



JUDGES MATTER

Judicial Service Commission interviews

3 October 2016, Afternoon session

Electoral Court

Interview of Judge W L Wepener

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Chairperson (Acting Deputy Chief Justice Nkabinde): The next candidate as you know is Judge Wepener. Commissioners the next candidate is Judge Wepener. Good afternoon Judge.

Wepener: Good afternoon Justice Nkabinde and members of the Commission.

Nkabinde: You pronounce my name very well. Do I pronounce yours well? Will you please pronounce it for me?

Wepener: Wepener.

Nkabinde: Thank you sir. You're welcome.

Wepener: Thank you Justice.

Nkabinde: You're a Judge at the High Court.

Wepener: I am.

Nkabinde: And you have been a Judge of the Electoral Court on a continual basis.

Wepener: I have. It will be four years in effect – I was appointed in 2013.

Nkabinde: Needless to say you have pronounced on quite recent decisions in *Mhlophe, Kham* and *Lotter* that saw their way to the Constitutional Court. [*Mhlophe and Others v Independent Electoral Commission of South Africa and Others* [2016]

ZAEC 1; *Kham and Others v Electoral Commission and Another* [2015] ZAEC 2; *Lotter v Electoral Commission and Others* [2014] ZAEC 3]

Wepener: Yes.

Judge President Shongwe: Thank you Chairperson. Judge Wepener you have been with the Electoral Court for about three years now, and you were appointed for a period of four years – am I right?

Wepener: That is correct, that is so Judge Shongwe.

Shongwe: Now, I have worked with you for some time. I was in fact appointed in 2014 as chairperson of the Electoral Court. With the amount of work that Court receives, is there any comment you'd like to make on that aspect, of the amount of work?

Wepener: Mr Shongwe there is more work there than I think meets the eye. Fortunately for us, me and Judge Moshidi in Johannesburg, our Judge President allowed us time to deal with matters especially in this election year – I'm not talking about by-election years. We make time but especially after the election, he gave us three or four weeks to concentrate on all these matters and I don't think the general public out there knows how many matters we actually dealt with – they will see the few reported judgments, but I think there had been over 12 matters - no much more than that 16 I think, so we did a large number of matters but we all had time off and could concentrate.

Shongwe: In fact it's about 22 matters that is now in relation to the recent local municipal elections if I remember. Is there any change you would like to see in the Electoral Court, or are you happy in terms of the legislation, the regulations and the legislation that is in place?

Wepener: It's a difficult one – there are issues which I specifically, or we, specifically addressed in some of the judgments, especially in relation to by-elections and the bussing of people that needs attention, but I think it's something that the Commission as the custodian of those matters are more entitled to and may take further. We have made the recommendations. Judge Shongwe, it's a specialised Court and I think the appointment of judges to that court is important, and it may be more important to have Judges full-time, full-time judges there instead of non-judges, but I'm not saying that as a criticism, I think it is something that can be looked at. It will be more cost efficient because you wouldn't have any costs in relation to the judges participating unless there is travelling or something that like.

Commissioner Nyambi: Thank you. What is your view of the South African electoral system in its current form?

Wepener: I think it works. I think it's important that it dovetails with the Constitution. I think we've just seen a very successful election on local authority level. I have no particular criticism of the system that I find needs urgent or drastic haul over.

Nyambi: Do you think - is there any need for it to be improved as is? Don't you think there is any need for it to be improved?

Wepener: Madam Chair if I may say yes – we have made certain specific recommendations at times in the judgments, but then it's not always for us to make recommendations, its more for the Commission to take a problem and to then recommend legislation to Parliament. It's not really in our sphere – we can say certain things but there are certain things that are not within our sphere to do. I believe that works pretty successful in this country.

Commissioner Motshekga MP: Judge, I want to believe that it must be very difficult for Judges to pronounce on some issues, for instance you are talking about bussing of people when we continue to live where, true South Africans for instance, you have a number of people living in informal settlements which are not demarcated, which do not have addresses and now when a bus come full of people, even if you can arrest them and say go and show me where you come from, they wouldn't be able to do so because there's no formal settlement. Don't you think that such makes your life difficult?

Wepener: Deputy Chief Justice no – I think the Constitutional Court has now pronounced. We don't have to show an address – the commission must ensure that you live within the area where you register. It doesn't mean that you've given an address – that has been the case and I know, I'm not talking about busses full of people arriving – the term "bussing in" means there is a by-election that people unlawfully register in a area where they don't live and once the commission gets the address issue, and when I say address issue, let me rather say the living issue that you are registered there where you live, when that is sorted out, I believe the problem will end. The recommendation made by us in our judgment to the commission was that when a by-election gets called, not to allow further registrations until the by-election has taken place – then you cannot have bussing in in that sense when people unlawfully come and register in wards where they are not supposed to be – that's what I term bussing. I didn't mean a bus load of people just arriving.

Motshekga: No, I am persuaded that you know what you are talking about.

Commissioner Schmidt MP: Thank you madam Chair. I see that you wrote the minority judgment in the *Kham* matter, but my question is more relates to your understanding as to the theory of four years – what is your understanding of the proposal, whether it should be extended or not? The four year period.

Wepener: Madam Chairperson, I am still going to be in that Court for anything that happens in February – it is for this body to decide if I will be there for the elections in

'19. I don't know what the President will do - if its four years, because some of the members there have been appointed for five or six years. I have four years. If I get another four, I'll be there for the next big election in '19. Time has flown.

Schmidt: I think to a certain extent you haven't answered my question, but it seems to be by virtue of a decision by the President if the term of appointment runs for a number of years?

Wepener: Yes indeed. I came for an interview four years ago and I got a certificate that says that's the period. I don't know of any legislation that says what the period is, but that's what I got whilst other members got about six years, so it's up to the President to decide what to do. Maybe this body recommends the period, I don't know. But if it is another four years, as I said I will be there for the 2019 elections.

Minister Masutha: Judge Wepener thank you for making yourself available. The world in general today generally operates according to the system of democracy as we understand it. There may be exceptions here and there. Is there any effort on the part of the Court to appraise itself of systems elsewhere, challenges elsewhere, positive experiences that the Court could draw on to enrich itself more, or do we generally see our system as unique and therefore tend to focus more on issues at hand and contextualise them as we understand the prevailing circumstances? How do we go about enriching the capacity of the Court to continue constant improvement of its capacity to deal with issues?

Wepener: Minister, the only way to do that is by reading. I by chance was asked by the President of the Court, just prior to the elections, to attend the signing of the code of conduct in the Eastern Cape, and I eventually also attended one in Limpopo, where I gave the keynote speech in each of those and I can assure that, prior to doing that, I did a lot of research in relation to voting systems, electoral systems in Africa and in Europe. In fact, I quoted some examples from Asia so the only way that I believe we can keep abreast and use internal knowledge is by reading and by doing that, which I did, in order to give the keynote addresses at these signing of the code meetings if I may call that. So yes, we do learn from international and we do take from what we can in order to promote our own electoral system.

Masutha: The sense I got to your answer, to the answer you gave to the earlier question that was raised in I think by Commissioner Nyambi in relation to what your sense or take of our electoral system is currently, was a response also in part taking into account those experiences to be able to base some kind of comparative assessment you have come to a conclusion – is there any particular reason why you seem to be, if I understood you correctly, quite positive about the system in South Africa?

Wepener: Minister if I may confess immediately that the type of matter which we have dealt with locally, as far as I can recall, except that some reference in the majority judgment in the *Kham* matter, our judgment not the constitutional judgment,

there was reference to some Canadian law, but the type of matter that we have had up to now, was in particular, and I can't say all 20 matters, there were factual matters and there were matters about the interpretation of specific sections and specific circumstances that did not really call for wide application of international principles. And that's why I say in my experience, we have an adequate and sufficient system that is working.

Nkabinde: Before I recognise Judge President Shongwe again, may I just make a follow up on the point relating to tapping from the jurisprudence of other similar democracies – I'm just thinking that, in giving expression to the right to vote in a situation such as that presented itself in the *Kham* matter. I would imagine that the point was how do you give effect to the scope, the nature of that very right in circumstances such as those that present itself in that particular matter, and I would imagine that it then became necessary to tap from the other jurisdictions?

Wepener: Deputy Chief Justice you will recall that those matters which we dealt with, the earlier *Lotter* matters, all came from by-elections - those were in difficult areas and it's in the by-election sense that some new measures may be needed to control the by-elections. So yes, they were very specific in relation to the fact that they were by-elections. And the problems were very specific – I can't recall that any of them called any specific finding to be made in order to interpret the law based on a general legal principle that may be influenced either by jurisprudence from other countries, but it is in the general election when you have everybody in their own wards and you don't have to worry about bussing or whose address is where, that's where the problem arises - and I must say in the judgments that I have been involved in, our Constitution has proved to be the saving grace in all those cases, in that it gave the guiding light and the guidance to us to get to the answers which we got.

Nkabinde: Having been involved in those matters where you have to make a pronouncement very quickly, does it - does the load of evidence you are presented with, does it create a challenge to the court?

Wepener: Deputy Chief Justice I have to say yes and no – yes it's a load of work but no, it can be dealt with because my Judge President allows us the time to deal with the work – so - I think that's the full answer, I can't say more than that. If one applies himself, I think we've dealt with most of the matters within days, no judgment has been outstanding for a long time, in fact it can be within a week or so or a couple of days, if not shorter. Most of the times when we sit as a court and we deliberate afterwards and we all in agreement, what the points are and where to go, although we give the order immediately, the judgment may take a bit longer. Parties, if they wish to approach the Constitutional Court to push us for a judgment but normally the judgments are out because we have the capacity to do that.

Shongwe: Thank you Chairperson. What I wanted to add was, with the period of four years that the candidates have been given, there is no law, there is no rule. I think you are right when you say it is in the discretion of the President as to how long a candidate will stay as a judge in the Electoral Court. Am I right in saying that?

Wepener: I must accept that as there are no prescripts as far as I'm aware and I've been appointed by the President on the recommendation of this body, so I assume he decided what period. I didn't look whether there's a section that says what period, but I'm not aware.

Commissioner Singh MP: Thank you very much. Good afternoon. You recently gave a significant judgment with other judges concurring on the exclusion of a political party from participating in the local government elections, for reasons set out in this here. I'm just trying to test my - and thank you for the judgment - I'm just trying to test out my understanding of when an applicant intervenes – what is the understanding when a party intervenes?

Wepener: Madam Chair I think we would firstly look at the interests that party may have. He must - if he's got an interest, he's there and the court will allow intervention like any High Court would allow intervention in any matter – it's not particular to the Electoral Court. In the particular matter you are referring to sir, we came to the conclusion that it's not necessary to deal with the application for intervention, because the party that wanted to intervene wanted to make the same points and we would have got to the same conclusion and in the interests of getting the judgment out - we know that they wanted the judgment, the elections were coming, it was unnecessary to deal with the reasons for intervention or the grounds for intervention because the case ended it like it was and the intervening party wanted the same result in any event, so it would have been superfluous to deal with that as well on an urgent basis – it may very well have been necessary to deal with it should that matter go to the Constitutional Court and they found against us in the one point and they - grant an intervention, but that's neither here nor there because in our view, the IFP was making the exact same point that was being made.

Singh: Note, I didn't mention the parties.

Nkabinde: I think Advocate Singh you can accept that the Commissioners would have read the papers and they know the parties. Thank you sir. Commissioners? Judge Wepener let me take this opportunity to thank you and in the presence of the Judge President, also to congratulate your Court for the outstanding work that you are doing. I've seen those judgments that come from your Court especially when the pronouncements are made, it's a matter of extreme urgency. Thank you and congratulations for this opportunity to you by the Commission. In the absence of any comment, you are excused sir.

Wepener: Thank you madam Chair.

Nkabinde: Thank you.