



JUDGES MATTER

Judicial Service Commission Interviews

6 October 2016, Morning session

Gauteng Division of the High Court

Interview of Advocate C J Van Der Westhuizen SC

DISCLAIMER: These detailed unofficial transcripts were compiled to the best of the abilities of the monitor. However due to capacity constraints they have not been fully edited. We have therefore made the video recordings available that were taken during the interviews available. Those wishing to cite or quote from the transcript are encouraged to check accuracy with reference to the video file.

Chief Justice Mogoeng: Good morning Advocate Van Der Westhuizen.

Advocate van der Westhuizen: Good morning CJ.

Mogoeng: Is it fair to assume that you are not related to my colleague Johan van der Westhuizen?

Van Der Westhuizen: I would have liked to say yes, but no.

Mogoeng: Okay. You have been in the profession for a long time. Maybe, let's start with your role as an advocate. For how many years were you junior counsel?

Van Der Westhuizen: 32 years at the bar, and I'm eight years as a silk; roughly about 25 years I would say.

Mogoeng: What took you so long to be a silk?

Van Der Westhuizen: Probably because I was too humble and thought I needed some more experience before taking on greater responsibilities.

Mogoeng: Yes. And your areas of focus were? Particularly as a silk?

Van Der Westhuizen: Particularly as a silk was intellectual property, though I did other fields too, mainly in the commercial area. But intellectual property was not by choice when I started. I was aiming to be a great criminal lawyer, but it did not work that way. One cannot always choose your field of expertise.

Mogoeng: But how did you get into intellectual property? Did you pursue studies in that area first and then briefs began to flow or were you just given a brief and you had to find your way in that area?

Van Der Westhuizen: It is rather curious where as a ranked junior, I did lot of noting of judgments for a particular attorney who was versed in the intellectual field and took pity on me, thinking that he cannot only use me for noting judgments, and then I started getting briefs. In those days, the Patents Act provided for only 16 years, but you could get an extension of five years under certain circumstances, and that's where I really started to do the applications for extension of term and then, slowly I moved up.

Mogoeng: Publications or applications?

Van Der Westhuizen: Applications for -

Mogoeng: So anybody can start in that area as long as you have work that compels you to familiarize yourself with that line of law?

Van Der Westhuizen: Yes. I know of colleagues who have done the LLM course and not getting one brief in that. It is really by chance that, speaking for myself, I landed in that field.

Mogoeng: By chance and by connections?

Van Der Westhuizen: I wouldn't say connections, no. It's just because the attorney was a real gentleman, and he thought maybe he should not be unkind and give me something better and -

Mogoeng: I'm sorry I interrupted you. Have you finished?

Van Der Westhuizen: Yes, I've finished. Thank you very much.

Mogoeng: Apart from intellectual property, what other line? I'm trying to establish how the court could benefit from your experience should you be appointed. Apart from that?

Van Der Westhuizen: Apart from that, I did commercial work, contracts, etc. The issue of the intellectual property is not something that takes you out of the field. Everything still remains the same – cross examining experts, leading their evidence. It's just your application of specific principles to a field that you will...

Mogoeng: Yes. Just in passing, what could be done to incentivize more black lawyers and women, not only to be members of the bar, but to also help them stay at the bar, help them stay on as attorneys?

Van Der Westhuizen: That is a vexed question. In a sense, it depends on the individual; what he wants to make of it. But from the senior people involved in the bar, there should be more outreach to them in that regard, and to mentor them to not falter if times get tough because the bar, because at the bar, you seem to go through various cycles: ranked junior and then that type of work falls away, you get into the junior work – it's like a curve; you go up and down, and it is to just persevere. I think the greatest drawback is financial aid. It has become very expensive to own chambers, especially in view of the fact that -

Mogoeng: I asked the question because I know that colleagues that I started with at the bar, who were whites, did not all have rich parents, and unlike their black counterparts, they never were without meaningful briefs, suggesting that maybe seniors have more work to release to juniors, the possibility might just work. The possibility of considering everybody might just help to strengthen the possibility of everybody staying on. What are the measures that the bar is considering apart from financial assistance? What measures in terms of work distribution are being considered?

Van Der Westhuizen: I'm not on the bar council, and for that, it is difficult to really say what happens in the inner circle. From my part, I would encourage that in the various areas, whether it's intellectual property, whether it's tax or other commercial matters, is that juniors indicate their area of interest, and that there is like a pool created from where you can draw juniors and in that way, expose them to the particular field. And that is what I believe can and should be done.

Mogoeng: Without going into specifics, is it fair to assume that you've played your part in ensuring that the desirable objective that are suggested to be realized, or should try to be realized, is realized or realizable?

Van Der Westhuizen: I would agree with that.

Mogoeng: Before I forget, what is this fencing association? Because I could only think of a fence. I said, why is the advocate fencing now; what is he fencing; is it a game or what? Is it sport?

Van Der Westhuizen: It is sport, yes.

Mogoeng: I'm a rural person.

Van Der Westhuizen: But as a rural person you would have had your fights with your siblings, with sticks, etc. It's a modernized -

Mogoeng: It's a modernized stick fight?

Van Der Westhuizen: It's a modernized stick fight.

Judge President Mlambo: I just want to go through what you've done as an acting judge. My spreadsheet suggests you've done 26 weeks, starting last year.

Van Der Westhuizen: Yes.

Mlambo: And in that 26 weeks, you've done the third court. I don't know how many you had that week.

Van Der Westhuizen: One specific one that was quite lengthy.

Mlambo: Right. And then you had two special civil trials. How long were each of them? These are trials of long duration.

Van Der Westhuizen: Yes, I think the one was close on to two weeks and the other one was about seven days.

Mlambo: Then you've done five weeks in the opposed motion and five weeks in the unopposed motion. These are work areas that you did within your normal practice as an advocate, especially opposed and unopposed and in the urgent court. Am I correct?

Van Der Westhuizen: That's correct.

Mlambo: Right. Now, when I look at the judgments you've handed down, the norm is you hand down judgments within a month to two. I think there is one where it took you just over two and a half months to three months, which was a special review; the *Ndaba* one. I think it's number 41 in your list. And then there are two others, but they were all less than three months. Is there any particular reason why those took longer than the norm?

Van Der Westhuizen: The one that took the longest was heard, I think, a week before the end of term. It dealt with constitutional issues. When recess started, I contracted the horrible flu virus which took me out for about five weeks. But in that time, I still considered the judgment; not just sitting with it, you mull over it, and that's how I approach my briefs and even the judgments you - you don't just sit down and write the judgment, especially if it is something of some concern or importance; and that mainly I think, was the issue.

Mlambo: Thanks for that response. Let me just deal with an issue that CJ raised with you. In the special civil trial role, that's where I enroll the intellectual property matters in Pretoria, and they're only heard in Pretoria.

Van Der Westhuizen: Yes, that's correct.

Mlambo: Unless I'm mistaken, one of those special civil trials was one such matter; the special civil trials you did.

Van Der Westhuizen: That was not - medical negligence was the one - off hand I can't remember.

Mlambo: The point I'm making is I was rebuked; not rebuked, called to order by the SCA in a separate letter, where one of the justices wrote to me to say I must stop fielding judges in work areas they know nothing about, because they had sit in an appeal where I put a judge, a black judge in the tax court, and the rest is history. I'm mentioning intellectual property deliberately. I'm not aware if there is any black counsel who does that kind of work. Am I wrong?

Van Der Westhuizen: Not senior counsel, which is unfortunate, but there are some juniors that have been used. I've had one specifically that I've been briefed with in two matters - that was a trademark matter, great assistance. There seems to be in respect of patents, a hesitancy, because it is something strange to maybe the culture of approach to a lot of black juniors and even female, to assist. And when they hear it's a chemical matter, they sort of stand back, which when I was briefed, I was also aghast because I had a very brief scholarly.. at school, exposure to chemistry, etc. But it is something that can be gained by way of experience, but there is an interesting gap. It's unfortunate that there are no seniors. One particular candidate attorney that became a director at one of the big firms, and he had shown great promise had he gone to the bar, but he was appointed or elevated elsewhere, also in the intellectual property area.

Mlambo: I think I raised it for one simple reason, that I think it's a constitutional injunction when it talks about demographics that our jurisprudence should also reflect that.

Van Der Westhuizen: Yes, that is correct.

Mlambo: You agree with that?

Van Der Westhuizen: I agree fully with that.

Mlambo: Because it can't be right that in any intellectual property matter, I've got to put white male judges. Well, I have one female judge, but she's also white.

Van Der Westhuizen: It is very unfortunate, and that is one thing that concerns me and some of my other colleagues to a great extent. It also depends on the individual, whether he would stick out his neck, so to say.

Mlambo: Yes. And when you are a silk, I'm sure you've had matters that you've been the lead counsel, it's your choice which junior you pick. I think the bar councils are now changing that rule.

Van Der Westhuizen: They are changing it slowly.

Mlambo: It's been your choice as lead, which junior you want to bring. This just touched on something else, the other side of the coin. I had a meeting with a very senior official of a banking institution to ask him why matters from his bank never landed in black hands, and he said no, it's the attorneys they brief who prefer to brief white counsels. I found it strange because if he says I'm the client, I want you to brief black people, why would the attorneys not do so? But is that a phenomenon you can talk about that the firms are the ones who call the shots about where the briefs go.

Van Der Westhuizen: I would say up until about three/four years ago, that was the norm. They did not want to use inexperienced counsel in that regard. That's why there is a very close community of advocates that do the intellectual property, which is sad, but some of the firms have broken that sort of steadfast rule whether they are in fact searching and encouraging.

Mogoeng: Thank you. Before I forget, just two things. There's been a reluctance to be involved in matters or a case involving chemicals by juniors, black and culture. How do they come together?

Van Der Westhuizen: That may be a wrong perception on my part, but it's even under the young white counsel that are hesitant, because it seems very daunting to deal with chemistry. But when one is in practice, very much or very little turns on the chemistry; it's for the experts to explain, and then it's merely just to apply the principles. My perception may be wrong, and I hope it is wrong that it is culture. When I say culture, in the sense that many young counsel come from the rural areas where they had normal schooling, not necessarily -

Mogoeng: But they're taught chemistry there.

Van Der Westhuizen: Sorry?

Mogoeng: I was taught chemistry in a rural school where the Acting Deputy Chief Justice stays. Where does the perception come from that rural people or black people -

Van Der Westhuizen: No, no. I don't say it's rural -

Mogoeng: Or black people would be disinclined to have something to do with chemistry?

Van Der Westhuizen: My - The way I may have expressed myself, I did not say it's only from the rural areas. I said it was also in respect of white counsel that is -

Mogoeng: So it's culture that cuts across -

Van Der Westhuizen: Cuts across everything.

Mogoeng: Then it's not culture. Culture can't be the basis for the disinclination to be involved if it applies to both blacks and whites.

Van Der Westhuizen: You are quite correct Chief Justice.

Mogoeng: So it was just an error?

Van Der Westhuizen: Yes.

Mogoeng: Okay. Now, the JP asked you about why either clients or attorneys would not be keen to have black junior counsel involved, and then you say they don't want to use inexperienced counsel. What does that mean? Black inexperienced, what does it mean?

Van Der Westhuizen: Inexperience in the sense that where there is already a pool of juniors that are active in the intellectual property area, they tend to use that pool, and they don't fill it on. In that sense, I used the word 'inexperienced'; not being exposed to the particular area, not necessarily intellectual property, but the fields of law too.

Mogoeng: I'm raising it because it sort of almost became controversial on a wide scale, this thing of roping in black counsel and inexperience. I don't want you to leave here with an unfair perception about your views attached to you. Is it fair to assume that everybody comes to the bar, well not everybody, many people come to the bar with limited experience?

Van Der Westhuizen: That's indeed true.

Mogoeng: Black and white?

Van Der Westhuizen: That was my circumstances too.

Mogoeng: And has it been your observation that some of the junior white counsels get the work which some black juniors are actually more experienced about than they are?

Van Der Westhuizen: Yes, I have to agree with that.

Mogoeng: So experience is - inexperience cuts across.

Van Der Westhuizen: It cuts across, but I used the word 'inexperienced' in the sense that where there is an established pool, it appears to be or it appeared to be until three/four years ago that they did not want to go outside that pool, which was in that sense inexperience.

Mogoeng: But it is the same in every area of the law, whether its criminal law or divorce, you hardly ever come across a situation where there is keenness either from

client or from the attorney to brief black junior or senior practitioners. Is that not your experience?

Van Der Westhuizen: That is so.

Mogoeng: Yes, that is why the attrition rate really is to be found primarily, if not exclusively, among black practitioners.

Van Der Westhuizen: Yes.

Mogoeng: They're the ones who fall out of the profession because they're not getting enough work, not because they are not any good. Just like Mohamed, Langa, Moseneke and Ngcobo, however good you may be, you will just never get that work.

Van Der Westhuizen: That's why I proposed that there should be a pool where counsel of any creed or culture should indicate their interest, and from that pool, there is a concerted effort to get such juniors.

Mogoeng: I thought I should clear that up before commissioners raise difficult questions with you. Commissioner Lesufi; I'm sorry, MEC.

MEC Lesufi: Just take me through your understanding. For you to understand that laws are just or unjust, is it through education or training, or is it through knowledge in terms of general knowledge, or reading from newspapers, just for you to understand if laws are just or unjust?

Van Der Westhuizen: A bit of both, I would say. It's your life experience and also the particular areas where you -

Lesufi: So by 1992 after you've qualified with your LLB, you had an understanding of laws being just and laws that are unjust?

Van Der Westhuizen: Yes.

Lesufi: So, when you went to join the army, you were enforcing an unjust system?

Van Der Westhuizen: I would not say I was enforcing a just system. The situation was that if you refused to do the conscription, you were treated as a criminal. You had to do - waste time for four years before you could get into society, and in your area of specialization or your area of, to do something about that to assist the people who are not there. It's in that sense had I followed the other way of being adverse, it would have tarnished my ability to be able to assist later, which when I had the opportunity to do so, I in fact did so.

Lesufi: So you went there knowing that apartheid was an unjust system?

Van Der Westhuizen: Yes. It was something that I could never understand as a kid, and even later. I still do not understand it.

Lesufi: But I went through everything that you have given us here. There's no single indication of you opposing.

Van Der Westhuizen: As I have explained that the opposition is not necessarily from the outside, it can even be from the inside. But I am a very apolitical person in a sense. For me, it deals with justice for all, and everyone has to be either represented or assisted in having the sun shine on him too, and that can be done from without or from within in a particular situation.

Lesufi: So apartheid needed to be opposed only by political people, not apolitical?

Van Der Westhuizen: That's not what I said.

Lesufi: I'm saying you said it was an unjust system; I'm going through your records, you have never raised your finger on anything that is related to apartheid. Am I correct?

Van Der Westhuizen: In the papers that far, no.

Lesufi: Okay. Outside these papers?

Van Der Westhuizen: I'm a private person; I do what I do. I've never joined any group for various reasons; the main reason being that being an individual is as good in opposing or supporting whatever. But in my papers, I have not indicated anything.

Lesufi: I'm trying to find your suitability in representing everyone, because from your records, including your sports, fencing and any other thing, it's a privileged background, and you're requesting us to consider you to represent and serve everyone. But in all the documents that I have in front of me, there's no single indication that you know what is an informal settlement; you have visited an informal settlement, or worked with people that are outside your background. Everything that is here is a one-sided view of how society is.

Van Der Westhuizen: I would not agree. In fencing particularly, there is a concerted effort from the various provinces and clubs to assist candidates or potential competitors from the previously disadvantaged groups. Where I was at North Gauteng, we had a, we still have, the Mamelodi fencing club, and it's protégée was for many years the South African champion being supported, and I personally out of my own pocket, bought fencing equipment to assist them in their training, the young lads. In that's sense, it's not just for privileged; it is also for the unprivileged, and there is a concerted effort all along to assist.

Lesufi: But let's agree fencing is a very expensive sport; it's very expensive, I know it, and if you said you supported somebody, it's fine, but did you play fencing in Mamelodi? Did you go to Mamelodi and play fencing?

Van Der Westhuizen: I never - I did it on a social basis; I never participated in competitions as the vice-president and as a president of the North Gauteng fencing union. I personally had many discussions with the person from Mamelodi. We had at one stage tried to - in fact, it was done, arranging competitions in Mamelodi, but the fencing community, although it's correct it is an expensive sport, but specific arrangements financially are afforded to assist the potential sportsmen in realizing their dreams. It is this many financial issues which would allow and permit them to compete at competitions throughout the country, which is done in various centers, and they are financially assisted.

Lesufi: I'm about to conclude honorable Chair; just want to get this clarity. As a potential judge, will you implement unjust laws?

Van Der Westhuizen: No.

Lesufi: But you said -

Van Der Westhuizen: Sorry, if I may just qualify my 'no'. 'No' within the constitution; one has to consider whether the law is just or unjust, and on that basis if it is found to be unjust, one refers it to the Constitutional Court to deal with it finally.

Lesufi: My initial discussions with you was that you either qualify or get knowledge of implementing something that is unjust or it's through general knowledge. You said it's a little bit of both that you can do that. I'm asking you now, and you're doing qualification to say it must be within the Constitution, but previously you said you didn't want your image to be tarnished, that is why you went to defend an unjust system.

Van Der Westhuizen: Perhaps, not a correct perception that I've come across. What I had said is that you can, from within, deal with things that are unjust and not necessarily only from the outside. And it is not a question of protecting my image. I've never been a person that would be arrogant to protect my image at all cost.

Lesufi: My last question -

Mogoeng: MEC, maybe before you - just in case you're going to follow up, his response was he didn't want to spoil his prospects, and that's where he used the word 'image', or furthering his studies, or pursuing his career by being a conscientious objector.

Lesufi: Point taken, honorable Chief Justice. My last question: in which year did you start to realize that apartheid was wrong?

Van Der Westhuizen: I said earlier, when I was young it was -

Lesufi: In which year? Year; specific.

Van Der Westhuizen: The year? Well, I can't remember, of my childhood, it would have been from about when I was five years old on, visiting my grandparents in Nieu Bethesda, that small town in the Karoo. My experience was that the people seemed to be accommodating to one another without having to deal with certain issues. But certain things and events came to mind which seemed unjust and not correct. So that was - it might be nine years old; probably - no; five years on from '65; about '61,'62, around in that area. It's difficult to put a year to it. It just seemed wrong.

Lesufi: Since nine years old up until now, you have never raised a finger against racism, or participated in any structure, or defended anything that is related to non-racialism. Am I correct?

Van Der Westhuizen: In my papers, yes. There's nothing there.

Commissioner Malema MP: Thank you very much. For sure you know that we all write our own history, right? As we grow up, everything as we do, we're writing our own history.

Van Der Westhuizen: But circumstances also write your history, not only yourself. Circumstances also dictate.

Malema: Through our own conduct and the things that we engage in. It doesn't matter the circumstances. We're writing our own history.

Van Der Westhuizen: As I said, to an extent yes.

Malema: And we'll be judged through that history?

Van Der Westhuizen: The history is to be seen within the circumstances.

Malema: We agree with that, but we'll be judged through that history?

Van Der Westhuizen: Yes, like I've said.

Malema: What is the longest time, time I mean hours, minutes, seconds, the longest time you have spent in a township, black township? In Mamelodi, Atteridgeville, anything, Shoshanguve, the longest, where you are so relaxed, you know?

Van Der Westhuizen: Time wise, I can't tell you.

Malema: No, but you can estimate.

Van Der Westhuizen: Couple of hours.

Malema: You must help us to help you. We're going to appoint you. So once you tell us nice answers, then you're going to be a judge, but if you go like that, you're not going to be a judge, I can guarantee you. So how many - just give me an estimate, the longest time you have spent in a black township.

Van Der Westhuizen: You should know it's difficult to say; I don't watch time. It could be half a day; it could be three-quarters of a day; it could be a day, I can't tell. I don't time myself in respect of any attendance wherever it is. I do what I do.

Malema: That's your answer? What is racism?

Van Der Westhuizen: Racism is denying somebody not of the same creed or culture as yourself any -

Malema: How do you become a racist?

Van Der Westhuizen: You become a racist -

Malema: How do you become a racist?

Van Der Westhuizen: Probably by choice.

Malema: You just choose to be a racist?

Van Der Westhuizen: Yes.

Malema: Are you - and you're not taught to be a racist?

Van Der Westhuizen: No.

Malema: Can racism be a culture, maybe part of upbringing?

Van Der Westhuizen: No. Each one is an individual and has to decide and fend for himself; he knows what is right and he knows what is wrong. So it is by choice, not -

Malema: No, but the apartheid taught white people to be racist; in schools, through propaganda, the type of education system imparted on those people – they taught them to be racist.

Van Der Westhuizen: The teachings might have been there but the individual, it's for him to decide whether he would follow and whether he agrees with that teaching; that doctrine.

Malema: But we agree that apartheid taught white people to be racist? It was part of the system; it was part of the education system. That's why there was bantu education and education for white people. They were taught to hate.

Van Der Westhuizen: I would not say they were taught because again as I said, it's for the individual to decide whether he hates somebody or not.

Malema: Apartheid did not teach white people to hate black people? Is that what you're saying?

Van Der Westhuizen: It was a doctrine, but it's not necessarily that everyone accepts the doctrine.

Malema: Did apartheid teach white people to hate black people?

Van Der Westhuizen: I've given my answer.

Malema: But I'm asking a question. Did apartheid teach - it doesn't matter whether individuals decide to choose to accept the teachings or not. Did apartheid teach white people to hate black people?

Van Der Westhuizen: No.

Malema: Apartheid didn't teach them?

Van Der Westhuizen: 'Cause they were many people that I knew as a child that did not hate people from the other colour.

Malema: Apartheid, shame, taught white people to love black people; is that what you're saying to me? That's why it was so nice, apartheid? That's why you joined the army?

Van Der Westhuizen: That's not what I had said. I had said what I had said. I've answered your question.

Malema: Was the apartheid system not declared crime against humanity by the UN?

Van Der Westhuizen: Yes.

Malema: Because it was a system that perpetuated hatred of black people by white people?

Van Der Westhuizen: Some may have followed the doctrine, others -

Malema: No, not whether others followed or not. The system itself. Slovo didn't follow the system; Ronnie Kasrils didn't follow the system; there are many white people who

didn't follow the system. That's not what I'm asking. What I'm asking is, was the system designed to hate black people?

Mogoeng: Before he answers, commissioner remember my plea yesterday, about lowering the voice? The question will still be impactful. Please provide the answer, sir.

Van Der Westhuizen: I have not made a study of the apartheid system, but I had said that it could be that the main doctrine was or the main thought behind it may have been I don't know, to hate others. What I've known of the apartheid system was that people were separated.

Malema: Will I be correct to describe you as a defender of apartheid through those answers you have been giving me?

Van Der Westhuizen: No.

Malema: You are. You are defending apartheid.

Van Der Westhuizen: I'm not defending apartheid.

Malema: And you are in denial that apartheid taught white people to hate black people, and others realize this was an evil system and they rejected it, even though it taught them to hate. That's why Madiba says 'no one is born a hater, they are taught to hate.'

Van Der Westhuizen: That may be one way of looking at it. I'm not defending apartheid, it's indefensible, and I had explained earlier to other commissioners' questions that it was something that irked me, I did not understand it.

Malema: But apartheid taught to hate?

Van Der Westhuizen: If that is the perception, then yes.

Malema: No, but I want your understanding. Did the system of apartheid teach white people to hate black people?

Van Der Westhuizen: If that was the intention, it did not succeed, because there were many people, not necessarily the exponents that you've mentioned, that did not follow that.

Malema: Are you a racist?

Van Der Westhuizen: No.

Malema: Can you speak an African language?

Van Der Westhuizen: No. I'm a lawyer, not a linguist.

Malema: So you don't see any need of learning an African language because you're not a linguist? I'm not a linguist, but I know colonial languages imposed on me by the apartheid regime; the system you benefitted from.

Van Der Westhuizen: I would not say that I benefitted from the system, nothing had come easy. I had to battle to reach where I am today. I did not benefit from anybody or any organization. There are official interpreters. If judges were to be in addition linguists, it will do away with employment, which is necessary, and there should be a drive to appoint more dedicated interpreters.

Malema: Are you an advocate?

Van Der Westhuizen: I'm an advocate.

Malema: With a firm?

Van Der Westhuizen: No. I'm on my own.

Malema: You're on your own.

Van Der Westhuizen: Yes. Advocates practice on their own, not in firms.

Malema: Go on your own with your firm. Good luck.

Minister Masutha: Good morning sirs. It's still morning. I will simply put it to you without pursuing the matter any further on the questions you've answered so far, that you are in a state of denial.

Van Der Westhuizen: No, no, that's not the -

Masutha: Can I just finish point, then you can react?

Van Der Westhuizen: My apologies.

Masutha: That you are in a state of denial about a reality that is not only characteristic of a historical past, painful historical past that this country went through, but which it's still grappling with, and that because of that, you do not present yourself as somebody who is poised to head the transition that the Constitution envisages in South Africa from a past, the unenviable past, to a future that this constitution cherishes. Would you consider that an unfair assessment of yourself by myself based on the responses you've given this morning?

Van Der Westhuizen: Yes, I would say that it is unfair. If the perception is that I'm in a state of denial, that is unfortunate. In so far as apartheid did teach people to hate, that I accept, but what I say - what I had said is that there was the doctrine which I never understood, never agreed with, but despite the doctrine, people accepted one another,

and did not hate. To the extent that the perception may have been created by my answers, that I endorsed it, or that I'm defending it, I am saddened about that. It is indefensible, and I accept that the doctrine was there to prevent white people from fairly and opening associating with all other creeds, and that is deplorable.

Masutha: I'm going to step off that point and leave it for what it is in the light of the responses you've given so far on the questions raised, but I want to narrow it before I leave it to the specific area of the legal profession. Do you believe or do you not believe that racism or racial exclusion or marginalization continues to bedevil the legal profession, such that past privilege continues to perpetuate and past exclusions based on race and gender also continue to perpetuate opposite each other?

Van Der Westhuizen: Yes, I agree with that. It still continues, and it's something that one has to work to get rid of. It would take time.

Masutha: Would you agree that this was a system planted by apartheid; it was but one of the many frontiers of the system of apartheid which continues to resist eradication despite a constitutional order that we have adopted since 1994?

Van Der Westhuizen: I have to agree. I cannot deny that it is a reality we have which has to be addressed.

Masutha: And being apolitical as you have described yourself, have you done anything or do you believe you have a responsibility to do anything to correct this as a member of that profession given your acknowledgment thereof?

Van Der Westhuizen: Yes, I have, as I've indicated in my papers, mentored and as far as I'm able to mentor many black colleagues and female colleagues to assist them in reaching that which I had reached and even to surpass me. I believe that is something that is continual on my part.

Masutha: My final area that I want to engage you on; you would accept that the mainstream of our legal system, especially your private law or civil law area is largely based on Roman, Roman Dutch law or common law as it's called, because of historical reasons that we have just described. Do you believe that post 1994, the time has come for that mainstream system to be transformed in a manner that it begins to infuse the values and principles deriving elsewhere other than Roman-Roman-Dutch law, specifically indigenous law for example?

Van Der Westhuizen: Indeed so. One of the judgments that I delivered dealt with that very issue, where the approach in respect of support was to follow the customary law, where there's an obligation on children to support their parents; and I acknowledged that and I still acknowledge -

Masutha: Was that in respect of mainstream legal dispute, or was it in respect of a dispute arising purely out of the application of a African customary law situation?

Van Der Westhuizen: I would have liked it to be a mainstream, because that's where one starts, not necessarily just to a particular area. There should be more, and if I'm granted the opportunity of expanding the law in that regard, I will gladly do so to draw in the customary law, the African law and the approach to that.

Commissioner Didiza MP: Thank you very much chairperson. Good morning sir.

Van Der Westhuizen: Good morning.

Didiza: How are you?

Van Der Westhuizen: I was feeling well until I came in here. (Laughter)

Didiza: I understand. Looking at your specialization in terms of the field of law that you said is your interest, what contribution have you made in the legal profession besides your practice? Have you thought of writing a book or journal, article?

Van Der Westhuizen: There was occasion that I thought that I would do or should do something to that extent. However, I am not a writer. I write judgments when I act, and I write opinions, etc. But I'm not that talented to be able to write the article. I've never tried it; maybe I should have, but I haven't.

Didiza: Thank you very much. Given the importance of the intellectual property, maybe just to tease you, your views in respect of the EU-South African trade agreement; there was a time that the European Union were very adamant that South African agricultural industry must actually stop using particular names based on their law of geographic indications. That related to champagne, ouzo and grappa, and I think as a country - that's my view - we were found wanting in finding a better way of defending ourselves and ensuring that we protect those trademarks that we have had and used over the years, but because Europe decided to have a no on geographic indications, we lost it, and it took time for the industry to adjust. What would you have advised if you were consulted during that period?

Van Der Westhuizen: I, I'm very much for the underdog and I would have advised we should have not allowed ourselves to be bullied by Europe or any other foreign authority. The same really applies to our trademarks, such as rooibos etc that we should have come out much stronger. I think jurisdictions are jealous of what they have, and they seek to protect that. But it is something we may have dealt with, sooner rather than later, and we'll in quote aggressive, unquote.

Didiza: Through you Chair, if I could just pursue it a bit. Given that as a country, we're part of the global system and part of the world trade organization, and some of those instruments are not necessarily dependent on what they want to protect or not. That's why I was asking for a legal view. I hear you said country should have defended, but

legally and in terms of intellectual property law, is there anything going forward that a country can do, particularly where you have to enter into trade arrangements?

Van Der Westhuizen: That's a tough question. I would advise that each jurisdiction is entitled to its protection it has in various areas but there should be an agreement that certain well knowing areas over many years should not be jealously protected but should be shared.

Didiza: Just the last question. Do you think in terms of law, indigenous knowledge can be protected, which is knowledge that has been passed from generation to the other?

Van Der Westhuizen: Yes.

Didiza: Could there be a legal framework that could be developed to ensure that such protection is legally binding?

Van Der Westhuizen: I would agree to that in that what is one's own, it should be protected, and in that sense, I would say there should be - times have changed, we're in a modern timeframe and there should be the acknowledgement towards in particular the African knowledge in that regard.

Didiza: Through you Chair. Just a little follow-up on this.

Mogoeng: On the legal advice?

Didiza: No, not on the legal advice, but on the indigenous knowledge system. In mind, I've just thought of the case of Hoodia and the San and the Khoi people. This was a medicinal plant that they know, they have used over the years, its properties, what it does, and so on. But when that got commercialised by a pharmaceutical, a challenge emerged. That's why I was raising the issue of indigenous knowledge systems as to whether there could be a legal framework of how that is protected because they gave their knowledge freely when research was done on the plant, and Hoodia is now a very commercial medicinal drug, and I don't think there was anything that much that the Khoi and San people gained as a result of that knowledge, and in it was in that context that I was asking, particularly given your field of law, that can there be anything that can be done to protect indigenous knowledge?

Van Der Westhuizen: There has been some amendment to the Patents Act in that regard, which may not go far enough, but there should be some other acknowledgement and I would say financial at least, when you use that type of information, and not exclude where you get it from. I was involved in the agro matter years ago before that became settled and it also appeared in that matter, that much was borrowed from information gathered from the traditional African usage.

Commissioner Semanya: I would like to discuss with you one of your judgments. It is not one of those listed in your application. It's the judgment in the *South African*

Diamond producers' Organization versus the Minister of Minerals and Energy and Others. This is a matter where you struck down a section of a statute as being unconstitutional. Do you recall that?

Van Der Westhuizen: Yes, I recall that.

Semenya: Now, obviously I don't want to discuss the correctness or otherwise of the judgment; that's not my area of interest for this interview. In that judgment, this is my enquiry with you. In that judgment, you made a finding in contradiction to a finding done by the Supreme Court of Appeal on the same aspect. Now what I want to ask you is, what are the juridical guidelines that inform circumstances in which lower courts are to differ with findings of the superior courts?

Van Der Westhuizen: I recall that was a point that you specifically appeared before me in that matter and you argued. In the SCA judgment, certain information was provided in the application on which the SCA had made the ruling. I differed from that ruling on the basis as to the facts that were before me, which were far more. There was a specific letter that had to be interpreted; the letter was not before the Supreme Court of Appeal, and the submissions or the factual allegations in that regard were contrary to what was stated in the letter. Having the letter before me and having heard the arguments from both sides, I had not followed the SCA's finding. Had the SCA had all those facts, the ruling may have been different, and it's on that basis I had differed from the ruling. I had more facts before me than the SCA.

Semenya: That's why I'm not asking about case in particular. I'm just trying to establish, juridically speaking, what are the guidelines that must inform a lower court departing from a finding by a higher court; what are those signposts?

Van Der Westhuizen: If there is a clear indication that the higher court, whether it's the SCA, whether it's a full bench was not correct in their findings, it's on that basis that you can disagree. It's difficult - you are bound in terms of the *stare decisis* rule to a higher court finding, but if it appears that there has or there is other issues that would have influenced that, one can -

Semenya: I understood *stare decisis* to mean even if the higher court is wrong, as a lower court you are bound by that. No?

Van Der Westhuizen: Yes, you are bound. But if in a particular case, the facts are different to what was before the one, then to extrapolate from that and to find yourself bound by that.

Semenya: Okay. Your understanding of judicial deference in constitutional law, what did you say it is?

Van Der Westhuizen: Pardon?

Semenya: The principle of judicial deference in constitutional law, what would you say it is?

Van Der Westhuizen: The Constitution is first and foremost, it sets principles, guidelines that are to be followed when dispensing justice. It establishes various tiers of court and there is to be compliance of the principles in that regard. The Constitution is first and foremost to be fair to everyone.

Semenya: Is that your answer?

Van Der Westhuizen: The further issue is that you have the three tiers, you have your legislator, you have your executive, and you have your judiciary. To borrow from ancient mythology, it is akin to Cerberus, the three-headed dog that protected the entrance to and from the underworld. The one head being the executive, the other head being the legislator, and the center head is that of the judiciary or justice that separates the two from impinging upon one another's fields or areas, without devouring either or both and upholding the Constitution within which the courts are to work.

Semenya: Under our Constitution, are there areas in which courts can't go?

Van Der Westhuizen: Can't go?

Semenya: Yes.

Van Der Westhuizen: Particularly where government has set - the word escapes me now - policy. It's not for courts to adjudicate upon the policy, but it is for considering laws that in terms of the Constitution may be found to be against the Constitution's protection.

Commissioner Notyesi: Thank you Chief Justice. Counsel, I would just ask you on your judgment, this one of the - the judgment that you have attached.

Van Der Westhuizen: That's the criminal judgment where -

Notyesi: The criminal judgment. In fact, just before that, I note from the spreadsheet that you haven't done any criminal court during your acting period?

Van Der Westhuizen: The allocation of matters and courts that acting judges preside on are the prerogative of the Judge President, and if he requires a judge to deal in a specific matter, it's his prerogative. According to and in terms of my questionnaire that I submitted, when I started at the bar, I did many criminal matters for a long time, and that was my main intention until I was channeled in a different direction. But I had sat on appeals, special reviews, and it's very much a question of determining the facts and then applying the legal principles.

Notyesi: In this judgment, you increased the sentence from ten years to 15 years; in that appeal court, you increased the sentence from ten years to 15 years. Obviously, in the course of that judgment, you pay heed to the judgment of the Constitutional Court that before you increase a sentence, there must be some of notification to the appellant. You noted that?

Van Der Westhuizen: Yes.

Notyesi: And my understanding of this judgment is that you purely, as I read through, you purely rely on the seriousness of the offence when increasing that sentence, despite the concessions made by the State in relation to the sentence itself, of ten years, that it was not shocking. But my question is simply this, what are the factors that the court should take into account when passing a sentence in circumstances of an appeal like this one?

Van Der Westhuizen: In that matter, the appeal was before a previous court who indicated that there should be submissions as to why the sentence should not be increased. Neither of the parties had heeded to that request. The only issues that were raised if I recall, were the issues relating to the personal circumstances; nothing else was raised, and there is authority which I did refer to, that that is not the only factors in dealing with it. If the perception from reading the judgment is that was purely as to the gravity of the offence, that is not correct. It also dealt with the factors that were absent in having the minimum sentence of 15 years for a first offender imposed. It's on the accused to set such factors before the court.

Commissioner Nyambi: The first question is about the issue of the Constitution from the first page. The preamble of the Constitution of South Africa if I can quote it, says "We the people of South Africa recognize the injustice of the past, honour those who suffered for justice and freedom in our land"; if you can share with us your understanding of that.

Van Der Westhuizen: My understanding of that is that prior to the Constitution and prior to the time of which we enjoy democracy, as it was not acknowledged prior to the Constitution, that the Constitution is to uphold each and every one as being equal and not to be subjected to the past injustices, which would primarily be the doctrine of apartheid. And it is for us to uphold that principle that all is equal; all are equal rather.

Nyambi: Because you won't be privy to the deliberations, maybe the issue of the language when you're asked whether you're able to speak an African language, what was your response?

Van Der Westhuizen: My response was that I am not a linguist; I do not speak any of the African languages. I do not have an aptitude for languages; that's why I'm not a linguist. I'm first and foremost a lawyer, a lawyer that is to uphold the Constitution, that there is fairness to all and justice to all.

Nyambi: What is a linguist?

Van Der Westhuizen: A linguist is a person that does the study of languages.

Nyambi: How can language, race and gender legitimize confidence in the judiciary, with your own understanding?

Van Der Westhuizen: The situation we have in South Africa; it's a multicultural, multilingual, multi-religion, multi-everything, and not all are able to speak all languages or to learn it easily, and that should also be accepted; and sitting as a judge, there are various issues. Language being a difficult creature, much can go lost if you are not a 100% schooled or experienced in a language; even from Afrikaans to English, there are many nuances that get lost if you are not a 100% fluent in that language. And as a judge, you have interpreters that could interpret that nuance that you may have not picked up because you are not a 100% schooled in say, a particular language.

Commissioner Nkosi-Thomas: I just want to follow up please, on your answer; the answer that you gave to a question by Commissioner Didiza, and you said that you are for the underdog, and as South Africans, we should not allow ourselves to be bullied by Europe.

Van Der Westhuizen: Yes.

Nkosi-Thomas: Now, in that answer of yours, I take it that Europe would feature there in that example as an investor and South Africa would be a host State in the context of an international trade investment deal. Is that right?

Van Der Westhuizen: Yes.

Nkosi-Thomas: Now there's this global tension that I just want to test to find out what your thinking is around that, as between host states such as South Africa in your example and investors such as Europe in that example. And that tension is between on the one hand, the investor seeking to extract as much profit as possible return on their investment, that is on the one hand, and on the other hand the sovereignty of the host State; and I just want to find out from you how that tension could sort of - be balanced out; and that is seeing South Africa terminate most of its BITs - bilateral investment treaties - because of that tension. So my question is to you in the context of you being for the underdog in such a scenario; how would you - where do you see the solution in that situation? How could you possibly resolve that tension?

Van Der Westhuizen: That in a sense has a varying on, perhaps closer to political views and strategies, commercial views and strategies. All need to be married, if I may use that word, and to find the balance. It would be a fine balance, but it would be a great challenge to be able to achieve the fine balance between the two. And it is perhaps more on the field of people in commerce, in the political arena to really dedicate or to define the approach on that regard, other than from a lawyer.

Nkosi-Thomas: Thank you. Do you think the passing of the Protection of Investment Act would assist in that regard? You know, the Act that has just gone through Parliament on the protection of investment; the Protection of Investment Act, I think that's what it is called? Do you think that would go a long way in harmonizing that space, the tension?

Van Der Westhuizen: I must concede that I do not have intimate knowledge of that, but it would seem that it is a step forward, if I can put it that way.

Mogoeng: Thank you Commissioner. You're excused Advocate Van Der Westhuizen

Van Der Westhuizen: Thank you very much.