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Judicial Service Commission Interviews

07 October 2016 – Morning session

Eastern Cape Division of the High Court

Interview of Advocate BR Tokota SC

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Chief Justice Mogoeng: Good morning, Advocate Tokota.

Advocate Tokota: Good morning, Chief Justice.

Mogoeng: Are you well?

Tokota: I am fine. Thanks, Chief Justice.

Mogoeng: You've been in practice for a very long time. Just tell us, briefly, why you believe you are the one to be recommended for appointment.

Tokota: Well, Chief Justice, you said for a very long time. I am not so sure it's been a very long time. But it's been some time I've been in the field of law, and I think, at this stage, I ought to have acquired some form of experience, which I can share with my country, not only confining my services to Pretoria, although I do go to other divisions. But if I am a judge, then I am able to contribute, not only by confining myself to the division where I am appointed, but if you write judgments, then you subject yourself to criticism by the jurists, by the lecturers at the universities and so on. So in that manner, you can contribute towards the development of the law.

Mogoeng: By the way, for how many years have you been senior counsel?

Tokota: This is my 11th year.

Mogoeng: Yes. And you've acted as a judge severally?

Tokota: Since 2003.

Mogoeng: Yes. Very well. DJP?

Deputy Judge President Van Zyl: Thank you, Chief Justice. Good morning, Mr Tokota.

Tokota: Good morning, Commissioner.

Van Zyl: I see that you have a long career in the Transkei, in the Ciskei. In fact, it seems to be your home?

Tokota: Yes.

Van Zyl: So do I take it that you want to come home?

Tokota: I do, DJP.

Van Zyl: You've acted on several occasions in the Eastern Cape. Is that correct?

Tokota: That is correct.

Van Zyl: You have also, if I remember correctly, helped us out in Bisho, towards the end of last year, on the last occasion when you acted. Is that correct?

Tokota: Even this year.

Van Zyl: Even this year. I remember on a Friday afternoon phoning you to ask you if you could take over the motion court for the following week due to illness or some other mishap.

Tokota: Yes.

Van Zyl: That occurred to the judge who was supposed to do that court, and you agreed to take over the court?

Tokota: Always willing to.

Van Zyl: I must say your energy for work is something I have to commend you on.

Tokota: Thank you, DJP.

Van Zyl: I see from your questionnaire that you have filled in that you have properties and a fleet of cars that you have to sell.

Tokota: Yes, DJP.

Van Zyl: That may require some time in order to do that before you can officially take up your appointment should we recommend you, should you be recommended for appointment.

Tokota: It may take some time – it may depend. But I have estimated not more than nine months.

Van Zyl: October is the maximum time –

Tokota: That's the maximum. But I am willing to make myself available even before that, should it happen that I dispose of them earlier – let's say by June. Then I can always make a call and say 'I am available if you want me to act until such times that my appointment takes effect.'

Van Zyl: I get –

Tokota: It is flexible.

Van Zyl: I get it from the fact that you want to liquidate your assets that you reside in Pretoria?

Tokota: I reside in Pretoria. I've got two properties in Pretoria. One is an agricultural holding.

Van Zyl: So I get it from that you intend moving permanently to –

Tokota: I intend moving permanently to the Eastern Cape.

Van Zyl: I am glad to hear that.

Tokota: Thank you.

Van Zyl: Thank you, Chief Justice.

Mogoeng: Thank you, DJP. Premier?

Premier: I am covered, Judge President – Chief Justice.

Mogoeng: Thank you, Premier. Commissioner Malema?

Commissioner Malema: Thank you very much. I am sorry to ask this question: How old are you now?

Tokota: I am 64, Commissioner Malema.

Malema: And now, if you are in the position of appointing two people out of three very good people: black African female, a 44-year-old African male, and a 64 years old into the Bench, all qualified, well experienced, what will you do?

Tokota: Well, it's not for me to say. It's for the JSC to decide if they want to appoint the younger one is much better, she's acquired equally the same experience as the old one. It's alright; I don't have a problem with that. Even with myself, but statutorily, I still have ten years to render my services as a judge. So there's more time.

Malema: We are not talking about the same subject. I am talking – I am talking about something else and you are talking about the JSC. I am talking about you, and you cannot be a JSC. You are in a position where you must choose two people, and I have given you this scenario. What options will you take in the interest of empowering the young ones to ensure that we build and continue to grow potential young judges, and in the situation where we are also striving for gender empowerment, and given the fact that we also have a 64-year-old: 64, 44, and a female? What will you do in that scenario?

Tokota: I wouldn't know if I would ever be in that situation, but it all depends on what you want. If you – I would imagine that the age would not be the only criteria you can measure your decision. And, you would have some other aspects to take into account. But it really depends on you. But empowerment of women and so is what I also encourage young people – in fact, maybe that's why I stayed longer in the, as a silk. That was my aim as a silk: to empower my pupil. For that matter, now as I speak, they are three senior counsel, one of whom is a – no, the fourth one is a white. So I've empowered a lot of young people in the field as advocates. The male ones are countless – senior, some of them are judges for that matter. So, I would not really have an objection if you – for instance in my case now, if you have a young female, who is well experienced like myself, and you feel that she should take the position, I don't have a problem with that.

Malema: Well, the age difference ordinarily will suggest that they will never be as experienced as yourself, because you had an advantage of age, and they are much more younger than you. But when it comes to testing them on their understanding of the law and all the requirements, all the three of you are superb. It's what we are looking for. The only thing we are left with now is gender and age. It will be ideal for the judiciary to actually get a much more younger person if it had to choose between the two, because it makes more sense that they will stay longer, they will continue to serve, and that is, that would be like an investment actually, as it were, in the judiciary.

Tokota: That's fine. One of my experiences is that actually judges don't retire. You still have judges who are way beyond 75 years. They still work in the service in the sense that they are appointed to commissions, they are appointed to various capacities. And so a judge doesn't really retire as such. You remain a judge until you die. So you remain, in my view, committed to that profession, if I can call it that, of a judge.

Malema: What is your take on *muti*?

Tokota: Muti?

Malema: Ja. Muti, the African herb.

Tokota: Well, whether you believe or not, there is talk of muti. I, personally, don't have anything to express on that – my view on that.

Malema: So you think people can take muti and get engaged in different activities because they are motivated by muti?

Tokota: Ja, I don't believe in muti, for your information. I don't believe in it.

Malema: And you don't think that people can be motivated in whatever way possible, by muti? They can get muti, and as a result of muti, engage in an activity because they are motivated by muti?

Tokota: My experience, both as a magistrate and as, to put it, as an adult African, I know that blacks – certain sectors of the black people believe in muti. And my view is that whatever you believe in, it works for you. Some people believe in church – in certain categories of churches – and those churches, they advance their interests and so on, and things work for them. Some people believe in muti, and in their view, they have faith in that and it works for them. So it all depends on your belief. Personally, I don't believe in muti; I don't get involved in that.

Malema: But can people –

Tokota: I cannot deny that black people, there are certain categories of people in black communities who believe in muti, and I don't condemn them for doing that, I don't share any views to say they are wrong in that. It's like church, as I said.

Malema: But do you think a group of people can act because they are motivated by muti? Get into action because they are influenced by muti?

Tokota: I wouldn't venture to know ... what group – because, you know, my experience is that people act differently. When you act, when you have an

individual mind, you got that mind, you exercise your discretion in accordance with what you believe in. But a group mind, you must act as a group, and you've got a group mind. Psychologists will tell you how those people behave. I am not a psychologist, so I can't be in a position to say if these people have this belief then they must behave in this way. I am not a psychologist. I am sorry to say that.

Mogoeng: Maybe if I may: do you believe – this is what I think Commissioner Malema is getting to - do you know it to be the position or not, that some African people believe that there's power in muti, which could either protect them or allow them to do certain things? Is it a practice that you can relate to as an African person with your experience? That's part of the question. It may not be the whole question. But as a matter of practice, do you know it to be the case that an African person can apply muti, confident, for instance, that the bullet won't enter? We had a candidate one day at the JSC saying the muti – he knows that you can apply a certain muti, even if they fire at you, the bullet won't enter. He was applying for a Labour Court position. So, can you relate to that?

Tokota: I am sorry, CJ, I can't relate to that. But I know in the Marikana Commission, there was that – if that is aimed at directing at that – there was, that allegation that people have believed that they will be protected, they'd used muti and so on. We heard that evidence.

Malema: And you signed the report that said, that blamed, that workers acted because they were motivated by muti.

Tokota: Is there a clause where we said in that report that those workers were motivated by muti?

Malema: Yes.

Tokota: I don't remember it.

Malema: So you sign things that you don't remember?

Tokota: No, we never said – as far as I am concerned, we didn't say that those people did what they did because they were motivated by muti. That report - there were a lot of allegations in that regard. Fortunately, the three of us didn't believe in muti. That is Judge Farlam and Advocate Hemraj SC. But the allegation was there.

Malema: Now, can you explain the judgment where you recently gave a judgment and absolved a white person who had put a black guy in a container?

Tokota: No, the way I was trained, right from the start, when I came from university, I never prosecuted. I missed that opportunity to prosecute. I was a

magistrate immediately right from the university. My train of mind is that you don't look at who is this. Is it a white person? Is it a black or whatever. You don't look – you look at the facts, and you interpret the law in accordance with what you believe is the correct position, regardless of whether it is a white or black. You don't look at the colours, otherwise a judicial officer who does that, then can pose a danger to certain societies, because you have also to preside over certain cases which may involve certain religious beliefs, and if you don't believe in this one, then you have to give judgment in favour of this one which you believe. You've just got to, all what you've got to do as a judge is the ability to identify the issues from the facts given to you. In civil trial matters, even including criminal matters for that matter, it is very difficult to evaluate evidence and come to the accurate decision. But you try your best with your experience to evaluate facts, and then once you have identified the issues, then you apply the law. You don't look at who is who, who represents who, who is the plaintiff, who is the defendant. That you don't consider as a judicial officer. That's my view, as a judicial officer anyway.

Malema: No, that's not the question. I want you to explain that issue where a white guy put a black guy in a container. And there was nothing wrong in your view?

Tokota: That was not the –

Malema: [*Cross-talking*] I hear what you are saying –

Tokota: The issue was defamation in that case. We are not talking about putting a guy in a container and then find a judgment in that regard. No, that was not the issue. The issue was defamation, by the newspaper by the way, not the guy put in the container. That was the issue.

Malema: Now, as a judicial officer, it's always important to look at the law. But it is equally important to look at the strong – the people who appear before you may come from a very strong background. For instance, males can always dominate females, and whites can always, have got a history of having dominated blacks. And to want to ignore all that, that this one comes from a position of authority, can be misleading at times.

Tokota: I am not too sure. You know, in my view, there are ten commandments of a judicial officer, one of which is impartiality; one of which is independence; one of which is patience; one of which is prompt. There are ten of them which I have. I don't want to waste the court – the time of this House. I am sorry about that. So you don't look at who is bringing this. You look at the facts. Like I said, I am not going to change that. You don't look at the background. That's something which you can apply at ... and maybe, when it comes to say mitigation of sentence, you may look at the background: he stole bread, the background is they don't have food; they live in shacks. So they don't have – he's committed an offence, but I don't have to send him to jail. Those are the factors you can look at – the background – only when

dealing with situations like that. When you talk civil matters like the one you have just referred to, you don't look at that. You don't look at 'what's your background? What's your – where do you come from? Okay, if you come from a disadvantaged then I must give judgment in your favour. That's not how you apply the law; that's not how I understand the application of the law, anyway.

Malema: But you just agreed that it is important to look at background because, without taking into consideration the background of where we come from, you might give a judgment which perpetuates the inequalities that we have been subjected to as a country. And therefore it is permissible in law to look at the background. You just said that yourself.

Tokota: Yes, I've told you under what circumstances, not in all the cases. I have told you under what circumstances you look at the background. Even in criminal matters, you look at the situation, the nature of the offence committed by the person. You can't say this man, because he has murdered a person, okay, he comes from a disadvantaged background, I can't send him to jail. No, you can't do that. So, I am telling you the circumstances under which you can look at the background.

Malema: But it would be –

Tokota: Otherwise it – let me, sorry to cut you – otherwise if you look at the background, you will look at – let's say he is a criminal. There's a background to this – the previous convictions have now been handed out. The background of that is that this man has committed criminal offences. You look at that; you take that into account. But that is after your finding of guilty. You don't look at it whilst – before you make a finding on the issue. You see?

Malema: But the point I am making, it is in the context of racism. That, in taking into consideration where our country comes from, you can't ignore the parties that come before you, particularly in a matter that can perpetuate racism in this country. I am not talking about the matter now that you dealt with. We are talking about, as a judicial officer, you can't act ignorant, and adjudicate on a matter based – based only on the facts before you, neglecting the background of where we come from as a country.

Tokota: No, that's not how I was trained. I acted also in these divisions. None of the senior judges trained me in that way, that you must look at the background first before you decide the facts. No, that's not how I was trained. I was a magistrate for 15 years, four of which I was training magistrates myself, in the whole country. So, I have never said to them: before you come to a decision in the matter, look at the background; ignore the facts; look at the background. Oh, that one is a white; he was a racist. Okay, let me come to the facts: you are a racist, therefore I am giving judgment against you. That you don't do as a judge.

Malema: Which, which –

Tokota: It is not permissible in law, anyway. Here is the head of the judiciary. He will agree with me that it is not permissible in law.

Malema: You are a magistrate 15 years, which years?

Tokota: Since – at the start of – since 1979. I had not yet even qualified in 1979. I'd come back after the Steve Biko incident had an effect on me. So I didn't pass my law degree. So in 1979, I had to come back and work. But I was immediately appointed as an acting magistrate for the whole year. And then in – from 1980 – I am sorry from 1978, in 1978, I am sorry about that. In 1979, I went to the university again. Then from 1980, that's when I started permanently on the Bench.

Malema: And then who trained you? Because you've got this pride, 15-years of being a magistrate, who trained you?

Tokota: The judicial officers! I don't want you to drag me to racism. I am sorry.

Malema: No, but you are trained by apartheid mechanism, trained institutions.

Tokota: You know what? Let me just tell you a little story, as an advocate now. There was an attorney, who was a black attorney, who was being, there was an application to strike him off the Roll because he has not complied with the legal profession. I had to represent him. The papers were already drawn. The papers were saying 'This court is an apartheid regime court; the judges are apartheid, are racist; I am not supposed to be subjected to them.' The first thing that the judge asked me – I said to him: 'How do you draft papers like this?' And then he said, 'No, Tokota, I want you to represent me.' Then the first thing that the judge asked me: 'Mr Tokota, these papers, do you agree with them?' I said: 'No, I don't. I don't agree with that.' Apartheid or no apartheid, the law is law. If it was apartheid law, it was law at that stage, and everybody had to go along with that law, not that you liked it. Even now, I cannot guarantee that everybody likes the law. You only like the law when it is in your favour. When it is not in your favour, you say 'oh, this government!' That's what happens in life.

Malema: But you are an apartheid magistrate.

Tokota: Well, call me what you like. I was working at that stage, but I can tell you one thing: one thing I can tell you is that I gained the experience.

Malema: You were trained by an apartheid government to be a magistrate?

Tokota: Ah, call it what you like.

Malema: And you didn't see anything wrong with that apartheid training?

Tokota: Let's assume I see something wrong, what should I have done? Should I have said, 'I am not going to be a magistrate in this era because you are apartheid? Should I have done that?'

Malema: I am asking: you were trained by apartheid regime to be a magistrate? Was there something wrong with that apartheid system?

Tokota: The law is the law. So, it's not for me, I don't make laws. Parliament makes laws. The courts – even those apartheid laws, they were not rigidly enforced by some judges, for example. Some judges didn't agree. That's why you have an opportunity as a judge to develop the law. These days, it's even better because there's the Constitution. Anything which is inconsistent with the Constitution, then it is bad law. You don't apply it. So it's no use taking us back to the apartheid. Even the customary law, as long as it is consistent with the Bill of Rights, then you can apply it. It's, it's permissible in law; it's permissible in terms of the Constitution. But if you want to change it, you change it only in accordance with the Bill of Rights.

Mogoeng: As you round up, Commissioner Malema.

Malema: Was there something wrong with apartheid?

Tokota: Yes.

Malema: What have you done?

Tokota: What do you expect me to do as a magistrate? To strike, and say 'there's something wrong here?'

Commissioner Ntsebeza: I just wanted to follow up on your time as a magistrate in the Eastern Cape. Those of us who were practicing in that place at that time were astounded by certain decisions that you took, given that you were a magistrate. And it seemed at a time like that, they were going against the grain. One was when it appeared you were being ordered by the Bantustan minister to complete a trial and you took a position. I want you to tell us, in your own words, how you decided that matter.

Tokota: Thank you, Commissioner Ntsebeza. I remember very well. That time, there was a change in the apartheid regime, where they created tri-cameral parliament. Yes. And then the black students embarked on strikes in the Ciskei. I was a magistrate in Mpedi then. And then they were arrested. In Zwelitsha, I was phoned by the Minister of Justice at that stage in Bisho. We went to the Amathole Sun Hotel, had dinner there. He said to me: 'Tokota, I want you to go and preside in the matter in Zwelitsha tomorrow, and I want you to finalise that matter so that you can teach those students a lesson; so that those strikes shouldn't spread throughout the country.' I said 'that's fine;

no problem. Have I got a judicial appointment? He said, yes, you will find it there. I said 'fine.' Because if you go to another judicial district, then you must have a special judicial appointment for that case. I said, 'No, fine, Minister. I'll go there and preside.' He said: 'you see to it that you finalise the matter.' I went there. Even though there was no Constitution, we still had some human rights in some way. I explained their rights. They wanted legal representation. Mr Nel was prosecuting. Yes, Mr Nel? Any objection to bail? I want to grant them their right to go and look for legal representation. Mr Nel said no objection. R50 bail. Go. Quarter past nine I was in Mr [indistinct]'s office, the Chief Magistrate, he said, 'Have you finished?' I said yes. Oh no! You can't! How can you finish in such a short time? I said they wanted a legal representation. What must I do? I am finished for the day. I must go back to my district. Then the next thing, the following day, it was in the headlines of the Daily Dispatch, the paper there. The DG phoned me: Mr Tokota, what happened to that matter? I see that you didn't finish. I said I finished for the day. I granted them bail; I had to give them a right to legal representation. Woo, then I was in trouble with that. But to cut a long story, I found them not guilty in terms of section 174 of the Criminal Procedure Act.

Ntsebeza: There was also the incident which also received world wide – well, not world wide – quite prominent attention about the liquor licenses?

Tokota: That one was also very interesting. We were called – I was a Chief Magistrate in Mpedi – the Minister and the DG were the shareholders of Mpedi Hotel. And then Parliament passed Deregulation Act, which legalised liquor licenses. So you could get a license at the counter. As a magistrate, you were the representative of the government – all the departments – and the Revenue Office was in my office. So people bought licenses, and then if you go to a restaurant and find a liquor in the fridge – everywhere else, liquor was readily available. Then the sales in the hotel dropped –

Ntsebeza: Where the Minister and the DG were –

Tokota: Yes. Then we were called. All the magistrates were called: 'Look, we have asked the President to repeal that Proclamation.' By Proclamation, that Act of Parliament. I said, 'But Minister, you can't repeal an Act of Parliament by Proclamation. The President doesn't have that power.' He says 'No; then you must go back, see to it that those people who have – who are selling liquors in their restaurants. they are arrested and pay admission of guilt.' Well, I didn't say anything. We went back. The next thing, following day, there were lots of admissions of guilt. I refused to accept them. I said 'I am not going to sign any admission of guilt. If you say these people are guilty, take them to the Criminal Court. In any event, in my view, that Proclamation is invalid, not only because it had been promulgated by the President to repeal an Act of Parliament, but because those people have acquired rights before this Proclamation. You can't just take them away like this, so I am not going to obey this.' You know what happened thereafter? I was charged with misconduct. What happened thereafter? Every lawyer came to my rescue:

'No, we know what's going on, Tokota.' The hearing took less than 30 minutes and I was found not guilty. I was defended by advocates and everybody, because they knew my stand is like this [*points straight*]. That's why I am saying when I look at the facts, you cannot politically manipulate me [laughter].

Ntsebeza: I thought that should balance – I rest my case.

Mogoeng: Advocate Tokota, I wish we could have you longer. But time doesn't permit. You are excused.