



JUDGES MATTER

Judicial Service Commission Interviews

6 October 2016 – Afternoon session

Free State Division of the High Court

Interview of Mr J J Mhlambi

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Chief Justice Mogoeng: Good Afternoon Mr Mhlambi.

Mr Mhlambi: Good Afternoon Chief Justice.

Mogoeng: Are you well?

Mhlambi: I am well. Good afternoon Commissioners.

Mogoeng: We apologise to you that it is only now that we are starting with you.

Mhlambi: No problem Chief Justice.

Mogoeng: For how long have you been an attorney?

Mhlambi: Since 1987, the past 29 years perhaps, if my maths is okay this time.

Mogoeng: Did you appear in court fairly regularly?

Mhlambi: Yes of course Chief Justice.

Mogoeng: So you have sufficient practical experience, and you have the right of appearance in the High Court?

Mhlambi: Yes Chief Justice.

Mogoeng: Do you occasionally appear in the High Court, unassisted by an advocate?

Mhlambi: On a few occasions I must say Chief Justice.

Mogoeng: Did you find it to be a welcoming environment, or not quite?

Mhlambi: Well Chief Justice, it has always been, I hope that does not sound presumptuous, but it has always been.

Mogoeng: It has always been?

Mhlambi: It has always been fine.

Mogoeng: Why do you believe you are the right person for the position?

Mhlambi: I must say that having been fortunate to be granted an opportunity to act a few times, that it dawned on me that this is actually the work that I really love, for lack of a better term. I think through the judgments and my personal circumstances in the sense that most of my children are now of age, I have more time to do a lot of things. I am more diligent and can actually apply my time in judgment writing or actually application to the practice of law as a whole.

Mogoeng: So you have enjoyed your acting stint there?

Mhlambi: I have indeed, Chief Justice.

Mogoeng: You find support from colleagues who have been there much longer?

Mhlambi: Very, very, very much so, in all the Divisions that I have acted in. Collegiality was present at all times.

Mogoeng: You were interviewed before, were you not?

Mhlambi: Yes.

Mogoeng: Any improvement which has since taken place? I am not am saying that you were wanting, I am saying that developments do take place between one time to another, between periods. What more that was not available to be shared has since happened or since been gained, if any?

Mhlambi: Just briefly one, the churning of judgements. I see that with the effluxion of time I see that it improves, despite that there are, but it gnaws at you that the sooner you do it the better.

Mogoeng: You have become more and more comfortable with judgment writing?

Mhlambi: That is correct.

Judge President Molemela: Your first acting stint was in 2012, is that correct?

Mhlambi: That is correct.

Molemela: And ever since then you have had several acting stints, in fact on one occasion you also acted in Gauteng, is that correct?

Mhlambi: That is correct.

Molemela: Would you say that you have been exposed to a wide spectrum of work, types of cases?

Mhlambi: Certainly.

Molemela: Did you find any particular field perhaps challenging, or were you coping?

Mhlambi: I was coping.

Molemela: In terms of the delivery of reserved judgements, what is the average time within which you deliver your reserved judgements?

Mhlambi: Of course one looks at what is normally stated in the norms and standards, a document signed by the Chief Justice some two years ago, that one has to keep with the three months. With the effluxion of time and with the need to actually not delay the process, you keep it within the three months, alternatively you try to do it within the term that you are in.

Molemela: Have you ever taken in excess of three months?

Mhlambi: No, except that this was also a question you asked me last year when I was in the Gauteng province, when I said that some of the judgments were delivered on the same day, because of some administrative problem, because of my not being in Gauteng at the time, because I was back in the Free State.

Molemela: So those were delivered beyond the three months period?

Mhlambi: I think they were delivered at about three months, 10 days. All of them. They were all delivered on the same day.

Molemela: Do you have any outstanding judgments at this stage?

Mhlambi: No.

Molemela: You had occasion to do circuit court duties several times, did you find that challenging at all or did you cope well?

Mhlambi: Chief Justice I coped well, because at times you would just phone me and say please come and do this, because I would finish some criminal cases before the time.

Molemela: You said you do not have any outstanding judgements.

Mhlambi: No, not at all.

Molemela: Thank you, that will be all. I do not know if whether that is a prophecy or not, you kept referring to me as a Chief Justice, I am the Judge President. There is only one Chief Justice in this room.

Mogoeng: That is a good one, JP.

Premier Magashule: How many languages can you speak, read and write?

Mogoeng: Read and write, say five. English, Afrikaans, Zulu, Xhosa, South Sotho. I will not say Latin, because the going is that it is a dead language.

Magashule: You know the people that are being interviewed today, some of them are SC's. Why should we consider you or prefer you to these SC's?

Mhlambi: They have got very strong points, I think I can also contribute in my way by virtue of the experiences that I have and also believing that I can comply with the requirements as stated in, should I section 165 of the Constitution?

Commissioner Nyambi MP: I will not repeat what was asked last. I have realised that at some stage you worked as an interpreter, so what is it out of that that will make you use those challenges to your advantage, if you can be appointed as a judge?

Mhlambi: It is true, what was very interesting is that one came to understand the court system. Have a feel of both the person in the dock, the person who is defending them and even the very principles that are there. The communication aspect of communicating with these people, how they communicate, and on hindsight I realise that access can also be denied to these people by virtue of the fact that what they communicate may not be properly communicated. It has assisted me in a number of cases whilst on the bench, as a manager of proceedings so to speak, that one can have a feel without actually going overboard, try to steer things in a proper direction.

Nyambi: What will be the best way of addressing a challenge, where the person on the Bench may not be at an advantage to understand the correct interpretation?

Mhlambi: Excuse me Commissioner, you are saying what would be the advantage?

Nyambi: What will be the possible best way of dealing with that challenge, when it comes to wrong interpretation?

Mhlambi: Will this be it when the communication of the person is wrongly conveyed? The thing is then, for the sake of justice that should be corrected.

Nyambi: What are the attributes of an efficient, effective, good judge?

Mhlambi: In a nutshell, if I may borrow from the oath of office that is taken by judicial officers, to be impartial, to be fair, being subservient to the Constitution of course, apply the Constitution and the law without fear, favour or prejudice.

Commissioner Singh MP: I see that you record that you were a member of the ANC from 1992 to date, did you hold any executive position in the organisation from then to now?

Mhlambi: No, I have not.

Singh: So just an ordinary member?

Mhlambi: Just an ordinary member.

Singh: Obviously, you know that if you are appointed you will have to -

Mhlambi: Yes, yes of course.

Singh: With the financial interest, the directorships, I know this question was canvassed widely by Commissioner Malema in the last hearing, but is there anything you would like to say to us about these directorships again of Mangaung Son, ProCo Pty (Ltd), Archiquant, and then, not your company but Misty Sea Pty (Ltd)?

Mhlambi: With ProCo as I indicated last time, that aspect has been finalised and the transaction has been finalised. I have also resigned as a director in Misty Sea. I am still a member of Archiquant CC.

Singh: And what does this company do? What are they involved in?

Mhlambi: It is a property CC, as indicated also last time, even the premises, one of the premises serves as the building for the current practice. The other one has been leased out to Legal Aid South Africa, as I indicated, just opposite the court.

Judge President Mlambo: Just a few questions from my side, you acted in Johannesburg, am I correct?

Mhlambi: That is correct, Johannesburg and Polokwane.

Mlambo; How many weeks all in all?

Mhlambi: In Polokwane it was for a week with the JP, Judge Makgoba and in South Gauteng it was for three weeks.

Mlambo: Three weeks, what did you do in those three weeks?

Mhlambi: I started with opposed motions for two weeks and thereafter I was in the ordinary courts.

Mlambo: Opposed motion in two weeks?

Mhlambi: The first week that I came was opposed motions and then the following week, two days was reading time, because there were still other applications.

Mlambo: Unopposed motions.

Mhlambi: Unopposed motions! Thank you very much JP.

Mlambo: It would be very unfair to do two weeks of opposed motions in Johannesburg. Did you pick up any reserved judgements?

Mhlambi: Yes, of course.

Mlambo: And how long did it take you to write those judgements?

Mhlambi: Even in the last interview and now that I indicated to the JP, it was about 3 months 10 days and I think at one stage I did take it up with you that I am worried that my judgements, having been sent in, had not been delivered yet.

Mlambo: There was a misunderstanding, I remember you talked to me about it. Do you do your own appearances in the High Court.

Mhlambi: In the High Court, of late, no.

Mlambo: Is it because your former partner is now a judge there? You do not have to answer that question. But you do not do any appearances recently in the High Court?

Mhlambi: Not at all.

Commissioner Hellens: Could you tell us your understanding of the doctrine of separation of powers.

Mhlambi: The doctrine of separation of powers has to do with the three arms of the state. South Africa is a constitutional state. There being the legislature, the judiciary and the executive. The separation of powers is that there should be no encroachment. Each and every department should be independent of each other and no one department should prescribe to the other. So there should not be an overreach between the three arms of government, so to speak.

Hellens: A different question, you have answered it from a different direction I would like you to answer it from this direction: what is your judicial philosophy?

Mhlambi: Judicial philosophy is to give effect to the principles of the Constitution, especially the founding sections in Chapter 1 and give effect to Chapter 2 the Bill of Rights. And -

Mogoeng: Do you understand the question, or should it be clarified, because some of these words tend to be too big and you try to answer, you have not really

understood the question. Have you understood it, or do you want it simplified for you? Because it took me long to understand what is philosophy for instance.

Mhlambi: Mr Hellens will help me out -

Mogoeng: Do you understand the question or not?

Mhlambi: Let me not take it further, can I understand.

Hellens: Let me clarify, how do you see your function as a judge? When you wake up in the morning, you go to court, how do you want the world to see you, how do you see yourself delivering justice? What are the parameters, what are the paradigms, what are the things that drive you? Make sure you get this right and make sure you do not do this, what are those things?

Mhlambi: Those things, put it this way for myself: how would I behave. My philosophy is to give effect to, or my mind should be of such a nature that I understand what are the values that I want to give effect to, as I am in a constitutional state of which the Constitution reigns supreme. There are values there in Chapter 1. Or in a nutshell, to act taking into account the preamble of the Constitution, of actually giving effect to human dignity, to treating people equally, treating people fairly, independently, without fear or any favour.

Hellens: We have had a bit of an admin problem with some of the copies of the judgements you have given us, but were these the only judgments you felt worthy of putting before us? You didn't have more?

Mhlambi: Commissioner Hellens you are referring to the three judgements I attached to my application?

Hellens: Yes.

Mhlambi: The most recent I will say, these are the only two judgements I could write in the stint that I had this year. Previous judgments, refer to 2015 when I last acted in Gauteng and were attached to my application during 2015. I thought it would perhaps be overkill if I were to attach them.

Hellens: Well the Commission changes all the time.

Mhlambi: My apologies, that is an oversight.

Commissioner Gcabashe: Just one question, I suppose it is a discursive one. It is said that the principle of legality gives effect to the rule of law, would you agree and just tell us why? It may be useful to make reference to the three branches of government as you talk us through that.

Mhlambi: The rule of law which is entrenched in section 1, basically the rule of law is saying that state organs should act lawfully. Within the competencies that they have and prescribed procedures or manner and form as prescribed in the Constitution.

Gcabashe: Yes, you are correct, and I would just like you to elaborate, by going through the principle of legality and how it is applied, and how it curbs this abuse of power.

Mhlambi: That to quote an instance of one case, say for instance a company or a municipality for instance, in order to do something it must subscribe to certain procedures to reach that particular goals. Perhaps to advertise to bring people in to participate in whatever process there should be, if that is not attended to by the municipality the municipality will have acted wrongly and that should be stopped.

Commissioner Malema MP: I just want to ask one question, because that Hellens' question is not properly answered. Perhaps if I ask differently, we can find each other. What is philosophy?

Mhlambi: I think it derives from Greek, the wisdom of life. From the philosophia the Greek word. Or the way that you perceive things and how they should be.

Malema: A particular system of thought. That is philosophy. So the question is what is your particular system of thought when it comes to judiciary? Or maybe it is asked different, what is judiciary to you?

Mhlambi: Judiciary is the third arm of government, consisting of judges who are called guardians of the Constitution, though they themselves being subservient to the law. They are guardians to see that the precepts of the Constitution are guarded against, so things can flow well.

Malema: Now that we have the definitions of judiciary and philosophy, what is your judicial philosophy?

Mhlambi: My judicial philosophy is to say - as a judicial officer or as myself?

Malema: We are interviewing you, not the judicial officer. You.

Mhlambi: My judicial philosophy is this one, things be as they are right now have not come about without the interference of human conduct. The pre-1994 situation was changed because of human conduct. My judicial philosophy is to maintain that situation that has taken place before the era of the Constitution, should not arise. That should be guarded against so that it should not be. So my judicial philosophy would be that the rights that we have obtained should be maintained, there should be human dignity, as some of us did not have that to the level that we do now, there should be human dignity, there should be equality, all persons should be treated alike under the law.

Malema: You got it very right, I do not know why you were struggling. You just have to relax and you are coming for the third time, so you should be one of those seasoned people who just relax and get that question right, because it is something that is going to guide you in discharging justice to our people. What guides you? It is a guiding principle that will make you a good judge. The question is what will make you a good judge, what guides you. Those priests are guided by the bible, you are guided by the Constitution. Then you start talking to the Constitution, the things you are talking about.

Mogoeng: I expect he was expecting more from you Commissioner Malema.

Commissioner Motshekga MP: There used to be a course offered at university called jurisprudence or legal philosophy. If I look at the Constitution now and look at that course, I think you are right to say you are guided by the constitutional principles, because I am just wondering whether that course was legal philosophy or the opinions of certain European scholars. Now, I hope that course is no longer being offered, because it could continue to create confusion. But I do not agree that legality gives effect to the rule of law, I think it gives effect to one aspect of the rule of law. For instance legality would relate to procedural or formal aspects. Then there would be substantive justice. Both together would constitute the rule of law. Would you agree with that?

Mhlambi: I do.

Motshekga: I also find that sometimes we make things difficult, by trying to search for jurisprudence in the sky, because law should address the rights of the individual and the communities. Would you agree that the concept of uBuntu, if we respect that it will actually take care of all these many things we want to define as jurisprudence?

Mhlambi: Hit the nail on the head, I would agree in toto.

Motshekga: Would you tell me why there are many attempts to say Ubuntu is one of the principles or rights, should we not say uBuntu is the fountainhead of all rights, individual and peoples right?

Mhlambi: I would agree in toto, with you, The abstract concept permeates and in itself, has a total effect.

Mogoeng: Mr Mhlambi thank you very much you are excused.