is the status quo?

Malusi: Commissioner, as I indicated the last time, two of the companies are not active. The one company that is active, that is involved with the trucks is in the process of being registered in my wife's name. She is already a signatory in the bank account of that company. If there's one lesson I have learnt from this civil case, Commissioner, it's the wisdom of saying, if one wants to be elevated to the Bench, you must not be involved in business in any shape or form. That is the lesson I take from this. I can assure the Commission that I would not be involved in any companies, in any capacity, be it as an adviser in any way.

Stock: So what's your view around, there was an advice that was given to you last time you appeared before us, and it was also recorded in the transcripts of the last meeting. Honourable Commissioner Malema gave you a friendly advice to say: 'every time you come here and appear before us, with such a potential that we have in you, it's actually opening you up for unnecessary criticism.' And then he gave you an advice to say: 'Look, take a backseat; go and resolve whatever issues that are there before you appear before us; so that the next time you come to appear before the Commission, there is no smaller any other issues that will be still following you, smaller, smaller shenanigans. So I want to know from you, Mr Malusi, that – have you followed the advice?

Malusi: I certainly took the advice, Commissioner. This is why I have not been back before this Commission up until this occasion. With regard to the civil claim, I had thought it had been finalised when the plaintiff did not appeal for nine months. But then it came back. And when I studied the High Court judgment, I took comfort from the fact that the learned judges set aside the lower court's judgement on the basis of a procedural step; not to say they are persuaded that I have done wrong. But on the basis that the incorrect test was

applied by the lower court. My view, Commissioner, is – I came here because from my experience of following the proceedings of this Commission with regard to other people, not necessarily me, with regard to other people – I have confidence that this Commission will see through when someone tries to use this Commission for advancing their own personal interest. Because this Commission has made itself clear on previous occasions that it considers matters and comes to the right conclusions. So I have that confidence in coming here.

Stock: In terms of your own view, what are the attributes of a good judge?

Malusi: The attributes of a good judge is knowledge of the law, it's an independence of mind; it's someone of a good character; it's someone who is experienced in the practice of the law; it's someone who is balanced, generally. And in the present circumstances, what you would require of a good judge is someone who is sensitive to the transformation imperatives that are now required at this time in the history of our country.

Stock: What is your view on judicial accountability?

Malusi: Judicial accountability is at the core of an independent judiciary. And it is at the core of the members of the public having confidence in the judiciary. Because members of the judiciary are not elected, their accountability comes in the form of, when they make their decisions, they give a reasoned judgment, so that members of the community can have confidence that that particular judge had considered everything in coming to a decision. There's also accountability in the form of a particular judge accounting to the Judge President or the Deputy Judge President, the Deputy Judge President accounting to the Chief Justice. That relates to the administrative side of it – that is use of public resources. So it's in both respects that you get accountability of a judge.

Commissioner Singh: Just to use your own words and that of Commissioner Stock, it is quite regrettable that every time you appear before us, some of the issues seem to be following you – unresolved issues. But having said that, I think at one of your last interviews – not the last one, the one before that – you did indicate that you are on a very successful practice. Is that still the case?

Malusi: It is the case. The practice is still continuing, Commissioner.

Singh: And you did indicate to us that you had delayed some judgments because of the number of people that seem to want you to represent them in matters and they come to your office in queues and that was one of the reasons you had advanced?

Malusi: Yes.

Singh: Now, in response to a question by the Deputy Judge President, you indicated that you would be prepared to relocate to Port Elizabeth. So are you prepared then to sacrifice your love for the community and their matters, and also the interest that your wife has in your practice to move to Port Elizabeth? I just want to know whether that was an honest discussion with your wife as a member of your practice.

Malusi: Yes. My wife happens to be my partner in practice, Commissioner. Her practice is mainly conveyancing. I am a litigation attorney in that I go to court almost every week. I appear in the High Court and the lower court. So if I were to be appointed, I would not have been available to my practice in anything. With regard to her own practice, the indications are that even if she were to relocate to Port Elizabeth, she would still be in a position to conduct her conveyancing practice because the clients that she assists mostly – in fact, it's exclusively government departments. We do not have the banks and such institutions as clients. So she's on the database, for example, of the Department of Human Settlements. All that would need to happen is for her to inform the Department of Human Settlements that the office has relocated from East London to Port Elizabeth, so that she is given instructions in the Port Elizabeth area and not in East London.

Singh: So the community, which would have, up to now, relied on your astuteness and the benefit of your wisdom, would lose out if you go to Port Elizabeth?

Malusi: They would not lose out, Commissioner, because I am going to Port Elizabeth. They would lose out because I've been elevated to the Bench. Even if I were to be appointed to the Bisho post, [and] my wife retains the same practice we have, they would still lose out because I would not be available to my practice. That's how I had looked at it, Commissioner.

Singh: The second and last question is: are you aware of the composition of the Bench in terms of race and gender, and representivity at the current moment?

Malusi: That is nationally, Commissioner?

Singh: In the Eastern Cape.

Malusi: Yes; I am. I am quite familiar. I have acted in that division, Commissioner, for quite some time.

Singh: Can you just give us an idea of what the make-up is?

Malusi: I am not going to be able to give you the precise numbers. Fortunately, the Deputy Judge President is here. But what I can say, Commissioner, is, with regard to Bisho, there is three – I beg your pardon – two women judges. The honourable judges are white ladies. In that seat of

court, there is also the Deputy Judge President Van Zyl is based in that court. Then there is Judge Mbenenge. That is the composition of the Bisho Court. With regard to the Port Elizabeth Court, the senior judge in that court is a black judge – by that I mean he is of Indian or Asian descent. And then there are four judges who are white. And presently, there is only one black judge in that court.

Singh: The last question is a follow up: your view on women empowerment and gender equity?

Malusi: My view, Commissioner, is that it's a matter of priority. I am all for it, Commissioner, if, in these present circumstances, the Commission were to be of the view that my colleague, Advocate Crouse, because of this particular requirement, the Commission is of the view that she must be recommended, I would gladly accept because the true test of one's principles is when those principles are against your own personal interest. Every one of us can claim to have this or that principle, but you are only truly tested when the application of that principle is against your own personal interest.

Singh: Thank you Mr Malusi. Thank you Chief Justice.

Mogoeng: Well said.

Malusi: Thank you Chief Justice.

Commissioner Semanya: Chief Justice, thank you. Mr Malusi, speaking truthfully now, as a defendant in a civil action, you are not a compellable witness. Am I right?

Malusi: Certainly, Commissioner.

Semanya: So that if you decide to close your case without testifying, there can't be credibility findings against you?

Malusi: Definitely not, Commissioner. This is why I said, Commissioner, when I had been asked earlier, my view is that I do not see the Regional Magistrate changing her view that the plaintiff has not made out a case for me to answer. But it is not my decision because I had asked Zidwa SC – because of the respect I have for him – if he insists that I testify, then I would have to.

Semanya: But even if you don't testify and the judgment goes against you, it would absolutely have no integrity issues in it?

Malusi: Absolutely not; absolutely not, Commissioner.

Semanya: And if you elected to pay the claimed amount and settle the matter, it would absolutely have no integrity issues with you?

Malusi: Absolutely not, Commissioner. Commissioner, I had been advised that, in light of this matter –

Semenya: You still on?

Malusi: Yes, Commissioner. May I have a moment? [*Pauses*] I have been advised, Commissioner –

Mogoeng: Do you want to take a moment or you are fine? These things do happen to us. You want to pause a bit?

Malusi: No, I am fine; I can continue.

Mogoeng: Are you okay? Very well.

Malusi: I have been advised that the simplest thing to do is to pay the R140 000 and walk away. I have the money; I could have paid it. But my view was that I would have bought my way to the Bench. It would have been against all my principles.

Semenya: But –

Malusi: I refuse to pay this man so that I am appointed because I believe I do not owe him money. That's the reason I have not paid him. But you are correct. I can pay the R140 000 tomorrow and that's the end of it.

Semenya: But there's also an unfounded premise that if you testify, you would be found wanting?

Malusi: This is why, Commissioner, I am repeating myself. Perhaps, I am not eloquent, perhaps, I am not expressing myself well enough. This is why I am saying, I agree with Commissioner Hellens. I agree with all the Commissioners that there is this potential, speaking in the abstract, there is this potential. But if we look at the facts of this case, there is absolutely no likelihood that, unless I turn out to be a horrible witness, there is no likelihood whatsoever that there is going to be this sort of finding against me even if I testify.

Semenya: But even if you are a horrible witness, it would not mean you are a dishonest witness?

Malusi: I agree, Commissioner.

Semenya: Okay, let's go on a lighter now. Commissioner Motshekga has a pet passion with the hierarchy of various legal systems and our Constitution, the Roman-Dutch Law, Customary Law and the Common Law. Now, let's talk

about this. When somebody concludes a civil marriage, they are precluded subsequently to conclude customary unions. Is that your understanding of the law as well?

Malusi: Yes, Commissioner.

Semenya: And yet if they start by concluding customary unions, they are still permitted to conclude a civil marriage. Is that also your understanding of the law?

Malusi: That's the correct interpretation of the law.

Semenya: So that seems to mean that monogamy, as a practice, seems to enjoy a status higher than the cultural practices of certain people?

Malusi: Commissioner, if we are honest with ourselves, the premise of our law is based on a centuries old prejudice that the practices of the indigenous people of this country are inferior and barbaric, and so on. It –

Semenya: [*Laughingly*] Don't go that far.

Malusi: It is incumbent on those of us who occupy these positions; who are afforded the opportunity to correct these issues to do this because the Constitution says that Common Law and Customary Law must be developed in accordance with the principles in the Constitution.

Semenya: Yes, section 9 would deal with the question of equality – that everybody must have equal benefit of the law, whether they are parties in one culture or another. And so that section 30 of the Constitution dealing with the right to practice one's culture, both underpinned clearly by their compliance with the Bill of Rights. We must do something, don't you think?

Malusi: Certainly; certainly, Commissioner. I agree fully.

Commissioner Ntlama: We are both from King William's Town, I am from Qaga at the rural area. You are from Zwelitsha. The issue that I have is the quality of access to justice. I'm from the rural area, from Qaga, but we still access the courts at Zwelitsha, I am glad that the Minister is here. We, in fact the Ciskeians, we still access the courts at Zwelitsha, whilst there is central King William's Town, where there is a court. So the people from the villages, they drive – they take taxis or buses from the villages to King William's Town, then from King William's Town they still take taxis to Zwelitsha, in order for their cases to be heard. What is the impact of this differentiation on the quality of access to justice? Just give us your opinion.

Malusi: Thank you, Commissioner. Commissioner, it's an issue that I believe is unique to our Division in this country. Fortunately, the Deputy Judge President is here, he is based in Bisho. Us as practitioners in that area have

raised this issue that, up until this time, the apartheid boundaries are still there. You can take it further, Commissioner. If you wish to go to the High Court, you are residing in King William's Town, your matter is heard by the local court in King William's Town, there is a court up the road, less than three kilometres from where you reside. But when you have to go to the High Court, you have to drive an hour and some odd, a distance of about 150 kilometres to go to Grahamstown because the High Court in Bisho is not available to you, because Bisho was part of the former Ciskei. It hampers access to justice significantly, I speak as a practitioner in that area. We have people who when you explain these issues to them, people simply say they would rather give up on their rights because the expense involved is beyond them. But I can, Commissioner, place this on record, that the Deputy Judge President, Judge President Sangoni, we know for a fact, we've had meetings with them as NADEL and other organisations; submissions have been made to the relevant authorities, but this issue just seems incapable of being resolved, and our people are suffering.

Ntlama: Okay, let me leave you there because you don't seem to have a solution. But your response to your question on customary marriages, that to date, they still succumb to civil marriages, but we have the Recognition of Customary Marriages Act, that was adopted in 1998, which give equal status, or equal recognition to the marriages, that if you are married according to customary law, you cannot marry according to civil law, or to have your customary marriage being killed by your civil marriage. But your answer to that question?

Malusi: I understood Commissioner Semenya to be making the point that our law does not view these marriages equally. It would appear that the treatment of the law regards the one form of a marriage, in a way, to be inferior to the other form of marriage, in that if you start with this one, you are allowed to go on and have the other one. But if you start with the other one, you are not allowed to proceed and have the other. That's the point I agreed.

Ntlama: So if you are given an opportunity to be appointed as a judge and you are confronted by this situation, we know very well that the courts, particularly, are being criticised for being insensitive to customary law issues, how would you ensure the development of the principles of customary law in their own context? I hope you understand what I mean? How would you develop the principles of customary law in their own context without importing the Common Law conceptions of marriages?

Malusi: As a judge – the role of a judge, Commissioner, is to apply the law –

Ntlama: Which law?

Malusi: The law that is prevailing in the country at the moment. With regard to what you are saying, customary law, the role of a judge would be to apply customary law as it stands. If you are of the view that it must be developed,

you then develop it. But it is not the role of a judge, as I understand it, to change the law. The honourable members of parliament are here. That is their role because our Constitution provides for a separation of powers. I may have strong views that a particular law is not in the interest of a particular section of our population. But it is not the role of a judge to legislate. As tempting as it is, when you are on the Bench, to correct a wrong you see, the Constitutional Court has hammered this a number of times, when you are presiding you must be careful not to cross the boundaries, because the courts themselves are bound by the Constitution to play only their role and not to interfere in the sphere of the legislature or the executive.

Ntlama: Let me take you back. I am an academic. When it comes to customary law, we talk of the living version of customary law and the official version of customary law, meaning that when we talk of the living version, we talk of the law that is practiced. When we talk of official one, it's the one that is codified, which in this instance of customary law marriages, it has been codified. But how do you strike a balance between this living version, as a judge, because it has not been put before you. But you know that the requirement of a marriage in customary law, for example, is lobola, even though in the Recognition of Customary Law Marriages, lobola is not included as a requirement. But what that legislation requires is it has to be celebrated according to custom, and that custom cannot be celebrated if lobola, as the foundation of this marriage, was never negotiated. So how do you, as a judge now strike a balance between these laws?

Malusi: To confine myself to the example you are making Commissioner, the Recognition of Customary Law Marriages Act provides that the marriage must be concluded according to customary rites. Then as a judge, you would then have to check: what are the customary rites? Have they been observed? I've been involved in a matter similar to what you are raising, where it had to be decided who had the right to bury a deceased person. Was the marriage concluded in accordance with customary law? So, you then, there, look at the point you are raising. Has lobola been paid? Has the bride been delivered by her family? So you are getting to the detail now of the customary law. My view is that in that respect, though the Act does not specify that you have to pay lobola – it's a national Act, we have to be alive to that - there are other ethnic groups in this country that may not necessarily practice what we practice in this province as the Xhosa people. I do not know what the practice of the Pedi or the Tswana is. So I am alive why the legislature deemed it fit to say it must be in accordance with customary rites. And then, each of our different ethnic groups would have its own customs with regard to that. So it is my view that in that respect, the law appears to show deference to our customs. I cannot criticise the law in that respect, Commissioner.

Ntlama: Then in that context, why would civil marriages overshadow customary law marriages if customary law is also constitutionally recognised as a legitimate system of this country?

Malusi: This is the point I had considered to Commissioner Semanya. It would appear, if one looks critically at the legislation, it is informed by a particular view because if these types of marriages were treated equally, one would have expected that the law would provide customary marriages are recognised, and they are on equal footing with the civil marriages.

Mogoeng: Judge President Mlambo? And commissioners, let me just say those of you who have earlier flights, start arranging for later flights because at this rate, we're not going to get done anytime soon. So just make alternative arrangements. Commissioner Mlambo?

Commissioner Mlambo: Thank you, Chief Justice. Mr Malusi, how are you?

Malusi: I am fine; thank you, Judge President.

Mlambo: I'm very well. I am happy you read my judgment. It shows that they mean something when we write them, there are people who read them. But it's a judgment that, as JP, I had to write.

Malusi: JP, without being heard to be flattering you, I thought it's a well-written judgment. There ought to be no doubt for anyone after reading that judgement what the law says.

Mlambo: Thank you very much. Just on the issue where you were quizzed on about getting a postponement being granted because you were acting, I just want you to know, for future purposes, I say this as JP, that even permanent judges have personal issues, and they go to the JP and say: 'JP, on that day, I have an issue, would you excuse me? You should do that in future if something like this happens. I don't know if you understand what I am trying to say?

Malusi: I understand fully. I thank you for that advice, Judge President.

Mlambo: It is a prudent thing to do, to say people don't shield behind the office of judge. Their lives continue like anyone else. So the JP's office is there. You go to him and say: 'JP, on that day, I have this issue. Please excuse me.'

Malusi: Thank you Judge President.

Mlambo: Right. Just dealing with your exposure – my interest as JP, I represent other JP's, I need to get a feel of your experience and suitability. You've acted, when I count, about 25 months in the Eastern Cape. It's quite an extensive acting period. And you've written judgments. How was your experience sitting on the opposed motion courts? Of both, of the courts, the way you said it, I think it's Port Elizabeth. I think Bisho as well?

Malusi: It's an experience I thoroughly enjoyed, JP, in that when you are in motion court – be it opposed or unopposed motion - you go in there prepared. You hold a particular view; but when you get to court, you get submissions. You have to think quickly.

Mlambo: Yes.

Malusi: I particularly enjoyed the challenge of exchanging views with counsel. I have had no difficulty with motion court. I have even asked [that] when there were difficulties – particular judge assigned to a motion court was not available – I have offered myself because as I say, it's something I enjoy.

Mlambo: Yes. Now, in terms of your exposure – pardon me, did you also do criminal trials?

Malusi: Indeed, JP.

Mlambo: For how long?

Malusi: I did them from 2012 right up until now. If I may mention this JP, based on the experience I have gathered, if you have regard for my application, there is a question: 'Are there any outstanding matters?' There is an outstanding matter – State vs Lundberg [?] and Another. It is a murder trial in the PE High Court. I was not supposed to have done that matter according to the Roll as it was drawn. But the senior judge in that court, because of the experience I had gathered, of the people who were available, he swapped the Roll to say he is specifically assigning me to that case, because it was presenting with particular complexity. Just briefly, JP, it's a –

Mlambo: No, you don't have to go there. I just wanted to test whether you've sat in criminal trials.

Malusi: Yes. Thank you.

Mlambo: Now, you say in your application you appear in the – I think you said Small Claims Court, the CCMA, not Small Claims, CCMA, and the Bargaining Councils and the Labour Court, as well as the High Court and the Magistrate's Courts. Is that correct?

Malusi: That is correct. My practice, JP, is a general practice.

Mlambo: Have you had matters in the SCA which your firm is involved in?

Malusi: Yes, JP. Our – the latest matter we have is a land claims matter, where it was heard by the SCA during the month of May. The judgement was reserved. We have had a few matters –

Mlambo: You briefed counsel to go to that matter?

Malusi: Yes; we briefed counsel to go to that matter. I have not appeared in the SCA, nor in the Constitutional Court, JP.

Mlambo: But you've had matters from your firm going to those courts?

Malusi: Yes; JP.

Mlambo: And you've briefed counsel?

Malusi: Yes, we've briefed senior counsel, JP.

Mlambo: Now, just going back to your constitutional understanding of issues. Under what circumstances can the Bill of Rights be amended by Parliament?

Malusi: My understanding, JP, is that there would have to be a 2/3 majority for the legislature to amend any of the provisions of Chapter Two, that is the Bill of Rights of the Constitution.

Mogoeng: Commissioner Malema? You are excused sir. You are excused.

Malusi: Thank you, Chief Justice, and thank you to the commissioners for the opportunity.