



# JUDGES MATTER

## **Judicial Service Commission Interviews**

**October 2016, afternoon session**

**Gauteng Division of the High Court**

**Interview of Mr M P N Mbongwe**

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**Chairperson, Chief Justice Mogoeng:** You hold a B.Proc degree?

**Mr Mbongwe:** That is correct.

**Mogoeng:** Since when have you been an attorney?

**Mbongwe:** Since 1985.

**Mogoeng:** That's about what?

**Mbongwe:** 31years.

**Mogoeng:** What kind of Practice did you have?

**Mbongwe:** I have a general practice.

**Mogoeng:** With special emphasis on, or constituting mostly what?

**Mbongwe:** It's mostly with the bodily injury cases.

**Mogoeng:** RAF?

**Mbongwe:** That's correct

**Mogoeng:** Any criminal work?

**Mbongwe:** At the present moment, very very less.

**Mogoeng:** You have acted as a judge, is that not so?

**Mbongwe:** That is correct.

**Mogoeng:** For how many weeks?

**Mbongwe:** At the moment it is 89.

**Mogoeng:** How did you find the acting experience, was it just too difficult for you, or maybe initially, and then as you grew into it you found it relatively easy? Just tell us what your experience was as you were acting?

**Mbongwe:** I want to say Chief Justice, at the beginning it was a bit difficult, not by way of the work itself, it's more particularly coming from the ranks of attorneys. You seemed to be second guessed in everything that you do, and it takes a bit of time to establish yourself. Once well established, the flow is okay, as we speak now those challenges of taking everything you say with a pinch of salt is gone.

**Mogoeng:** Did you struggle at any stage with handing down judgment timeously, or was it never a problem for you?

**Mbongwe:** It actually has never occurred.

**Mogoeng:** What is the longest it has taken you to have a judgment delivered?'

**Mbongwe:** Less than two months.

**Mogoeng:** I beg your pardon?

**Mbongwe:** Less than two months.

**Judge President Mlambo:** You responded to a question by the CJ that it's 89 weeks, I think its 3 weeks in addition to the period set out in the spreadsheet in front of you, and these are three weeks you performed service now towards the end of the term, am I correct? My spreadsheet says you've got 86 weeks.

**Mbongwe:** It was 83 weeks at the time we submitted the application then I went in.

**Mogoeng:** You are speaking too softly Mr Mbongwe, not everybody can hear you what you are saying.

**Mbongwe:** It was 83 weeks at the time we submitted the application, I think it was the beginning of August, and then the additional weeks make up the 89 weeks.

**Mlambo:** I am not disputing the additional weeks, according to my spreadsheet you acted until the end of the term?

**Mbongwe:** That's correct, JP.

**Mlambo:** Of all the candidates, you are the one who've acted the longest of the candidates that are appearing here, 89 weeks, that's one year 8 months?

**Mbongwe:** Nine months.

**Mlambo:** One year nine months, I confirm your answer to the CJ that you do not have problems in writing your judgments, I've never confronted you about a judgment. You've acted in difficult work areas, including 23 weeks in the un-opposed court, for a black practitioner how did you manage that?

**Mbongwe:** The unopposed court is indeed the heaviest -

**Mogoeng:** Commissioners are complaining, they can't hear you. You are speaking too softly.

**Mbongwe:** The unopposed court is indeed the heaviest, I regard it as the heaviest court, it does take a lot of time. The reason why one copes is to be ready by the time you go to court, time will be consumed if one were not to be ready and expect the counsel to take you through the paper but, if one has read, specific things, you can allow them to speak and at some stage you ask them to address you on specific things where it's a matter of concern and that facilitates - you are able to shorten and control the procedures.

**Mlambo:** So you've not struggled in the court?

**Mbongwe:** Not at all.

**Mlambo:** You've also done work in the opposed motion court and urgent court, I see four weeks in the urgent court?

**Mbongwe:** That is correct.

**Mlambo:** Good. It's the second time you come before this commission, you came last year. I just want you to take the commission into confidence. When you came last year issues had been raised against you by the Johannesburg Bar Council. And after the

interview I said to you I'm still going to offer you acting appointments to see if what happened will happen again. Can you take over from now and just tell the commission what's happened 'til now?

**Mbongwe:** The advantage of receiving comments is there are times when you act and you are really involved, you seem not to appreciate what other people see. The advantage of those comments was one is able to sit, reflect and remember that one will always have in mind that you are dealing with the public, and if there is any area of concern that is being expressed one takes that to heart. Since October, I have drastically tried to deal with the temperament. I've tried to allow people to speak without compromising the control of the proceedings, but being less involved, and only speak where it's necessary. Quite frankly I must say JP, it has worked. People are free to talk, more accommodative, even in matters where you realize that I shouldn't be allowing because of time constraints. It does not bother me anymore. To give a typical example, if you have read the file you indicate to a person that maybe you need to supplement the papers or what have you. I am no longer rushing time, I will tell the person that, if it's on a Monday I will be sitting again on Wednesday, I will be sitting again on Friday, why don't you go and prepare your supplementary papers and come on any of those two days, and the cooperation of people. In most instances they will come on the very same day, and say we've managed to get the supplementary document, here they are and it really facilitate and everybody is free to express themselves and everybody is willing to participate, and that actually lessens the time, and there is no unnecessary wastage of time.

**Mlambo:** You've not had any recurrence of the incidents that led to the discussion of those issues in the last interview this time around?

**Mbongwe:** Not at all.

**Mlambo:** You said the additional time of acting since the last interview has been well used in that regard?

**Mbongwe:** I've actually enjoyed it especially when one monitors one's own conduct to see that is there a change I have actually found that it has worked positively.

**Mlambo:** You've submitted a list of judgments you've written. I am counting 65, is that correct?

**Mbongwe:** That is correct, I did indicate that it could be more, it's just that there are judgments that were not sent to me, others that were sent I couldn't find in my I-pad anymore to say that they are not been downloaded from the server, it could be another five or six judgments that I have not been disclosed.

**Mlambo:** Mr Mbongwe, you've transversed a wide spectrum of areas of law in the judgments you've written, is there any difficult area you've encountered?

**Mbongwe:** I did actually indicate in the application form JP, that it is a difficult question if anybody is going to say what is my preference area in an interview. I just accept any challenge, and I've never really struggled to get grips with any matter so far.

**Mlambo:** I think you are the only candidate who've also done criminal trial work in this whole group. I think you've done a total of nine weeks, is that correct?

**Mbongwe:** I have.

**Mlambo:** And you feel this has adequately equipped you to get the nod to be appointed

**Mbongwe:** I think I'm well equipped.

**MEC Lesufi:** I had an opportunity to interview the candidate last time, so I have no question.

**Commissioner Nyambi MP:** Its only one question from my side. I have gone through what was said previously. It's in relation to the number of attorneys that you have produced, if maybe you can be able to explain them in term of figures in relation to gender. It's almost 10?

**Mbongwe:** It is, the females will be about four, they are all in Johannesburg.

**Commissioner Hellens:** Mr Mbongwe, taking into account that JP Mlambo has asked you, I just made a quick calculation that since you were last here, I think you have acted for 15 weeks. From October last year till now you've acted for 15 weeks.

**Mbongwe:** 16 weeks.

**Hellens:** I will take 16 weeks, prior to that if you acted for a total of 86 weeks you would have acted for 70 weeks prior to October last year?

**Mbongwe:** What happened when I was here at the interview last year, by the time I submitted the application it was 62 weeks. and there was still 7 weeks to go.

**Hellens:** I'm not grappling with the figures, the point is that you've acted for 16 weeks since you were last here, and prior to that you had acted for 70 weeks before coming here in October last year. The precise number doesn't matter, the ratio matters as far as I'm concerned. You agree?

**Mbongwe:** I'm not quite with you.

**Hellens:** Okay, prior to October last year you had acted for 70 weeks, up to October last year. Correct?

**Mbongwe:** Yes.

**Hellens:** Since October last year you've acted for another, I said 15 you said 16 and I'm quite happy with 16. After having acted for 70 weeks, the comment of the GCB was very negative, you are aware of what they were and are in the transcript. The GCB dealing with your temperament, you were interrupting counsel, you were rude to counsel, and the GCB summed it up like this "a number of qualities that one would expect from any judicial officer are not exhibited by this candidate for the reasons set out above. The message which the appointment of this candidate will send to the community about the legal community will therefore regrettably be a negative one." I'm quoting from the transcript. Do you remember that comment?

**Mbongwe:** Yes, save that you use strong word like rude, I don't remember seeing such a word.

**Hellens:** Well, do you remember the comment of the Supreme Court of Appeal in *Naidoo vs. The Minister of Police* matter, about your conduct?

**Mbongwe:** Yes

**Hellens:** I would not read it out again, but the last bit of the supreme Court of Appeal's comments are "even more disconcerted by the numerous unwarranted interruptions of the learned judge when he wrongly prevented or restricted the critical stages of the trial [indistinct] legal representative when she led or cross examined witnesses. To compound matters some other intervention order on the discourtesy and cynicism towards the witness and counsel were not spared either." The succinct question is this, if you behaved like that just as recently as just before October last year, how in 16 weeks do you suddenly turn into a model judge and see the errors of your ways and cure them completely? Did you not see in the first 70 weeks of your acting that you were behaving wrongly, it didn't occur to you?

**Mbongwe:** Commissioner Helens, the reality is, after that interview I did have a discussion with the Judge President. And with those experiences I'm sure if there was any complaints that subsequently followed the Judge President would have been aware. He has said it actually in this commission that I know the correspondence that he received from other legal bodies. I have not been called by the JP so far to come and account and say you undertook that this is what we discussed. It has not happened.

**Hellens:** I don't think you answered my question, at the time you behaved in the way that the GCB had criticized, the Supreme Court of Appeal had criticized you, didn't you feel you were behaving wrongly at that time?

**Mbongwe:** It's more a subjective matter actually, I could be thinking that I was behaving properly and somebody else can see that I were wrong, what was important and is still important is that the fact that the comments drew my attention to certain types of conduct, and what is important as well, that has been corrected, there had not been any similar complaints.

**Hellens:** That's what I'm interested in, people don't often change very easily, I want to know how you achieved what appeared to be a dramatic change in demeanor.

**Mbongwe:** That is very subjective Mr Hellens; all I can say successfully is that it has changed.

**Hellens:** Can you answer a different question please, what is your Judicial Philosophy?

**Mbongwe:** We are in a constitutional democracy, where the rule of law is actually the order of the day, and the judiciary obviously as the custodians of the Constitution will look at all aspects as long as the rule of law is upheld in whatever circumstances. I think the strive and the focus is to uphold the rule of law.

**Hellens:** Can you expand upon what you believe the doctrine of the separation powers means?

**Mbongwe:** Yes, if I refer to the cases that I have attached, you will find that there is the matter of the *SSETA versus MTIYA Dynamics*. It is clearly set out there, but for the benefit of saying it in public, it will be the rule of law; firstly, I will say that government consists of three components. A simple way of displaying the separation of power, I will put it this way; is the refrain of each of the three components from intruding into the area of operation of the other. That will be summing it up. Do you want me to explain it further?

**Hellens:** You choose the way you answer the questions, not I.

**Commissioner Ntlama:** In your question, in fact in your form, you were once in partnership with Moodie and Robertson Attorneys, and your partnership did not last long. It was a year, and when you answered as well the other question that you have learnt a lot from that partnership. Is there anything that you can share from that experience, or what are the challenges that you were faced with that prompted that short stint of that short relationship between you and that other law firm?

**Mbongwe:** I will try and answer this question though I do not quite frankly think that I'm free to do so. Because it will mean that I will bring the matters of the partnership house in, and they are not here to answer for themselves. There was no fight between me and the firm, we differ on certain agreements, for instance I was [indistinct] pushed for the bringing in of more black people, I was the only black partner. And at the beginning it was agreed and I was given the task to try and bring in black people, and I actually specified that I am here, my preference will be to bring in two black women to join the partnership. That was the agreement, and when it did not six months down the line it looked like nothing is happening, I then raised it in the partnership, discussed it and there was the issue of the purchase of shares. To me is, it was, in my case it was easy I had practice, I did not really have to pop out money, I was bringing my practice, both firms were audited. If you think of bringing new people, I was thinking that grown up

people so to speak, will be settled where they are, so we were looking at basically young people, now the extension of the mind to say that it will be impossible for those people to raise the capital that might be necessary for them to purchase shares in the firm. We had to devise a strategy, I said I for one with my 10% holding I was prepared to give 2% away, is there any other partner who will be willing to give shares, but now the effect of that was that it wasn't enhancing the BEE rating of the firm, it was basically going back, which basically meant other partners should actually give shares. We could not move any further than that, and to me I was not. I must say that there was pressure as well, I'm a senior attorney, there would be younger people, attorneys who were not quite about me being there, and obviously, I don't know if you know this, the city of Johannesburg was the B kind of the firm, so the difference were more principle than anything.

**Minister Masutha:** Counsel I want to hear based on your own experience as a practitioner, what your view is about whether it's a fact or a perception, the phenomenon of forum shopping, and the extent to which it impacts negatively on the image of our justice system, if you could comment on that?

**Mbongwe:** Minister, I'm gonna ask a question, forum shopping could basically mean more than one thing. Would you be more specific as to which aspect you were referring to?

**Masutha:** The intention was to give you a free license to say anything that comes to mind about it. Let's try and if you have difficulty maybe we can narrow it down somewhat.

**Mbongwe:** If I may, I want to ask you to narrow it.

**Masutha:** It has come in different forms, in some instances there is view that because of lack of confidence in the transformation of the judiciary, certain litigants opt not to use the mainstream justice system through the courts, and opt to arbitration as a way of resolving their disputes outside of the mainstream justice systems, for that reason. It also comes in the form of certain litigants or their legal representative finding a way to choose who they appear before in the mainstream court in some form or another; being privy to who is going to be the judge sitting in their matter, finding a way to rather have the matter come up in another day when a different judge will be sitting. Those are just two examples that will come to mind, are you familiar with any such phenomenon; have you ever come across those perception if not a fact, and what is your take on it?

**Mbongwe:** Thank you Minister, it is a fact that people where confidence is lacking would rather seek different avenues of resolving matters. I do not particularly think that it has any really impact on the court. I'm not aware of a situation, or I've never come across a situation, where a matter that was allocated to me was conveniently settled. As a matter of fact I should say, I have come across situation where at the face value I thought were very much involved then at short notice. Then I'm going to refer to Commissioner Hellens, once I was sitting in the oppose motion court, a matter that was

for some reason not on the roll was taken to a senior Judge, and the senior Judge referred the matter to me. Now you are faced with the situation where you have to decide, and it was an involved matter. I did not really begin perhaps to feel that counsel could go away or anything, I say I have not experienced that. Does it come to a question where that affect its more a matter of people, the depth of their pockets, those who believe they can afford the other avenue and individual who would be hearing those matters are free to do so but the majority would remain? The other aspect is that I still believe, with the presence of forum shopping by and large is still more reliable. You see that by decisions taken, I referred earlier on to the matter of *MTIYA* which was taken on a private forum, and ultimately because both sides was not happy, they even fought just to bring the matter for judicial review. I was happy to listen to all those things, and the reason why they have chosen a different avenue they ultimately came back to the judiciary. It is concerning if people will prefer not to come to the court and prefer different avenue, but those avenues are not without problems themselves.

**Masutha:** Clients seem to choose who represents them in court based on the kind of reputation of a specific practitioner preceding them, whether or not those reputation is a true reflection of their competence or otherwise. Is there anything that should be done or that should be done to ensure that there is equal access to lucrative work across the demographic of society in a manner that overcome prejudices whether they are based on gender or race?

**Mbongwe:** Honourable Minister, it will be a difficult question to answer in the sense that people make their choices, and if people with deep pockets decide on following any particular course of action or avenue it should not be discouraged, it will be to me a futile exercise even to try. It is a situation that cannot be controlled; it is a decision that is taken by individual.

**Masutha:** My third and final question to you relates to the perceived or actual creeping in of impropriety within the profession, or pre-existing continued impropriety, specifically that is calculated to fleece the state with malicious and opportunistic litigations which sometimes even borders on fraud. Should the judiciary pay attention, intervene in cases which present themselves as such, or is it the responsibility solely of the state, or shall we say government specifically, as the arm of the state who stands to be prejudiced? Do you think the judiciary should be involved at all in your opinion?

**Mbongwe:** Yes, I should think that it is more an aspect that should be attended to by the state. I say this having in mind the separation of powers, the judiciary's intervention is actually limited until such time that those matters are brought. Surely the other arms of government will not be happy that these are matters that are the reserve of the state and the and suddenly the judiciary is rearing its head.

**Commissioner Singh MP:** Your practice is still functioning, who manages when you are not there?

**Mbongwe:** Yes, they are three qualified attorneys

**Singh:** Is it a fully functional practice even when you are absent?

**Mbongwe:** Yes

**Singh:** Also I am looking at the transcript last time, in response to Commissioner Helens. You said I think I allowed myself to be nervous in light of the six claims that were contained therein. You went further to say it was the first civil trial that you did wrong to allow, my nerves to take the better of me. Do you still stand by that?

**Mbongwe:** That is correct.

**Singh:** And you also stand by the fact as we heard from the JP that you have corrected the 'temperamental' issue in the last year?

**Mbongwe:** I have indeed.

**Commissioner Nkosi-Thomas:** Let me find out from you what your view is as regards the role of the court to develop the common law, would you say that function is an obligatory one or a discretionary one?

**Mbongwe:** I would basically say it took the circumstance to take that as concerted exercise, I think it wouldn't be proper unless such time that we see that there is a demand to undertake that course, it should not. Whether it's discretionary or not is difficult to say, it's a course that is open and should be followed, as and when circumstances so demand.

**Nkosi-Thomas:** What is your authority for that proposition, Why, what's the basis for that answer. What are you saying, are you saying it's discretionary or mandatory? I didn't quite follow the answer

**Mbongwe:** if you say it's mandatory so we don't have a choice; it's something that has to happen. I will take it, the commissioner you used the word discretionary because there is also that possibility, so I'm saying unless we have circumstances or frequency of circumstances that warrant that there be such development. In the absence of any, it will save resources not to channel every resource or energy in that direction. Development will always be necessary; I do not believe that there should be certain instances particularly in the area of law that should be allowed to stagnate.

**Nkosi-Thomas:** What does the Constitution say in a case where a matter comes before you, and you form the view that the common law does not go far enough? In other words, it does not accord with the provisions of the Constitution. What are you as a Judge expected to do in such a situation?

**Mbongwe:** Commissioner, without making this a debate, it comes down to what I said. It will be circumstances that direct you in that direction to say ok, we need to develop

this particular area and that is why you'll do it. Whether you just take circumstance and say everything taken into account there is a need to go this route, then you're focusing on something that might not necessary be relevant that time. The law develops the course of event.

**Advocate Nkosi-Thomas:** Thank you Chief Justice, I don't think I can take it further than that.

**Mogoeng:** Thank you. You are excused.