



JUDGES MATTER

Judicial Service Commission Interviews

5 October 2016 – Afternoon session

Gauteng Division of the High Court

Interview of Judge E M Molahleli

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Chief Justice Mogoeng: Good afternoon, Judge Molahleli.

Judge Molahleli: Good afternoon, Chief Justice.

Mogoeng: I notice that you hold, among others, a Bachelors of Arts degree.

Molahleli: Yes, Chief Justice.

Mogoeng: Why did you start with Arts?

Molahleli: Well Chief Justice, '76 came up – I was a product of '76 and my parents couldn't afford, but fortunately my mom was always concerned about education - went to do research and finally found there was a scholarship, a United Nations scholarship, and found me a scholarship in Lesotho, and that's where I did my BA Law.

Chief Justice: And you studied law all the way through to a Master of Law degree?

Molahleli: Yes indeed.

Chief Justice: And for how long have you been a Labour Court Judge?

Molahleli: Next year April I'll be doing ten years.

Mogoeng: And in the course of your work as a Labour Court Judge, you do more than just labour law – is that correct?

Molahleli: Yes, I've done more than just labour law. I've had an opportunity to also act in the High Court, and that gave me exposure to other cases, to other areas of the law which I've always been interested in going into. When you look at my CV, and a quite lot of people would know me to be a kind of labour law person, because the rest of my career has been focused in labour law. Besides that which people don't know, I actively was involved in a whole variety of the areas of law, I've been involved in land claims, I've been involved in mediation, I've been involved in arbitrations, I also was involved in the setting up of the Land Court Tenant Tribunal in Gauteng which subsequently actually became a model which was used for national legislation, and that was the whole purpose that we drove when we started that particular tribunal.

Mogoeng: And your experience in life extends to being an Executive Mayor?

Molahleli: Yes indeed.

Mogoeng: For three years? That doesn't look like a time? What happened - very briefly?

Molahleli: Well you know some of us come from circumstances we grew in, and I know some people say to me, a friend of mine who keeps saying to me "you were a politician". I don't regard myself as having been a politician. I found myself having to go into being a mayor because of being an activist at the time. Yes indeed, I did serve as the executive in the civic organisation and other political organisations, but at the time really what was driving all of us was to resist a system that the whole world rejected. And some of us couldn't stand by and say let it go through. What then happened was that I got involved quite extensively in community dispute resolution. In fact, myself and three other people, Lavery Modise and Advocate Paul Pretorius at the time, we started a community dispute resolution project because of what came out of a case where Moses Mayekiso and a number of the Alexandra people were charged with the so-called People's Court. Now I was quite active in Kagiso, I must say, in terms of dispute resolution, and my life centres very largely around dispute resolution. When we looked at it and we were debating it at the Centre for Applied Legal Studies, and I said that I'm really opposed to this whole idea that the media project the People's Court as a horrific kind of barbaric process. I have actually been involved and I have attended some People's Court proceedings in Kagiso, and I stood firmly around the issue of human rights - that is if somebody is accused of wrongdoing, make sure that the person has a full hearing as to what had happened. We then approached the then Minister of Justice

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Mogoeng: Just summarise it.

Molahleli: That's how I then got involved in the whole process of dispute resolution, but also even within the ANC itself I had the blessing that now and again, whenever there was a dispute, I would be asked to either go and negotiate or I would be asked to go and mediate. For instance, there was a dispute between the youth of the ANC and the PAC in Kagiso. Initially I was sent to go and establish a contact and when I met the PAC they asked me to become a go-between between the parties, and I successfully did that.

Mogoeng: Compared to the Johannesburg or Pretoria High Court, just how busy is the Labour Court?

Molahleli: The Labour Court is extremely busy. I think if one looks at the number of senior judges sitting in the various courts, you will note that, if I may use this term, most of them get a "grilling" from the Labour Court – it's a very busy court. The very nature of the work that we do in the Labour Court really helps, particularly around motion proceedings, because most of our work is around reviews.

Mogoeng: Did the workload you had to contend with in the Labour Court smoothen your transition from the Labour Court to an Acting Judge in the Johannesburg High Court?

Molahleli: Yes indeed, Chief Justice. The first time I was invited to act at the High Court, I really questioned myself a number of times. When I was given the motion papers which were given to me two weeks before, that weekend starting from Saturday, Sunday, I didn't want anybody to come close to me, because I thought this was going to be a big challenge. I prepared all those files, and I went into court on Monday, and of course I surprised some of the counsel, because the policy at the Labour Court wanted judges to prepare the matter. You don't dare come tell me I must postpone unless you've got some real good reasons.

Mogoeng: Last question: why do you want to go to the High Court?

Molahleli: I want to go to the High Court, Chief Justice, because I've always wanted to be involved in the broader aspects of the law. As you saw from my paper, I've been involved in the broader legal field: land claims, land lord/tenant boards and all those aspects. Even when I joined the Labour Court, it's always been at the back of my mind. What took me so long was that I always believed that when I move from one level to the next I really needed to feel very confident that this is what I'm going to do, and I will do it successfully with the commitment and dedication to the work. If I can mention, very early when I joined the Labour Court, the then Judge President Zondo said to me "as soon as you're ready, please tell me when you want to go act at the High Court". Couple

of months later he said to me “are you not yet ready?”, and I said to him no, I’m not yet ready. I think Judge Mlambo at an earlier stage also approached me and I said no, I’m not yet ready. As soon as I was ready I said yes, now I think I have done what is necessary to acquire the experience, the exposure and I want to give it a try at the High Court.

Judge President Mlambo: You’ve acted for three full terms in the High Court – is that correct?

Molahleli: That’s correct.

Mlambo: And you’ve been a judge in the Labour Court for total of 10 years?

Molahleli: Yes.

Mlambo: You’ve sat in all the work areas of the Labour Court, am I correct?

Molahleli: Yes, indeed.

Mlambo: The urgent court, the opposed motion court, trials and unopposed court?

Molahleli: Yes.

Mlambo: And in the High Court you’ve also done that – in the unopposed court and in the opposed motion?

Molahleli: Yes.

Mlambo: Did you find any difference that troubled you in the transition from the Labour Court to the High Court?

Molahleli: Not quite. Some cases required me to do much more reading, because it’s a field that I would not have been involved in, but that for me that was no different than when I joined the Labour Court. There are certain areas in the Labour Court, in fact even till today as I sit here, I was sitting in a matter yesterday that requires me to do much more extensive reading than one would think for someone who sat for 10 years would not need to do. So there are some cases where yes indeed I needed to do much more reading, but generally no, I didn’t find it to be a problem.

Mlambo: You say you are not a politician, but I remember you mentoring me as a young article clerk in communism and socialism many years ago. Is that not what a politician does? You don’t have to answer -

Molahleli: I will answer it. At the time I was very committed, and I really believed that it was necessary to do it. And you would recall during our debates at the time that I used to say to you that the law was useless, and that the law was an instrument of the

oppressor. As I grew older I became wiser and I now believe, particularly with our constitutional democracy, that the law is actually an instrument that advances development.

MEC Lesufi: I just want to deal with something that I'm quite aware might have been brought to your attention- an objection by somebody called Mr Derek Grootboom. It looks like he has a bone to chew with you. Are you aware?

Molahleli: Yes indeed, I am aware.

Lesufi: What is your comment on all the issues that are raised here, especially relating to his case in particular, that he has to wait for almost eight years for your judgment to be overturned, and the calibre and the nature of your judgment in terms of grammatical and spelling errors? Is it personal, or is it something you can contextualise?

Molahleli: Yes I can. Firstly I would like to deal with it in three ways. The first one is the broader principle that Mr Grootboom is entitled to complain and it needs to be welcomed, because it talks to transparency and accountability. The second point relates to his challenge on my judgment in terms of saying that I said Pick 'n Pay had dismissal in terms of Section 17. That is a total incorrect understanding, and I think I wrote the judgment for the parties that were before me and the losing party being government, would have understood exactly what I meant when I used the Pick 'n Pay reference, because it was their case that were dismissed. There is also an aspect where he refers to his own case. His case - he came before me and I see in the email he wonders whether I will remember what he said to me when he came on the leave to appeal. I came to Cape Town, and if I recall the one court was not available. I then proposed to both parties, this being a matter that is being considered on paper, is there any problem in me conducting in chambers and he agreed, the state attorney agreed and I dealt with the matter. Then he said to me he is going to take me through unto the Constitutional Court, and I think it is irrelevant. As a judge I don't have to concern myself with threats. If a party makes threats, my responsibility in terms of the Constitution is to make a decision. About the grammatical and typographical errors, I must just own up. I feel very embarrassed. I struggled for the whole week as I pondered on this matter as to how it happened, and I think to try and give some explanation would really not help the cause, because it should not have happened, particularly to a person at my level. But it has happened, and I can but say a good lesson has come out of it. I will have to go back and look into my own systems to ensure that it does not happen again.

Lesufi: I can't trace your financial disclosures here honourable judge. I'm not sure whether you have some directorship in any companies or institutions you want to disclose?

Molahleli: Not at all, not a single one.

Minister Masutha: I just want to canvas your view on the issue of the system of judicial appointments, specifically to the specialised courts – the Labour Court and perhaps you could touch on the Land Claims Court if you want to, and indicate if you have a particular view as to whether the existing system is the ideal system, or whether we should conversely explore a different dispensation in this regard.

Molahleli: Thank you Minister. I think and I strongly believe that the system as it stands should continue. I know when the superior courts were debated, there was the whole issue whether the Labour Court should be incorporated into the High Court. I'll speak more about the Labour Court, and I really believe it should continue to operate as a specialist court.

Masutha: Is there a particular reason why you support that specific view, including the manner of appointment and the tenure of judges who get appointed?

Molahleli: As far as I understand the Superior Court Act as it is now, judges in the Labour Court are no longer serving the 10-year period, they have a full tenure and so the whole system has now changed as far as that is concerned. In terms of the appointments, I think in the labour market you have two main social partners which are labour and business. The dynamics are quite unique and the disputes that arises there do require people with not only the expertise in labour law, but also people who appreciate the kind of contextual process that happens in the conflict that between the employer and employees.

Mogoeng: So you need NEDLAC there, and in the case of the Land Claims Court you still need - is it Land Affairs that somehow gets involved?

Molahleli: Land Claims Court Chief Justice as I understood, particularly at the time when I was still quite actively involved in those disputes -

Mogoeng: The core responsibility – labour, justice and then, is it rural development, land affairs and then justice - doesn't it complicate our situation?

Molahleli: I see now - I missed the point. As far as I understand, all the courts, the responsibility at some level is that of the Minister of Justice. When it comes to the Labour Court of course, those matters, the labour matters would fall under the Department of Labour. I can't see any problem with that, because in as far as the judicial functioning of the courts is concerned - well now things have become much better, because it falls under the Office of the Chief Justice. Therefore the whole dynamic that happens between departments and the courts in relation to the area of the operation of the courts, I think should improve or should have changed by now.

Mogoeng: If the Land Claims Court judges were appointed like all others we would be able to advertise and have them appointed now. But because there is another department involved, we can't. It's entangled with the Land Restitution Act and so on - but that was just by the way. Commissioner Notyesi?

Commissioner Notyesi: Thank you Chief Justice. Judge I understand you are very committed to issues on access to justice. You've serve on the Legal Aid Board?

Molahleli: Yes.

Notyesi: Now there has been some criticism, particularly from some Commissioners, even here, that the Legal Aid lawyers are not of quality, and it impacts on access to justice. What can you say about that?

Molahleli: Well firstly, let me just say my experience and as far as it is concerned, talking from the Legal Aid SA point of view, there are very firm processes that deal with quality of work. And that organisation – incidentally, I'm no longer part of it - what impressed me when I was there was the kind of monitoring and control over performance. When criticism is levelled against the lawyers, that would mean that somebody would have to sit in a court of law and see their performances. I have now sat in three terms and I can say to you, the one case I sat in on appeal, there was a lawyer from Legal Aid. We went into that appeal, with my colleague, with a particular view and we were going to give an *ex tempore*. The Legal Aid lawyer put such an argument, that I leaned over to my colleague and I said I'm sorry, no *ex tempore* here, we have to go and consider this matter. And indeed, we were persuaded that he made a very excellent case and the preparation was quite great. In fact, all the leaves to appeal that I sat in, in Pretoria, there were lawyers from Legal Aid SA. I can't criticise them and I can't talk for what other judges may have experienced, and I know there have been some problems.

Notyesi: Lastly, What is your own judicial accountability?

Molahleli: Firstly, judges are accountable to the Constitution. They are accountable to litigants that come before them - they then are accountable to the Judge President, and immediately that goes up to the Chief Justice. I believe that we are all accountable, and fortunately the court that I come from – we have such a collegiality that we as a team believes if I'm overloaded I shouldn't just ... or If don't have matters or my trial collapses, I shouldn't just move on – I go to others and I say I'm now completed and I offer myself. That's what I would regard as accountability.

Commissioner Nyambi: Let me commend the dispute resolution document you drafted. If you look at the Gauteng division, out of the 79 you have 52 males and 27 females. What can be done to address this challenge?

Molahleli: The challenge is gender representation. I think the issue has been raised on a number of occasions. I think the profession needs to do serious introspection and look at where they are in terms of transformation and the empowering of women. Us as judges, the best we can do is to cry out and say we don't seem to be following what the Constitution and all laws require, the Employment Equity Act, and therefore ultimately when it comes to the courts, it doesn't reflect what should happen. But I think also the leaders in the judiciary need to sit down and look at strategies that will ensure that women come forward to serve in the judiciary.

Nyambi: Do you have any personal contribution that you have done to advance gender transformation that you can share with us?

Molahleli: Yes indeed. I'm sure you will be aware that judiciary hierarchy is a very important aspect. My very first acting stint at the Labour Court - I went to Judge President Zondo and I said to him, I'm quite concerned that I've come to join this court and I don't see women. And he said to me listen, I have tried my best and every time I think I'm successful it fails – do your best. I then went out and got some names and some people did act. I did the same with the current Judge President, and the last time I served on a committee which was set by the Judge President in terms of inviting people to come and act, he made it very clear to us that the issue of women representation in the courts is quite an important one. Yes indeed, in the Labour Court we had a number of women acting in the courts. I think more than that, the heads of the courts need to find a strategic way of addressing also the kind of environment, and I'm not sure if the current environment is non-conducive, but somehow female judges that act in the courts, do not stay, they don't come back and say now we want to pursue this. There is some disjuncture somewhere, but I can't really put my finger on it and say this is the cause of the disjuncture.

Nyambi: What connection do you see between democracy and the rule of law?

Molahleli: The rule of law is the cornerstone of democracy. If you don't have the rule of law, you can't have democracy. Democracy would fall flat, and that is the relationship I see between the two.

Mogoeng. Thank you Commissioner. You've been a judge for about 10 years now and qualified to be a leader of a court – High Court, Labour Court - is that not so? It wouldn't raise eyebrows, based on your experience, for you to be appointed to a leadership position, would it?

Molahleli: I would assume so Chief Justice, in particular if one takes into account the work that I've done. I've not only sat in cases incidentally, I have also been quite active in the case management administration of courts and I think JP will tell you that when he was a JP at the Labour Court that I'm quite an activist when it comes to that. I

strongly believe that as a judge, and I know the traditional way would be to as a judge is to wait for the file to come to you, but Chief Justice I can say to you and relating also to the question about the empowerment of women, the majority of the staff in the Labour Courts are female. They come to me anytime and I am quite happy to sit down and say this is what we do. Recently I was acting in Pretoria, just to give you a typical example, I showed my secretary how to do the tracking and how to use the computer and suddenly she came with three others and asked me if I would mind explaining it to them again. So yes, indeed, if the opportunity avails at some other stage once I've been exposed to the High Court, I would think about it.

Mogoeng: Can you tabulate without elaboration which strategies heads of courts, judges, judge presidents, etc. could employ so that there is more gender representation, based on your experience in the judiciary, knowing the challenges?

Molahleli: Well I think you need an imbizo with the Law Society, you need an imbizo with the Bar Council, and let them explain exactly where the problem is. Is it a problem of political will, or is it just a problem of not being committed to the whole process, because that's the feeder into the judiciary?

Mogoeng: Apart from imbizo, what must the heads of courts do to attract women? The strategic ways you alluded to.

Molahleli: Chief Justice, there was a programme where judges wanted to be trained -

Mogoeng: The aspirant judges' programme is running. You were saying there is a need for additional ways. I want to benefit from your own input.

Molahleli: In addition from the training programme Chief Justice I think you need to also have some other, and I'm going back to the *bosberaad* -

Mogoeng: Or *imbizo* -

Molahleli: Imbizo, not only with the Law Society, but with the women leadership groups to sit down and say: where is the problem? What can we do? And they might have better ideas than -

Mogoeng: We've met them – apart from them?

Molahleli: I can't really think now what else should be done.

Judge President Kgomo: If I'm right you cannot now serve in the Labour Appeal Court, which you seem to be suitably qualified and experienced to serve in, because you're not a High Court judge. Would I be correct?

Molahleli: Yes indeed, Judge President.

Kgomo: So appointing you, even in line with what the Chief Justice has said, would afford give you the responsibility to operate on a higher level?

Molahleli: Yes indeed. That's one of my visions at some point that the Judge President in the Labour Court would invite me to sit in the LAC, and then I can take the experience I acquired in labour matters to deal with them at the LAC level.

Mogoeng: You are excused, thank you very much for coming.