



# JUDGES MATTER

## Judicial Service Commission Interviews

5 October 2016 – Morning session

Gauteng Division of the High Court

Interview of Advocate P G Malindi SC

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**Chairperson, Chief Justice Mogoeng:** I notice that you have been interested in society from a fairly tender age, starting with COSAS.

**Advocate Malindi:** Yes Chief Justice, I have.

**Mogoeng:** Please share a bit of that side of your life with us.

**Malindi:** Chief Justice, in 1976 having read the events of 16 June in '76, I became informally involved with other students, and my involvement led to a detention in 1976 September, and then thereafter we formalised our student activism in the Vaal. In 1979 we formed a committee to establish a branch in the Vaal, which was formed in 1980.

**Mogoeng:** And you have been consistently involved in that line of activism until when?

**Malindi:** When I outgrew COSAS, I was part of the Vaal youth congress interim committee, which was only formed after my arrest and imprisonment, but before imprisonment, I also worked with community members to form the Vaal civic association, which affiliated to the United Democratic Front in 1983.

**Mogoeng:** From what I could gather from your questionnaire and CV, you have never really stopped being keenly interested in what is happening in the broader society?

**Malindi:** Yes, Chief Justice. Whilst we were in the United Democratic Front, some of us were approached to join the ANC underground, which we did, and after my imprisonment, I

formally joined the ANC on Robben Island, and formally joined again after the ban on the ANC and other liberation movements ANC were finally lifted in 1990.

**Mogoeng:** When did you begin practise?

**Malindi:** I began my practise by doing my pupillage in January of 1995, and sat for the exams in June, and I was admitted as a member of the Society of Advocates, Johannesburg in July 1995.

**Mogoeng:** How many years have you practised as a junior and as a senior counsel?

**Malindi:** All in all I have practised as an advocate for 21 years, 5 of which as a senior council which was awarded to me in October 2010.

**Mogoeng:** You have acted as a judge?

**Malindi:** Yes, indeed.

**Mogoeng:** So what challenges can you share with the committee so that it is better informed about the challenges that are facing the judiciary, very briefly, if any?

**Malindi:** When I first acted in the first years of 2010 and 2011 and 2012, that was when the motion court was particularly stressful, and judges receiving of up to 300 files of unopposed matters. Which sometimes would be opposed matters, that as very stressful for someone who was acting for the very few stints. It was challenging regarding that one had to write judgments in the urgent court immediately, and most of the time I would deliver my judgements in the next day, which meant that I had to work overnight in order to deliver those judgments. Unopposed motion court was also a challenge, because they were hundreds of them in any given time which required the judge to be on top of those issues without the assistance of the counsels.

**Judge President Mlambo:** Mine is just to deal with the acting part of your career and portray whether you are ready to be appointed as a judge. My spreadsheet tells me you have only done 19 weeks in the High Court only, so does that accord with your own records?

**Malindi:** Yes, it accords with my records.

**Mlambo:** In that time you did 5 weeks of opposed motions, 4 weeks in the unopposed and 1 week in the urgent court.

**Malindi:** Yes, indeed.

**Mlambo:** Are those easy courts to deal with?

**Malindi:** They are not easy courts at the beginning, but one soon grasps the essence of running those courts, and in my subsequent acting stints I have found it easier and manageable and I acquitted myself better than when I first started.

**Mlambo:** You have also acted in the Labour Court, am I correct?

**Malindi:** Yes JP, that is correct.

**Mlambo:** What work areas did you act on in the Labour Court?

**Malindi:** I acted in reviews, in opposed reviews, and the opposed motions ordinarily, and in the unopposed motions, and I did trials as well.

**Mlambo:** In terms of you doing five weeks in the opposed motion court, you would have picked up reserved judgments there?

**Malindi:** I have picked up reserved judgments, especially on one or two occasions when I did special motions.

**Mlambo:** Any particular issue you want to mention about the judgments you picked up in the High Court, and the difficulty in writing them?

**Malindi:** There are matters that are not easy of quick judgment, and I remember in particular a special motion matter which involved the international trade, and there were issues of guarantees and counter-guarantees, which I needed to study the documents and heads of arguments in it, and ultimately I delivered it after some 3 or 4 months which is the matter of *DeneI* listed in my papers.

**Mlambo:** That would have been in Johannesburg, because it is not reflected in my spreadsheet, that was an allocation of out of ten by the DJP, is that correct?

**Malindi:** Yes it correct.

**Mlambo:** As an advocate, you are the second male black silk who's available this time. Have you had occasions to be lead counsel in the SCA and Constitutional Court?

**Malindi:** I have, Judge President, and in the matters that I have listed and appear on page 20 of my bundle, the first matter – *Democratic Alliance vs The African National Congress*, I led Salim Ebrahim and Yusuf Salujee, and in the *South African Informal Traders Forum and Others*, I led Thabiso Matshaba, and the other two I was led by Unterhalter SC and Sibeko SC, respectively. In the Democratic Alliance matter there other junior was Isabel Goodman, and the *Glenister* matter the junior was Leah Gcabashe.

**Mlambo:** When you sat in the unopposed motion court, you do confirm that the counsels who appear in the unopposed motion court are white, predominantly?

**Malindi:** Predominantly, yes.

**Mlambo:** That gives us a bad name, don't you think? That blacks are only good to settlement matters.

**Malindi:** Yes it does JP, that they appear to settle matters in the RAF matters and that becomes their daily bread and butter. There seems to be an absence, in matters that can be regarded as substantial matters.

**Mlambo:** When I spent five years in the SCA, it was very rare to see black led teams and I don't know what is the experience in the Con Court, but it is a problem to ask JPs about why is that trend there. Maybe you can assist us, because we want to ensure that we invite people who have the confidence to do the work of judges.

**Malindi:** Historically, the persons who had had the benefit of good education such as studying the fields of law had been white people, because of the privileges that they have always enjoyed. They have always had the requisite numbers to appear in those courts, and so appear to dominant in those courts. The blacks started at a low base due to the doors of culture of learning being opened properly post 1994, so we are building that base of excellence in the law. Post 1994 we had a limited number of SC's who could immediately deploy in matters of substance, so there were rare occasions, and then there were many others who excelled in the field of human rights, which was almost forced upon us, considering the struggle against apartheid. So post 1994, although the law schools have produced what I consider to be an excellent crop of black and women advocates, they have not been able to be afforded the same opportunities that are afforded white members of the bar.

**Mlambo:** I asked the question deliberately as JP, because you and Advocate Madima are the first black silks to become available for an interview for a High Court appointment in a long time, since I have taken over as JP. What is it that can we do as JPs to attract more, because if you look at the complexion of the bench, you have more people from the attorneys ranks who are black in the judiciary, and then you have an oversupply of white silks. How do we balance it?

**Malindi:** There is that difference, difficulty that the judiciary can only make recommendations about the dearth of black and women counsel in your courts. The judiciary can also make strong recommendations, within the limited interactions that the judiciary has with the executive, to point out that the continuing pattern that we all complain about does not say much for the transformation that the Constitution promises, and that government across the board promises.

**Mlambo:** One last question from me. The experience you have gained as an advocate and senior counsel coupled with the acting stints you have done, you feel those eminently qualify to become permanent?

**Malindi:** They do, Judge President, after 21 years of practice I have not had any adverse comments from my colleagues about my advocacy skills, about my conduct in court, my collegiality. I have not had adverse comments from members of the Bar who have appeared before me as an acting judge. I have not had any adverse comments from judges, both in Pretoria and Johannesburg, that I have interacted with during my acting stints. On occasion, when a judgment that I think needs particular attention because of its importance, I have sought the views of a fellow judge or fellow judges, and on each occasion I've been found to be on the right track, and my judgments have been praised, with obviously a comment here or there about how I could improve my judgment.

**MEC Lesufi:** Let me clear just a small technicality here, I see you share the same birthday as the late president Nelson Mandela.

**Malindi:** Yes I do.

**Lesufi:** But I see your ID number does not follow that sequence.

**Malindi:** Yes, it is one of those in congruencies of going to Bantu affairs offices where dates and names sometimes get incorrectly recorded.

**Lesufi:** I just wanted to clarify that so that we are dead sure that we are speaking to the right person. I am one of the people who was inspired the Delmas trial, I actually attended the Delmas trial. That court represented a state institution that was biased to a certain policy. Don't you think that your open membership of a certain political party will alienate in the same fashion other political parties and other people who might feel that your judgment will be clouded by your political affiliation? There is nothing wrong with being a member of the political party, by the way.

**Malindi:** I have that strong political affiliation, and I do not believe that it will affect my function as a judge, and my ability to act objectively was demonstrated even within the ANC by my participation of being the provincial disciplinary committee, as a panellist as a person when called upon in terms of the constitution of the ANC to represent any party in a dispute whether as a complaint or otherwise. I did that with honesty and impartially. There hasn't been any complaints from the ANC itself for acting partially in any case I took upon, I could take an oath to affirm the oath that is set out in the constitution that I will not deviate from exercising impartiality and acting without fear, favour or prejudice in terms of that oath that I will undertake if appointed.

**Lesufi:** You have declared a series of business interests, 34 to be precise, there is one called Mvelaphanda Empowerment Trust, what is it?

**Malindi:** Mr Sexwale has about 3 family trusts, he invited me to assist him look after his family affairs, and then I may add that the companies, the majority of which you see on page 16 of my application, are companies that fall under those trusts, so it is really not individual companies that I am a Director of, but they are vehicles used by the family trusts. I can tell you the exceptions, number one is the Vaal River City Tourism company that I was recently appointed to, and it is a company I have taken office on. Number 4 is a company that I resigned many years ago, as well as number 9, 10 and 21. The Common Room is a company that started by me and the members of the Bar, hoping that it would be a platform for members of the Bar to exchange views, now that we no longer have a common room where we have tea together and share our war stories. Dikela Family Trust is a family trust of Mickey Dikela, number 34 is an education trust which produces educational material for schools in video, and other companies that wish to provide education for their employees. The rest, for all intents and purposes, the Sexwale Family Trust – that's it.

**Lesufi:** The TJS Family Trust, it has something to do with Julius Sello family trust?

**Malindi:** No, it's Tokyo Judy Family Trust.

**Commissioner Nyambi:** Afternoon, let me first commend you on your impressive CV. Being a member of Gauteng Champion for Social Cohesion, can you share your personal contribution, your assessment of what you have done for Gauteng and South Africa in general in terms of the role you have played in social cohesion?

**Malindi:** We have a mandate to develop a programme that the Gauteng government can embark on in enhancing social cohesion, the report is due in 2019, we will on October 13<sup>th</sup> present the full programme that we believe as a group, hand in hand with the Gauteng government may embark on. We have not started work, but we have put together a concept document that the Premier will approve shortly, I believe that it is an organisation that works in concert with the national programme on nation building and social cohesion. We have had one engagement so far which was to visit the Pretoria High for Girls, I was not part of that delegation, but the reports that we got in our last meeting was informative, and gave us an indication that it is necessary to have such a group, so that whatever the Gauteng government it does not appear that the ruling party is propagating a certain idea of what nation building and social cohesion involves.

**Nyambi:** Do you believe in judicial activism?

**Malindi:** There are two questions for judicial activism, before we became a social state we celebrated judicial activism because the SA judiciary was not in keeping with international norms and conventions that advanced and encouraged states to afford individual liberty, and especially socio-economic rights. We now have a Constitution which I believe encourages judicial activism, because the Constitution says judicial officers must not only

interpret the law in terms of the Constitution, or laws that bring such provision into effect, but may seek assistance in other instruments such as international law and customary law. I believe that when South African law does not provide an answer, a judicial officer must look beyond that law and see if there is any other law that seeks to promote freedom and liberties that our Constitution warrants. I don't have an answer whether if, after considering international and other instruments with a case confronting a South African judicial officer, whether they are available to extend their activism beyond that point, so it is something that requires a debate

**Nyambi:** Is it correct for politicians to criticise judges?

**Malindi:** The Chief Justice recently led a group of leaders of the judiciary, and they met with the executive. I believe that there was general consensus on the extremes to which politicians may criticise the judiciary, and key to that is that it must not be gratuitous, it must be criticism based on the matter that was being considered, and that a politician does not believe was well considered by the judge. So politicians may criticise to the extent that they bound themselves to criticise within those bounds agreed on at that meeting.

**Nyambi:** What about judges criticising politicians?

**Malindi:** Judges are the custodian of the Constitution, to an extent that judges believe that a politician has shown a disregard and disdain for the Constitution, judges may do so. I would qualify that by also stating that in that very same agreement there are parameters, there are methods of criticising politicians, and I take it you mean outside of a judgment or a ruling that a judge has made. And a question of the occasion is very important for both judges and politicians.

**Commissioner Ntsebeza:** Advocate Malindi, I want to ask you about what is in your questionnaire, and it seems to me that in the course of your career as an active member of the African National Congress, you have been a member of the Gauteng disciplinary committee, and particularly between the years 2013, to 2016, you have been what eventually was a prosecutor in the ANC disciplinary structures. No what I want to know is whether, in the course of your duties in that capacity, you were involved, in any shape or form, with the prosecution in the disciplinary structures of the ANC, of one Julius Sello Malema, and if you were, one would like to then ask the further question, whether, in whatever capacity you did so, seeing that now he is now a member of this body, you would be able to give this body an assurance that you will be impartial in the discharge of your duties as is required of a judicial officer, if you are to be recommended.

**Malindi:** The standard that you are asking me about, is a standard that we apply rigorously within ANC processes. I did prosecute commissioner Malema, at the time I was not a designated presenter, as we say, or prosecutor, I was requested to represent, or assist the national prosecutor, and I discharged my functions as required by the ANC's constitution, that structures of the ANC when they bring charges against members can draw from

members to discharge those duties. And it could have been the other way round, and I could have been asked to represent the charged member. Our duty is to, as prosecutors, present evidence in an objective manner so that the panel is to take the final decision has had the benefit of those submissions. And those submissions by a team of prosecutors are always tempered by the counter – submissions by representatives of charged members. I believe that the oath, when I took membership of the ANC, to be that members that is loyal and disciplined and carries out the functions of the ANC as required, is of importance as the oath that I will take if I do become a judicial officer, to dispense justice to all equally, without fear, favour or prejudice.

**Ntsebeza:** To what extent is a national initiator, which is what you have here in your CV, otherwise a prosecutor, expected to act as independently as prosecutors in terms of our Constitution and the enabling legislation, expected to act as far as independence is concerned. In other words, if I was to be blunt, to what extent does a prosecutor in an ANC disciplinary enquiry expected to exercise an independence from for instance, the Secretary General, the President or anybody in the so-called top six of the African National Congress. Do they do their biddings, or do they do what they ought to do, namely to present a case as independently as the evidence and the charges in terms of the constitution of the ANC allow them to do so?

**Malindi:** In my experience, there were lots of interactions with our so called principals, the top 6, to advise them about the strengths and weaknesses of their cases. We made recommendations about which charges we believed could be successfully prosecuted and which ones are not, we made recommendations about appropriate sanctions in respects where members were found guilty of those charges that we recommended, each time that we are approached by our opponents, so to speak, about how things could be dealt with differently, we always went to our principals, and insisted that we have a duty to inform them of any offer that comes from the other side, and to hear their views, to advise them whether it was reasonable or not. Certainly, in the team that I led, we adhered to those principles. If I may add, someone who is in the leadership of the province commanded me for how I ensured from the start, when we developed their disciplinary structures, and from there being a presiding officer, about how I did not just accept their say so, they believed that if the leadership says so and so is guilty, that would be it, the other side would have to prove their innocence, and I always insisted that that is not how it works, people had to be dragged out of meetings that they considered very important to come and testify, otherwise we would not proceed with a matter unless proper evidence is placed before us.

**Commissioner Schmidt MP:** Advocate Malindi, you will agree that not only should those who are appointed as a judge to be impartial, but also be seen or perceived to be impartial, that there be the necessary trust by the public in that individual. Do you agree?

**Malindi:** Yes, I agree.

**Schmidt:** There's basically nine issues that I want to put to you for your comment, which may have a negative impact on that perception of impartiality, and I don't think there is any dispute about the factual basis, it is the interpretation that's my concern, the perception. And they are basically based on what Commissioner Ntsebeza's raised, being a PDC member for approximately 13 years. Secondly, being a national initiator for the ANC for 3 - 4 years. You've appeared for the ANC at least 4 times I could find in the Democratic Alliance vs. the ANC, and I represent the DA here so, if there's criticism, it comes from that perception. Fourthly, you're appointed as the ANC Premier's one of 20 prominent champions of social cohesion, it basically flows from a appointment made by the Premier. You've been a branch chairperson, or a branch member rather, since 1980, and a branch chairperson since roughly 1997 until 2016. You are a member of the Sexwale Trust, he's been the Premier of Gauteng, and he's been a Minister in the National government. You've been, not that I keep the fact of imprisonment against you, because I think that it 's your right to have acted as you did, but you did so once again on behalf of the ANC. You are part of the Vaal River City Tourism Protection, and I know that is a political project to establish a whole Vaal River establishment there, the Premier has put his name to it, he's come to the Vaal saying we are driving this project as the ANC government. My concern from these is, how do you try and convince a member of the public to say that you are impartial. I've never seen a questionnaire so full of the ANC name included in any document, it sprawls, for want of a better word, it may sound negative, it sprawls with ANC involvement, motivation, commitment, lifelong passion. So my concern is, the perception, the very very strong perception, that you would further the cause of the ANC in cases where you would be possibly in a position to do so. What is your reply to those concerns?

**Lesufi:** Just a point of order Chair. I have been a member of this committee for quite some time as well, and to singularly say, is the first time you see something with a political nomination here is incorrect. We had people that were members of the Broederbond that came here, and were interviewed. I just wanted to rectify that part only.

**Schmidt:** It was more about the number of times that the ANC is recorded in the application form and the supporting documentation, and I didn't even venture to say that it is a politically nominated process.

**Malindi:** Starting with the Gauteng Champions for Nation Building and Social Cohesion, the Premier deliberately chose to appoint a diverse group of people, they are not only ANC members. The name that comes to fore, who is a valued member of the group, is Raenette Taljaard. There are others who come from the union movement, a representative of NEHAWU, you might say it is an ally of the ANC through COSATU, but there are others who are not close to the ANC. Coming to the Vaal River City, I come from that area, and I have seen the devastation of what the Vaal was when I lived there and the further deterioration of its state, and I see it not as a deployment by the Mayor of Tshwane, but as people who are able to assist in the economic revival of the area, and again he has tried to draw people who have the history and some qualification to assist him, and we believe that it is a group on a non-partisan manner to assist to revive the economic woes of the Vaal

area. The ANC generally, there are many members of society that have transcended their political membership in order to act in the interest of the country, whether they were Chief Justice Langa, who was a member of the ANC and NADEL president until the day he was nominated to the bench, and is a celebrated CJ. Dikgang Moseneke, who originally was a member of the PAC, and he's a celebrated former DCJ. I believe that when the society has agreed, as we have agreed through the pact we have reached through the Constitution in 1996, calls upon people to play a positive role to assist in building the country, I will always call to that call, and I do not expect people that I am politically aligned to, to demand that I do their political bidding, if there is any.

**Schmidt:** Don't you think it would be wise to have some form of separation in time, by virtue of these positions and roles you have fulfilled, and your possible nomination to become a High Court judge, in other words, I understand that you are still a member of the national initiators, still a member, chairperson of a branch. You were acting as a judge was maintaining these positions, not to say that you are not allowed to, but it shows the level of lack of separation between you and the ANC, and that creates an uneasiness between your possible appointment and your lack of distance from the ANC. Would you like to comment on that?

**Malindi:** As a matter of fact my membership of the African National Congress lapsed in February this year, and I received notification to renew, and I did not because I was already considering whether the time has not come for me to serve my country differently. So I am not a chairperson, I was appointed as initiator after the Mangaung conference, December 2014, the following year when the NEC met, but my membership has lapsed, I have not prosecuted any member since then. However, to the extent that perceptions exist, the law requires that if there is a perception, indeed it must be established that it's a reasonable perception, so if I appear in a court, and a person has a reasonable perception, they must apply for my recusal, and if it is established that they have a reasonable perception, I will have no hesitation to recuse myself. I think it is the *SARFU v Mandela* case that sets out the grounds for requiring someone to recuse themselves, so basically, as we say in law, it's not a request for the taking, it's because you feel you have an antipathy to a person, they must recuse themselves. And I'm applying in a division of some more than 30 members, so the Judge President or Deputy Judge President, if they feel, knowing my background, that being allocated a matter may raise that concern, they are at liberty not to even give it to me, there will be so many other people to give it to. Secondly, the work of a judicial officer is very diverse, I think in a term where I have to sit in four different rolls, it's unlikely that that situation will arise, it is rare that I will in an opposed matter or trial where there may be an objection, my day to day life will be in a space where my political affiliations do not matter. Of course, as I have said I believe that I have the ability to disabuse myself of any political leaning, because I have a different duty to discharge, and that is discharging a duty as a judicial officer.

**Commissioner Singh MP:** I just want to know, would you agree that if there is any matter that would cause you embarrassment if you are appointed as a judge, the same kind of

embarrassment would be felt by the body that would appoint you, which is the JSC? I am saying this because in section 4, you have indicated there that there is a matter, that could cause you embarrassment in undertaking the office of a judge, and you go on to list the matter and give us details of that matter. Now, how do you think that would impact on the JSC should we appoint you, would it not cause embarrassment to the JSC as well? Because this seems to be quite a serious matter, and how would you deal with it if you are appointed?

**Malindi:** I agree, I disclosed that matter, and obviously in the unlikelihood that I am called as a witness and has an adverse finding, it would embarrass me and the JSC, and at that time the JSC may decide whether it's a matter to be dealt with by the conduct committee or not. I can tell you if the finding is that I was dishonest, and the finding of dishonesty in this profession is a serious finding, I would readily resign without the judicial committee having to consider it. It's unlikely to get to that, and if I may add a little to that, in the dispute, the Trusts are sought to be part of the joint estate and from the advice that I got and my knowledge of how these things work, it is a legal question. So if the Trusts are made part of the joint estate, then there is an order of division of the joint estate, then I may not be required to give evidence.

**Singh:** I respect you for having disclosed this particular issue, and I think it is up to the JSC to consider it further in deliberations.

**Commissioner Malema MP:** Have you written any public articles on any matter of national importance?

**Malindi:** I have.

**Malema:** Which one?

**Malindi:** I have written an article on behalf of the National Association of Democratic Lawyers, I have written articles in support of the conference called by the Chief Justice in protest against the attacks on judiciary. I have written articles on whether the duties of the Public Protector are binding, I have written articles on matters of the conflict in Palestine and Israel, and as a public secretary of the UDF, and many articles commenting on national issues, even those that I did not personally write were issued by the organisation that I serve.

**Malema:** You didn't see a need to write an article when the judges were called reactionary?

**Malindi:** I believe we did to protest against judges called reactionaries.

**Malema:** No, I am talking about you. You didn't write any article in defence of judges being called reactionary?

**Malindi:** Personally, I don't remember writing as an individual, no.

**Malema:** Was there no need for you to write an individual in defence of the judiciary since it was attacked by, amongst others the people who happen to have worked with you politically, to try and clarify the independence of the judiciary as it were?

**Malindi:** I believe that my views against the judiciary being called counter-revolutionaries and other aspersions being passed against it, will carry more weight if issued collectively by an organisation such as Nadel, which I believe has an admirable standing in the legal field.

**Malema:** But you just said you wrote articles when even organisations pronounced themselves, you still wrote articles as an individual to express yourself,

**Malindi:** I meant as publicity secretary of Nadel, I'm sorry you misunderstood me.

**Malema:** You never wrote an article, in your life, as an individual, that is the first question I asked, to contribute to a national discourse?

**Malindi:** I believe I did, I tried to find, search for such articles which I have not come across, but I have on a number of occasions written to newspapers as an individual.

**Malema:** What impression will it create for a DG of Finance to resign from Finance, and immediately become a CEO of a bank, do you think it is advisable?

**Malindi:** I don't think it's advisable, and it is something that has received a lot of commentary about people who occupy positions in organs of state and then when their terms expire, or sometimes even before, they find employment in agencies that are private corporations.

**Malema:** In that too much commentary, there's been a call for a cooling off period before they assume such responsibilities?

Malindi: That is true, and it is commendable.

**Malema:** And given your history, which you have outlined on your own, don't you think there must be a cooling-off period in your two active political involvements before becoming a judge?

**Malindi:** I think the decisive criteria is one that is set in the Constitution, if I am suitably qualified and if I will satisfy the need to accommodate the dearth of representativity on the bench, it is important, it is also important if I have succeeded to convincing members of the commission that indeed I will make that transition without requiring that transition period, I

should be appointable, and the Judge President has taken the committee through my involvement as an acting judge, as I was very active in the ANC, and there has not been a complaint that my membership of the ANC, even at the time, clouded my judgement in any respects.

**Malema:** My brother, we just agreed that there is too much commentary on people who leave the certain strategic positions to assume certain positions, and as a result we further agree that there must be a cooling-off period to deal with a possible perception of conflict of interest, and then when it comes to you that principle completely changes. All those people, the DG of Finance who leaves finance to become CEO of a bank, constitutionally and in terms of everything else that you have said, they are qualified. There is no constitutional disqualification of those people, they are qualified. But we agreed that through this too many commentary, there must be a cooling-off period to avoid this perception, is that not something necessary to do?

**Malindi:** Indeed we agree in that respect, and if the qualification I will add is that commercial interest is very important, because the perception is that people place them in government positions where they can easily use that positions to gain better financial benefit. I am leaving practice, and it is recorded that people at my age are at their peak, and I am choosing to serve society instead of pursuing a lucrative practice.

**Malema:** No, there are a lot of benefits that you can't get when you are a practitioner, but we'll not talk about that. Can you imagine what the headline is going to be, and you must tell me if this is going to enhance the good image of the judiciary: 'the JSC appoints the ANC national prosecutor as a High Court judge.'  
Does that help us?

**Malindi:** If discerning readers consider the interview that I have gone through, I believe that they will realise that the JSC has appointed someone who indeed is capable of living through their oath of office as loyally as he has served in other structures loyally.

**Malema:** My brother I am not questioning your qualification and your loyalty. You are extremely too involved with politics and with politicians, worse, you are involved in Tokyo Sexwale's businesses, not just a businessman, Tokyo is a politician. Your hands are there. You are in the national prosecution team of the ANC, you are in the provincial disciplinary structure of the ANC. All of that, you are now going to be a judge immediately after leaving these things. It doesn't help, I'll now put it to you, it doesn't help to enhance the good image of the JSC, especially in the context where a country seized with debates like State Capture, and cadetship deployment, does it help us? Because I think the good thing would have been, which you tried in February but it's too short period, to take a break from all these things, so that after some time you return and ask to be a judge. But immediately from these positions into becoming a judge is going to be seen and feed into a narrative that the judiciary is captured, that the ANC has deployed, and the factional battles of the

ANC will say, Tokyo Sexwale has actually deployed a judge. Would I be unfair to have that perception?

**Malindi:** Well in closing on this question Chief Justice, I can only say that I have laid bare before the JSC who I am and why I am here, and it's for the JSC to judge, and in the discourse, and it has happened in this forum that there is no judge, consciously or unconsciously, who's untouched by their ideological upbringing, some still adhere to those political upbringings. All judicial officers are constrained by the need to perform their functions without the conscripts [?] of the Constitution, that is what I will do.

**Malema:** CJ, I don't know, 'in closing', what does he mean, does he mean that I cannot ask this question anymore? What does he mean? He can't tell me that, that is arrogance, he can't tell me that.

**Mogoeng:** Commissioner, you are free to put questions to him.

**Malema:** Now, my question is, and whether you like it or not I'm going to ask it, your appointment immediately from the chair of the ANC into the bench, does it help to enhance the image of the judiciary?

**Malindi:** My answer is that the message that will be sent out there, will be that a person who has, through their lives, from at least the age of 16, fought for freedom, and was an adherent of the Freedom Charter, is a champion of the Constitution, has been appointed, and from what he has told the commission, only confirms that he is still of the view that human rights, dignity, freedom and all the other precepts that are enshrined in our Constitution are still paramount to him, and he undertakes to champion those rights as much as he championed the struggle.

**Malema:** Let me leave it because, I don't want to be seen to be pursuing something else. There was a question about members of the ANC, and you said JP and the DJP, if they are seeing these are members, they will not give you that task – it means you are not going to be doing any things. Because the ANC is the majority party, and a lot of people that come before the courts are members of the ANC, and you said if there is a reasonable perception you can be recused from a case, so this means that you will not hear any matters and the JP would have hired a judge that will always have to be recused from a case due to his political affiliations. How is it practical going to be done?

**Malindi:** As I said earlier, when I sit in the unopposed divorce cases, unless a name stands out I do not know that they are ANC people, if I sit in a criminal matter, unless the relevance of political affiliation comes to the fore, maybe people stab each other at an ANC conference in confrontation with other political parties it will come to my attention. In almost every roll I sit on, membership of political parties does not appear apparent, it will not arise. If on those rare occasions it arises, I will conduct myself like any judicial officers who often will have the parties in chambers and hear objections on whether I should hear the matter

or not. If someone is a prominent member of the ANC and I can see and I know the person personally, I will say to the representatives that I have this relationship with the person concerned, and in some instances an application for recusal will be made and the JP and DJP will make the call, and that will occur in cases where there is a perception of bias.

**Malema:** Would I be unfair to ask you to withdraw your candidacy, given the fact that we have canvassed your close proximity to political activities, and the fact that you are still holding some political responsibility in the ruling party, to withdraw your candidature and allow a cooling-off period that we agreed it is necessary?

**Malindi:** It will be unfair, after what I have stated here I do not believe that this is a circumstance that requires that cooling-off period, and of course I'm in the hands of the judicial officer, if I'm not appointed I will take a few years to distance myself from the ANC, I have other interests at the bar, but I am not withdrawing my candidature.

**Malema:** Briefly, what is your understanding of state capture, does it include potential judicial capture?

**Malindi:** It does, we know that in many jurisdictions, especially ones that do not have a process like the JSC, presidents have a freer hand to appoint judges. There is a safety guard in this process in South Africa, that consists of all these representatives, it is your duty to convince the others that if I'm appointed, it will be analogous to appoint someone who is still too close to a political party, and that such appointment will be analogous to state capture, and I would be interested in the evidence that is placed to suggest that I am political 'deployee', and in South Africa the judicial services commission was established to ensure that the appointments are not dominated by any one sector of the legal field, it's represented by politicians that range from the ruling party to minority parties, it is established of legal practitioners from all regulatory bodies of the law. It is constituted by heads of various courts, and I trust their judgment on this matter to determine whether I am a political deployee or a genuine person who has 21 years of service in the profession, and has displayed what the criteria of the JSC requires of them.

**Minister Masutha:** The perception of abuse of court process through what is commonly known as forum shopping has been spoken widely about, would you like to comment based on your own experience working in the courts?

**Malindi:** The issue that you raised has been with us, certainly in my times since 1998, when the Arbitration Foundation for Southern Africa was established, there was a strong view at the time that it was established to avoid the bringing of commercial cases to the High Courts which were being staffed by black women practitioners in order to transform the bench, and obviously the people who championed the establishment of arbitration forums protested to say they were doing so because the world in commercial arbitration sought to arbitrate their disputes in a more speedy way than the courts, but it was clouded by questions of racism. I have no direct evidence, but I hear that there are practitioners

who arrive and realise which judge they have been allocated to, and immediately ask for a one hour adjournment and then immediately they arrive to say the parties have agreed to go to arbitration. It is still a problem, but it is a problem and it is less so in my experience.

**Masutha:** Is it true that it is used to manipulate a system in a manner that would avoid, or conversely prefer particular judges because of perceived personal inclinations of those judges in a manner they approach matters before them?

**Malindi:** Chief Justice, again I'm not a full time judge, but I have heard ,again without providing you with evidence, that in particular practitioners now have the advantage of knowing which judges are sitting on which roll to enrol their matters in a particular week, when they believe a judge that will be more amicable to their cause would hear them. They have a way of manipulating that, these are perceptions that require to be ventilated openly, with all the practitioners and legal bodies, because the perceptions persist.

**Masutha:** These kinds of perceptions, there is another difficulty of opportunistic litigation or perceived opportunistic litigation, specifically against the state, with the consequence of, in quotes, seeking to fleece the state unduly, especially in particular areas of practice, we've observed third party and medical malpractice claims where some practitioners have even been struck off because of certain abuses. Do you believe that the judiciary has a role to play in being on the lookout of such malpractices when they observe them in their courts, or is it something they should that they should turn a blind eye to, and leave to the persons responsible for them?

**Malindi:** In my last acting stint, that matter was a subject of a workshop, where there was debate about to what extent judges may interfere in particular in those matters that practitioners may be struck off, they are mainly RAF matters, next to RAF matters there are matters of unlawful unrest and detention, where sometimes in one weekend one police station would produce up to 20 cases of unlawful arrest and detention by one attorney, and similar claims, and most of them end up by not being defended, and they seek default judgments. Judges seek to appeal, to interfere by themselves calling upon the state attorney to appear, usually to find out that they are not even aware of the set downs. The problem does not only lie with opportunistic practitioners who seek to fleece the state in RAF and unlawful detention matters, but it also lies with the inefficiencies in the office of the State Attorney, and the station commanders whose stations these cases mainly emanate from, so there is a greater role to be played by the state, not just the judiciary.

**Commissioner Notyesi:** Firstly, you have been an acting judge, has there been any paper written that has been written that an ANC person has been appointed as a judge?

**Malindi:** There has not been, usually there is no practice to scrutinise us so closely when we are appointed as acting judges.

**Notyesi:** Your understanding of the independence of the judiciary, what can you say about that? If you are appointed as a judge, what is expected of you as a judge?

**Malindi:** Most judges, and I in particular, place more stress on the fact that being a judge is a bestowal of one of the most important services a person may afford to society and it is a bestowal that must be taken seriously, and this process is to ensure that anyone who makes themselves available is someone who will take it seriously as the Constitution demands.

**Notyesi:** I am asking you this question just to ensure, we have been asking a lot of questions about your ANC membership, when there is an oath of office that judges take when they are appointed. So I just wanted you to reflect towards that. Lastly, what is your position with relation to judicial accountability?

**Malindi:** Judicial accountability has been made more stringent in South Africa, my Deputy Judge President, my JP, if appointed are there to ensure that I discharge my duties as leaders I work under. The Judicial Service Commission has now established a Judicial Conduct Committee, so my judicial accountability is much more under scrutiny, and as a judge if appointed, society now has more liberty to scrutinise my conduct as a judicial officer. My judgments must demonstrate to everyone that I am worth the person that has been appointed, and should I fail in that regard, there are mechanisms to make me accountable and to remove me as a judge if possible, and personally if there is any reasonable or objective reason by any of these stakeholders to come to the conclusion that I am failing in that regard, I will remove myself without seeking JSC processes.

**Commissioner Stock:** In your CV you have indicated that you are a member of the Gauteng disciplinary committee, is that correct?

**Malindi:** Yes that is correct.

**Stock:** You also indicated that you were also appointed by the ANC NEC as a national prosecutor. So I want you to give us the benefit of the doubt so that we understand, these two positions on a provincial and national level, were these concurrent functions, or did you first resign in the province and then appointed at national?

**Malindi:** I first resigned in the province, and then I was appointed to the national level.

**Stock:** As the national prosecutor of the ANC, what were the cases you dealt with in the main? I'm actually not looking for a long elaboration of all the cases. If you can just give us a summary of some of the cases, maybe one or two cases, that you dealt with. I know there was - a case mentioned about your involvement when you were initiating against the case where Commissioner Malema was still a member of the ANC at the time, can you give us one or two cases except for that one that you dealt with at that level, as the national prosecutor of the ANC?

**Malindi:** The only case I prosecuted to the end was Commissioner Malema's, I was supposed to be involved in the case prosecuting Mr Fransman from the Western Cape, but I could not get involved in that matter. Immediately after 2011 there were a number of appeal matters that I supposed to participate in the prosecution, but then again I did not get involved in them, so for all intents and purposes after the end of Mr Malema's prosecution in 2012, I have not been in a position to prosecute any other.

**Stock:** Would I be correct to assume that you only dealt with one case from the time you were appointed in 2012, up to this year?

**Malindi:** That is correct.

**Stock:** I don't want to speak about the other two principles, of judicial accountability and independence, so I want to focus on the principle of judicial impartiality. What is your understanding about judicial impartiality?

**Malindi:** I don't understand anything more than that stands in the oath, I think that's the most succinct statement, that one must discharge justice to all equally, and act without fear, favour and prejudice. I believe that I have demonstrated that in many cases, when I started practise my main focus was in labour law, and I've represented both unions and employees and employers, and I have not been criticised of having acting impartially because of my political affiliation.

**Stock:** The principle of judicial impartiality also speaks about, in order for a judge to disperse the rulings in different cases, the judge must look at the facts before the judge, and also the laws that relate to that specific case. Do you know anything about that?

**Malindi:** I know that to adjudicate a dispute requires that all the facts be placed before one, and judicial officers do their best to bring about a just ruling or judgment on the matter, without being partial.

**Stock:** If the Judicial Service Commission will come to a conclusion to recommend that you be appointed as a judge to the President of the Republic, do you think it would be a good thing for the JSC to do?

**Malindi:** I think it would be a good thing, not only for my benefit, but also through the pro bono work that I have done as an individual, and we have two of our members who have won awards for best pro bono practitioners. The JSC would be recommending someone who believes in those principles of the Constitution being the supreme law other than the political persuasions that need to be tamed when it comes to judgments.

**Commissioner Didiza MP:** In the discussion between you and Mr Malema, a discussion about a cooling-off period emanated, would you say, given the political background of our

country and how many of its citizens may have been engaged in political activity whether in support of the state or against, the JSC should reflect whether or not there shouldn't be any cooling-off period, and if so, how long in order to make sure that such perceptions do not prevail?

**Malindi:** That is the most difficult aspect in any social institution, that there is an assumption that if people do not have an overt political belief they do not have one, the cooling-off period remains necessary, it is very clear that a person who comes from a political background should be considered on a case by case basis, because all South Africans have in one way or the other have their lives shaped by their political views, but not everyone discloses it, even when it is necessary. I have acted for 19 weeks in the High Court, and for some 12 weeks in the Labour Court, and there has not been any judgment that has been pulled out to indicate that I acted with bias in any of those cases.

**Mogoeng:** I do not mean to be insensitive, but you shed a tear earlier on during the proceedings, and I understand that it has happened before in a court atmosphere. Is it something that is most likely to happen when you are presiding as a judge, or it is just something that happens once in a while?

**Malindi:** CJ it is unlikely to happen again, it happens once in a while and if I am judicial officer, I will be more in control of the situation, and if I feel it coming I will adjourn the court to recollect myself. So it is not an issue that would play itself in a court space, and there are a few things that get me to that.

**Mogoeng:** Alright, thank you very much, you are excused Advocate Malindi.