



JUDGES MATTER

Judicial Service Commission interviews

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Kwazulu-Natal Division of the High Court

Interview of Advocate. I L Topping SC

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Chairperson, Acting Deputy Chief Justice Nkabinde: Commissioners, in front of us we have Advocate Topping, SC. Good afternoon Mr Topping.

Advocate Topping: Good afternoon.

Nkabinde: Mr Topping, I just want to quickly just remind ourselves that you are a member of the profession, you focused on maritime law when you began as an attorney and you are an admitted advocate being in the position since 1992 there. You have mentored pupils and you have acquired the position of the Silk since 2014. You have a certificate of good standing from the Kwazulu-Natal Law Society and 70 per cent of it is on largely on personal injury matters – am I right?

Topping: Yes. The only thing I can add, between the time I practised as an attorney and joined the Bar, I was a prosecutor for a time as well.

Nkabinde: Is it?

Topping: Yes. When I say 70 per cent, 70 per cent of my practise law had been litigation, mainly of course practitioner.

Nkabinde: Experience in labour matters?

Topping: Um, labour matters, very little I must confess. A few appearances as a junior in the Labour Court but no, I cannot say I am proficient in labour law.

Nkabinde: Experience in constitutional matters?

Topping: Constitutional matters, I have not appeared in the Constitutional Court itself, but I hope I have a good grasp of the Constitution.

Nkabinde: I must say I read one of your judgements and the treatment of the law impressed me. I found it quite interesting how you dealt with issues of public policy.

Topping: One of the judgments I've mentioned when I acted as a practitioner – you might be referring to the Mount Edgecombe matter, where I did refer to public policy, and I had to deal with the interpretation of the rules of gated complexes. That might be what you are referring to – *Singh vs. Mount Edgecombe*.

Nkabinde: Yes that is the matter. Thank you for reminding me of the name of the case. Your focus was more on common law?

Topping: Yes, and if I could mention that matter, as far as my decision on the rules application has been taken on appeal, so I might correctly be corrected.

Nkabinde: Your experience in criminal cases?

Topping: Criminal cases, as I've said, I've prosecuted three years before joining the Bar. My last 18 months was as a specialised prosecutor – I wasn't in a court, but we were dealing with cases that had been assigned to me so there yes I have criminal experience. Obviously my initial time at the Bar I also did criminal matters, but over time my practice had been focused towards civil law.

Nkabinde: And your overall period of acting as a Judge was slightly more than two months, am I right?

Topping: No, no, I've had three, five-week acting stints - one last year and two this year. It might not be evident from what's before you, but I've just finished a five-week stint from August to September in the Pietermaritzburg division of our division, so I have had three five-week stints. The last stint I was exposed to the appeals one has to hear, and then again a large majority of those appeals were criminal appeals. I've got quite a bit of exposure to criminal matters during this last acting stint that I've done.

Nkabinde: With the period of your acting stints, I see on 25 May to 26 June 2015 you had that opportunity which gives us a month. You had another opportunity 21 to 24 July 2015 which is about three to four days.

Topping: Yes, that was dealing with a part that had flowed over from it. My other period was during March/April of this year, and then August/September this year. The times in between was obviously dealing with matters that had flowed over and finalising matters which had not been finalised during the time I sat through slightly lengthier periods.

Judge President Jappie: Your practice as an Advocate has been largely in Kwazulu-Natal?

Topping: I would say solely in Kwazulu-Natal.

Jappie: You are quite familiar with the division?

Topping: Very much so.

Jappie: And you acted both in Durban and Pietermaritzburg?

Topping: Yes I have.

Jappie: Of the two, in your experience, which one did you find most enjoying?

Topping: I think I enjoyed both because they are different – in Durban one does much more trial work, but in Pietermaritzburg one had a different exposure of dealing with appeals, which was a totally different issue where there was not much trial work. So I don't think one could pick one as better than the other.

Jappie: Your criminal experience – I see you were a prosecutor?

Topping: Yes, for three years.

Jappie: You've already told us of what sort of practice you've got, you've told us now of your experience on the Bench. Now, in Kwazulu-Natal there is still a need for transformation. Now, what could your appointment bring to the bench in Kwazulu-Natal?

Topping: I'd like to think when one is appointed to the Bench one brings along one's life experiences. If you look at my past and you look at my curriculum, I have worked for everything I have achieved in life, and I think that is going to bring an insight into what might or what might not be important to other persons in society – what might seem trivial to me as first blush might be of paramount importance to another person and vice versa, and I think that appreciation of treating people as individuals. Also, if one looks at my background and formative years, I was born on a farm and my only friends, up until the age of 12, were the children of the employees on the farm, so I had been exposed at that stage to the isiZulu language and I was also exposed to the Sotho language, which I am sad to say I've forgotten most of it, but I have retained working knowledge of isiZulu and I think also, apart from my parents, during those initial years, the only grown up associations I had would be the employees on the farm – this had been formative in the rest of my years in how I treat people, treat different cultures and embrace everybody. Also, just at the level of practitioner, sometimes during interpretation, things get lost like subtleties of language get lost during interpretation, so it is an advantage to not only understand the English language, but I am, I would not say fluent, but I went to an Afrikaans speaking school until Standard Four, but also isiZulu. There's been times during running a trial that I have enquired an interpretation and I think that's an advantage. I would like to think those attributes would help towards a transformation of the KZN bench.

Jappie: Now, do you think it's important for a Judge to have, what could loosely be described as a judge's philosophy and if so, what would you say is yours?

Topping: Sorry I don't quite follow.

Jappie: Do you think that one, as a Judge, should have a personal approach to judging as such?

Topping: I don't think one should impose one's own will and we should treat litigants and their case on merits. I think one should always be objective whether you might personally agree with something or not, the rights of the litigant, I think, are paramount – that is in my philosophy.

Jappie: But you know one always bring one's own baggage to the Bench – how important is it to always remember that when sitting as a Judge?

Topping: You know, I'm a little confused as to the question -

Jappie: Well, the case before you is a case between the parties – you may, from your own background, have a personal view of how things unfold – how much should that influence one when one has to sit and decide?

Topping: I think one should apply the law and be objective about it and - one shouldn't bring your own personal criteria into it possibly - I've always thought that an exchange between the Bench and the Bar should be a debate and not an argument because an argument implies some sort of objective, if possible, disagreement and I would rather it be a debate than an argument.

Premier Mchunu: Now Mr Topping, just a follow up on the question that was asked by Judge President here on the issue of demographics in the province, do you have an idea of the spread, demographic spread, of the population in relation to the bench?

Topping: I apologise, no, I have never looked at it in any detail, obviously in general demographics of the Bench, I'm just trying to think, the position I'm applying for, I think there is three or four white Judges there, I think its three. I haven't added up the numbers as it were and I would not like to put myself on the spot.

Mchunu: What is your attitude just to the transformation in that respect?

Topping: I think I would fit in well although I am white and I have other cultural, if one wants to call it that, experiences and I think I could add to it and fit in. As far as running trials is concerned and so forth, I think I can deal with it and I think I can fit it.

Mchunu: But its necessity as a principle?

Topping: Very much so, no no, very much so. Obviously the Commission has that function to make sure those nominated fit into the demographics as such.

Commissioner Singh MP: If you are appointed as a Judge, it would be quite a thing because you would have risen from baker, in 1970, to Judge in 2016 – that it would be quite an achievement.

Topping: I've lived with baker to barrister this far.

Singh: From baker to barrister yes, because when I look at what you put in your questionnaire you started as a baker. You were interviewed before – was it in the April session?

Topping: In the previous session to this one.

Singh: This year?

Topping: Yes.

Singh: Where we asked you a number of questions. Maybe this question, you were admitted to the Bar in 1992, you took Silk in 2014, 22 years later. Can you tell us -

Topping: Yes, I pointed out at a previous occasion I actually applied two years before that, it was 2012 would have been, but myself and one of my other colleague as well applied. There was then that challenge as to whether the President was entitled to sign, dealing with honours, and it was held up for two years. I would liked to have been a Silk in 2012, that's when I applied and I always set out that 20 years in, because I'm one of those people, I want to be confident in myself that I can do something before I endeavour to do it – that's why there had been a bit of a delay.

Singh: I see you've appeared in a land claims matter recently – what do you think about the land claims process in our country? Is it working, is it not working?

Topping: Yes, the ones, I've dealt with three, completed two and currently busy with one. I think it's a process, yes, that works at the level of compensates - most of the ones I've dealt with, although one is running, a lot of it have been settled very amicably at the level that farmers were compensated and the traditional persons who originally lived there were moved back on - most of them moved back on, but some of them formed community trusts. There were also mentorship agreements were members of the community were trained. I think, just dealing with it corrects a lot of ills of the past, and there were just sad stories that you hear, and were told of someone's seeing their grandfathers grave being dug up and be told that spot was worth 50 grams of sugar - you realise how cruel that can be, but yes, the process I think works, and even after land had changed hands, processes have been put in place, not mentored, but overseen by the Department, and there are successes, the ones I've dealt with. Yes I think it's a very good process.

Singh: Have you any particular view on the slowness or the bureaucracy of the Department, either the Commission or the Department? Many of these claims were lodged in 1998, and you know land is very near and dear to the hearts of the people

who've lost it in the manner you have described. Have you expressed any kind of view in your -

Topping: In the matters that I've dealt with, I think it's just the volume and pressure of what needs to be done.

Singh: My last question is – your residence is in Peter Mokaba Road. Now we all remember Peter Mokaba very well – do you have any views on changes to street names and so on? Are you quite happy to be living in Peter Mokaba Road?

Topping: Very much so. I have no problems whatsoever – its progress and change and something one must embrace.

Singh: And how did your neighbours react to name changes at that time?

Topping: No, I don't think any problems whatsoever.

Nkabinde: Just before I forget, on the point that Commissioner Singh has raised related to bureaucratic delays in land claims, could that perhaps be attributable to competing claims following the amendment?

Topping: At the moment the new claims have been held up because of the Constitutional Court judgment that was recently pronounced, so the ones, the claims that I'm dealing with and the claims that are going forward, there has to be a finalisation of the old claims prior to the amendment, and as I understand, there is a two year period in which Parliament has to really re-enact the new claims as such. But as far as competing claims are concerned, what I've found and the ones that I've dealt with, the description of the properties, or what is actually pointed out by the persons that were dispossessed, sometimes go larger than what had actually been gazetted, and the matters that I've done, there's been no problem in extending the claims and dealing with them as expeditiously as possible, bringing those persons in, recognising their rights. No, I don't think there is any delay in competing claims or additional claims that had been brought in with the ones I've done.

Commissioner Nyambi MP: As you grew up in a farm, what is it that would stand out, as a positive contribution that you do currently to advance the plight of the farm workers?

Topping: Well, I must say the closest I've come is the land claims matters that I've dealt with and that's assisted me - I'm able to communicate with the claimants one to one, I can sit down and speak to them and be able to communicate freely and they trust me, and I think that's because of my upbringing on a farm. I know how to speak to the elders, I know how to respect them, I know how to deal with it, I think that's helped me but I've never been involved in any actual labour issues.

Nyambi: Any personal contribution to advance their interests?

Topping: I wouldn't say personal contribution, the work I've done on the land claims - I don't - it wasn't a practice that I had before my involvement as a Silk. No, I haven't done those types of things before, but I've put a lot of work into the land claims matters that I have been involved in, a lot of extra time.

Nyambi: Are you aware of the plight of farm workers?

Topping: Yes, one of the attorneys that briefed me on the land claims does a lot of those type of matters and yes, very much so. They need to be advanced and brought into labour laws and so forth.

Nyambi: How can language, race and gender legitimise confidence in the judiciary?

Topping: Sorry can you just explain that, in other words?

Nyambi: How can language, race and gender legitimise confidence in the judiciary?

Topping: I think the more persons of different cultures or races or languages or genders on the Bench gives the litigant a far wider choice or confidence in different matters being heard. I think it's important to have those elements on the Bench, yes. As far as language is concerned, I think it's important on the Bench. As I've said, sometimes one relies on interpreters and there's subtleties of the language that just don't come through – if you don't know or you don't hear the natural witness or litigant - I think it's very important. It adds confidence to the litigant to know the person sitting on the Bench, that there is a variety of different genders and races. I hope that answers your question.

Nyambi: Can you speak any of the languages of the Republic?

Topping: I can speak isiZulu, well - I wouldn't say I'm competent, sometimes I am at a loss for words, but I can communicate quite openly and freely in isiZulu. I can also speak Afrikaans because I went to an Afrikaans-medium school, and obviously English.

Nyambi: Do you think Judges have a role to play to make the public understand the role of the courts?

Topping: Yes, I think Judges should instil confidence in the litigant. Because of the nature of litigation, one party will always be upset about the result, but I don't think any individual should be upset about the manner in which the court case was run and that they got a fair hearing, and at that level I think a Judges input is very important – one has to ensure everybody gets a fair hearing.

Commissioner Motshekga: Advocate, I don't know if I heard you saying you specialise in civil law?

Topping: My practice has gone largely towards civil practice. When I say civil practice, a lot of it is personal injury claims, also commercial claims, general

litigation, insolvency, that type of thing but its moved away from my criminal law past to largely civil matters.

Motshekga: I'm sure you know that there is English Common Law, Roman Dutch Law, indigenous African Law – would you say that they enjoy the same status?

Topping: Uhm, yes, I think the simple answer is yes, if indigenous or customary law is to be applied, common law is obviously applied in the administration.

Motshekga: If yes, how much do you know about indigenous African law?

Topping: I'm embarrassed to say it's not something I have great knowledge in - it's never been part of my practice.

Motshekga: Now if you live and work in a province like Kwazulu-Natal where the overwhelming majority of the people are black, how do you think they can access justice if you know two foreign systems, Common Law and Roman Dutch Law, but you don't know the law applicable to the majority of the people?

Topping: Just the nature of my practice, I haven't had exposure to it, that's the only way I can answer it and, as an Advocate, one familiarises oneself with the case that's at hand that's why I say I'm embarrassed to say because I just haven't gotten exposure to it.

Motshekga: I think its common knowledge that poverty, inequality and unemployment in our country results from land disposition and that in 1913 African people only had 13 per cent of the land – do you think that the cut off date of 1998 is fair and just?

Topping: From the matters that I've dealt with, if you're asking my opinion, it should be earlier because the history goes way back before 1913, and if one looks at the history of traditional persons, it goes way back before 1913, so that arbitrary cut off date, if anything, if you're asking my opinion, should be extended further backwards to cater for the history correctly and properly.

Motshekga: Would you agree with me that unless this matter is addressed, there can't be real access to justice by the majority and if so, don't you think that Judges should be playing a role to address this?

Topping: I think the answer to the first part of your question is yes, it needs to be extended, but as a Judge you're bound by the statute, the cut off date and one has to apply that statute. This is something to be addressed possibly by the new legislation, but I think just from my personal experience, yes it should go further back to properly address the history.

Commissioner Schmidt MP: Just one issue, you refer to a sequestration in 1998.

Topping: My personal one, yes.

Schmidt: Was that voluntary sequestration?

Topping: No, at the time I was, I call it a Junior Partner, in my parents' firm at the time. Unfortunately they went, or the partnership, went insolvent and my estate was sequestered at the stage. I set my heart on doing a law degree. But yes I don't have any embarrassment from it, it's part of my life and I've dealt with it.

Commissioner Magadzi: You make mention of litigation into the health sector – is this an indicator that probably there is something not going right in the health institutions, or what exactly are the issues which is driving litigation in the main?

Topping: I think if anything it's more of an education that persons know their rights now. A lot of the cases I've dealt with are mainly birth defects because of delays in birthing, and that certainly needs to be addressed, although I say in the same breathe there's hundreds of thousands of perfect births. Going one step further, I have got a view on it - the matters that I've dealt with, it's usually a young child and that child, obviously when we litigate we need to cater for that person's medical and further needs until that person will pass away. Now, one does ones best to assess what the life expectancy of that child will be, and what happens in that case is that a trust is then formed to protect those funds until that child has gone through that period and make sure that the medical bills are paid during that period. Where I think there is something wrong in the system as such is that if that child unfortunately passes away earlier, those funds, and you're talking of probably R20 million worth of public money paid into the trust. Now once the child has passed away, that money just passes on to whoever the trust beneficiary is – the situation needs to be looked at to ensure the estate becomes the capital beneficiary of the trust, so if the child does pass away those funds does come back into state coffers. This is a personal comment I do have – I don't know if this is the right forum to address it.

Magadzi: Don't you, don't you think this will make the functionaries and professionals in this instance - because I've come across one situation where the GP and gynaecologist said I'm treading very cautious because I don't want to be sued. Don't you think this trend that is being created will make people to run away because of the situation spoken to at the current moment?

Topping: Just at the level of MECs in the public health system, persons will obviously go there because they're entitled to. Again talking from personal experience, a lot of education needs to be done and something needs to be corrected prior to the doctors getting involved, because the midwives and the nurses, maybe because of workload or number of persons going through the hospital at the time, it's because of birth delays and by the time the medical personnel get there its actually too late. Also private sector, obviously there has always been the negligence claims against them, but then again they always have insurance but there needs to be an addressing of stopping or making sure that things are dealt with more speedily again just dealing with the public hospitals.

Magadzi: Does it mean public hospitals must also have more insurance?

Topping: No, unfortunately it comes out of our coffers and taxes, and what is sad is that I understand it comes out of the hospital itself's budget, and it is a large claim because of one error. There is a large on flow of individuals not getting further treatment because of further budget cuts and so on. It is a system which needs to be looked at. I say so in my personal capacity.

Magadzi: There is a terminology nowadays being so eloquently spoken about – the state capture. We know the state is composed of the three tiers – is the judiciary captured, because really when people are speaking to state capture they are speaking to the executive or legislature?

Topping: I would sincerely hope not ,because I think the separation of powers is paramount in a democracy. I am proud to say from my observation, no, the judiciary hasn't been captured.

Commissioner Semanya: I see you have had an exposure in maritime law?

Topping: Yes.

Semanya: How much exposure?

Topping: In essence, six years. When I was an articled clerk and PA I worked in the maritime department of two firms, mainly doing exactly that, claims, arrested vessels. There was new legislation at the time and I had a little bit of exposure, but I can't say I have practiced in maritime law, it was mainly in an emergency situation when other people were not around, but it's not a situation that I've forgotten the rules or forgotten the Act, I am still au fait with it.

Semanya: One thing notorious about that field of the law is there is not equitable access to it by women and historically disadvantaged persons – is there an explanation for that?

Topping: My exposure is that the firms I dealt with was mainly run by London and New York – those were where the instructions normally come from, because those were the big laws firms dealing with maritime law and also arbitrations in London and so forth. I think it's a situation, just briefing the larger, can I say traditional firms as such - it's not a local thing, the claimants are mainly overseas persons. One just catches the ship and arrest the ship here because of our, because one is able to do so because of the legislation.

Semanya: But why should that be biased in favour of white males?

Topping: I think to some ignorance. I don't think - look I haven't been involved in it recently, with the greatest respect. Things might have changed, I might be speaking out of turn. But from my experience at the time, one just got an instruction from London or New York to arrest a vessel and a lot of the time it was for maritime

arbitrations taking place overseas - I think that still goes on here, largely security arrests and that type of thing for overseas litigation.

Semenya: And your take, what would you say would be constitutional constraints on the judiciary?

Topping: When you say constitutional does that - the judiciary should be answerable and Judges should be accountable?

Semenya: What are their limits?

Topping: I can't answer off hand - when you say limits, obviously when you taking that on appeal the limit goes right the way through to the Constitutional Court, but if you elevate it to the Bench, you're a public person and one should conduct yourself within your personal life or your public life properly and I think those are the constraints. You've got to be a fit and proper person, and if you're not a fit and proper person, those possibly are your limits or constraints.

Semenya: Yes, when the judiciary pronounces on conduct of legislators or the conduct of the executive, how far can they go? I'm trying to explore with you the separation of powers.

Topping: Everyone is answerable to the law, so the constraints are applying the law properly and ensuring it is applied properly. Everybody has to work within the Constitution and the rule of law as such, and no one is beyond that, and within those constraints we all have to live.

Semenya: Why do you want to be a Judge?

Topping: Because I think, honestly if you ask me, I can make a positive contribution. I've spent my life in the Kwazulu-Natal Division, it's been my life up until now, and I'd like to give something back to it and again, when talking about myself, I think I have sufficient qualifications and experience and also the temperament – I'm not someone that - I'm prepared to listen to everybody, and my colleagues know me, when I run litigation I'm always prepared to hear their case, and I sit with a lot of cases because of that. I will never fight with my colleagues, I never take things personally, and when things get a little hot in court I make sure to speak to my colleague afterwards and I think I have that temperament listening to my colleagues in the limited time I've had on the Bench, of being able to allow them to express their case congenially, not shouting down to them or anything like that. Bottom line is I think I am competent.

Nkabinde: Let me just follow up on the one question of separation of powers before I forget. I always just wonder, because you say there cannot be a total separation of powers – now how do you strike that delicate balance? How would you try to strike that delicate balance?

Topping: Just by staying within the confines of the law. Everybody is answerable, and every individual element mentioned, the judiciary, executive and legislature should know what you are allowed to do, because you know what the confines of the law is. One needs to work inside that.

Nkabinde: Will the interests of justice be the main consideration?

Topping: Yes, yes I think the interests of justice require us to apply the law correctly, freely and fairly.

Nkabinde: Because I suppose there will be just a number of considerations getting that balancing act. It seems to me the main consideration here would be there interests of justice – would you agree?

Topping: Yes, I would agree that would be the bottom line is it's got to be within the interests of justice.

Commissioner Malema MP: Thank you very much. I just want to ask about - what is customary marriage?

Topping: Customary marriage - again I say I'm not an expert or don't profess to - it's a traditional marriage, not a civil marriage.

Malema: But how is customary marriage conducted? That's what I'm asking.

Topping: I apologise I don't know, I've never dealt with it, and I've never been to such a ceremony.

Malema: It's not a serious marriage that requires of your attention?

Topping: Yes, that's why I say I'm embarrassed to say that I haven't applied my mind to it and, again, it's just something that I haven't - it's something that hasn't come up in my practise and so forth, to deal with that tradition, I'm embarrassed to say.

Malema: Does yes mean customary marriage is not of serious significance?

Topping: Yes, it is of serious significance that's why I say I apologise as I haven't given it my proper attention.

Malema: But, if it's serious, why didn't you pay attention to it? Because it's practised by black people?

Topping: No, no, certainly not at all. As I say, one tends to look at what one is briefed for, and the matters that you deal with during your practice and at that level I have never been briefed or dealt with a situation like that, that's why I don't know about it and don't profess to know about it, wouldn't say I'm an expert at all. It's just because of the nature of what I do or what has been presented to me in my practise.

Malema: But those people you grew up with on the farms, you never grew up with them, or you just saw them working there from a distance, because if you grew up with them you'll know what are their practices. Growing up with them will mean you know how they conduct their affairs.

Topping: Just to explain, I was the one on the farm, I lived there until I was 12 years old and I wouldn't have gone to any ceremonies along those lines. My days of youth were playing with the other children on the farm.

Malema: But you didn't grew up with them then.

Topping: Shall I say interacted with them on a daily basis from my birth 'til the age of 12 when I moved to Durban.

Malema: No, but you saw them in the farm of your parents – you did not grow up with them. You must stop saying you grew up with them.

Topping: If I've offended you by using that terminology I do apologise, but I can assure you that on a daily basis I used to get up in the morning and go and visit my friends. If I was at their homestead at lunch time we all ate together at the homestead, and if they were at my farmhouse lunch time we would all eat there and at that level, if one of their parents told me off or told me I was doing something wrong or chastised me, I simply accepted it.

Malema: But that's so patronising and borders on racism – you didn't grow up with them. The reality is that - you must acknowledge that you didn't grow up with them – they worked for your parents. You know, I grew up with this chap next to me here – I can tell you what he eat, what he does, what are his traditions, what are his languages, how do they do certain things, what rituals would be performed during funerals because we grew up together.

Topping: Yes, but I must emphasise that at the age of 12 is when I then moved to Durban. So yes, if you say I did not grow up with them, yes I acknowledge that completely, but up until the age of 12 I did associate myself with them and they were my friends – I can't take it any further than that.

Malema: What is racism?

Topping: Uhm, not accepting or treating as a lesser class than not your own race or accepting of everybody equally.

Malema: What is white supremacy?

Topping: Uhm I would say, in the past, the law allowed persons to be different.

Malema: But what is white supremacy?

Topping: I don't know how to answer, Mr Malema.

Malema: You don't know what is white supremacy?

Topping: If you could please just elaborate a little bit.

Malema: The concept of white supremacy - I want to know from you what is white supremacy?

Topping: The concept as I understand it is, white people subjugating other races and treating them as lesser persons.

Malema: Now, by not knowing the languages of the people you grew up with, their customary marriage and different cultures – would that amount to white supremacy?

Topping: Again I don't know how to answer that because, again I emphasise, I only had that exposure up until his age of 12 when quite honestly I was a child.

Malema: No, I am no longer talking about that – that one we agreed you and me, you will no longer repeat it again that you grew up with them because you didn't grow up with them – that one we are done. Now we are on a different topic of white supremacy. When you think less of other people, you don't care about their languages, you don't care about their cultures, you just don't care about them.

Topping: I agree with you about that as a concept, but if you ask me if I've ever done that, the answer is no, most definitely no.

Malema: But you've just done that, because you not knowing our customary marriages borders on white arrogance and white supremacy.

Topping: Mr Malema, I can't answer that. If you want to say that that's the case, yes, but I can assure you that in my life I've never ever treated myself as higher than anybody else. I've tried to always treat everybody as I would like them to treat me and that's a rule in my life.

Malema: Now customary marriage – is it a recognisable marriage by law?

Topping: My understanding is that yes.

Malema: So when I'm married in customary marriage I am married and it's not open to discretion and that law is acceptable?

Topping: As I understand it, yes.

Malema: So why do you also allow me to marry again in a so-called civil marriage when I'm married through customary marriage?

Topping: Mr Malema I'm slightly out of my depth, because I don't know if what you're saying to me is correct but if that is the case -

Malema: Ok, let me ask you this – by customary marriage we pay lobola and do all sorts of things. Then I come again before some marriage officer to sign this and that

and then - customary marriage is automatically in community of property. Then I go and sign a new marriage called out of community of property, you still allow me to do that when I'm engaged in a marriage which is in community of property, it's a properly legally recognised marriage, so why do you allow me to marry twice?

Topping: Mr Malema I do apologise, I'm not allowing you to do anything – if that's what the law said we have to do it but I am certainly not allowing you or disallowing you.

Malema: But don't you think this law also borders on white supremacy, because it's a white practice to marry in a manner that you sign and do all sorts of things and then it reads the customary marriage as an inferior marriage?

Topping: Again if it does than I would agree with you – nothing should treat anything else as inferior.

Malema: My brother, you are not giving me any answer that makes you committed to anything and you are going to be a Judge, so I want to support you to be a Judge but I want a Judge who has a mind of his own – not law, a mind of your own where you've got a position on this or that. It doesn't matter how wrong or right it is, but since I've tried to converse with you on any issue you are non-committal.

Topping: But if you want an answer on what you are telling me, if one law does treat the other law as inferior or allows anyone else to be treated as inferior, I agree with you, it's wrong and that is a definite statement.

Commissioner Notyesi: I have a follow up on an earlier question where you at least did some reflection on the composition of the KZN Bench. Perhaps do you know how many female Judges there are there currently?

Topping: Again I haven't done the exercise off hand but - five or six I would say, if not more. I...I - it's something I don't know off hand.

Notyesi: Also when I look at your CV, it is reflected that you are assisting training of pupils and you are quite involved.

Topping: Yes.

Notyesi: In terms of the Bench, I'm sorry the Bar, do you perhaps roughly know the statistics?

Topping: Rough number of pupils? Again - I am the convener of pupillage at the moment. If I remember rightly, it's either three or four female pupils at the moment in the last lot. We've just closed the applications for next year, and my committee hasn't sat yet – we intend to do it next week or the week after, so I can't help you as far as the applications for next year are concerned at the moment, because I haven't looked at them.

Notyesi: And also I look at the cases at which you appear –in those matters, how many cases, if any, have you appeared with people of historically disadvantaged backgrounds?

Topping: As a Junior, I think I've only ever appeared with one white female. I don't want to name names but - it's either Asian, Indian or Black, the pupils, not the pupils but the Juniors that I have had. I can only think of one white female that I've had as a Junior. And I've only been a Silk for two years but, the demographics, I'm just trying to think - predominately I think female and then male, Black male of the Juniors that I've had this far.

Notyesi: I ask this question because currently the legal profession is battling with the question of briefing partners and what steps, if any, contributed towards transformation you've taken as a person?

Topping: Like I've said I've always tried to do that. I think it's part of Silk's function to not only have assistance in a matter, but also to pass your experience on to that person, and I've always endeavoured to do that. But I do say again, I've only been Silk proficient for two years. But I support that it's something that needs to be addressed – skills are learned over time, and one cannot get experience without spending time, and I think it's a very important tradition where Silks pass on skills to Juniors and they can see things as its happening during the trial and you learn things – I think that's very important.

Notyesi: But you can't even remember any Black Juniors?

Topping: No I can, I don't want to name them. I've had someone who has been a Junior to me on a number of matters and then - another Indian gentleman who has been a Junior to me on a number of matters, and then a female who has been a Junior to me on a number of matters.

Notyesi: Lastly, you, I understand it is one of the functions of this Commission to ensure the Bench in that Division, that is KZN, is a reflection of South Africa and right now in that Division, you have fewer female Judges as I understand?

Topping: I think you are asking me my opinion, I think because of the traditions of the past where the advocate profession or the legal profession has been largely male dominated - and I have a view that it's a delicate balance as well, as there are very competent senior female advocates and practitioners, but if you take them away from the, the populous as such, they want to choose people of their choice but because those people, those ... that the ills of the past have not been cured over time and within a very short period I think the balance - but unfortunately we live with the sins of the past of it being a largely male dominated and white male dominated Bench.

Acting President Maya: Mr Topping, you've been at the Bar since 1992?

Topping: Yes.

Maya: And you said you took Silk only two years ago?

Topping: Yes, although I applied in 2012.

Maya: May I ask what took you so long?

Topping: I think I answered the question ma'am and you didn't hear me, and my simple answer is I want to be confident in myself before I do anything and I want - I always said one needs to be proficient round about 20 years before one takes Silk, and that was my time. I applied in my 19th year, and then it was held up for two years because of the challenge to the President's ability to sign Honours, and that's why I was only conferred in 2014, sorry 2014, although I applied two years earlier and would have got it two years earlier or approved two years earlier.

Maya: You acted as a Judge between May last year and June of this year, a total of about three months?

Topping: Yes, and then there has been three periods of approximately five weeks per period – once 2015 and two periods this year, I think it was more March/ April this year and then August/ September this year.

Maya: Not according to my calculations of all the information that you've given us.

Topping: It was definitely three extended periods of five weeks per session.

Maya: In that period, did you deal with any criminal cases?

Topping: Not *per se*, because I wasn't sitting as a criminal Judge but this last session, although one sits in 'Martizburg doing civil, the appeals are largely criminal appeals, so in this last session, every week I've had four appeals and one week I had two lots of four appeals, so eight appeals that I've sat on and of that, those appeals, only two were civil and the rest were criminal appeals.

Maya: So you've not adjudicated a criminal trial?

Topping: Not as such no, not as an Acting Judge no I haven't. Bail appeals, but then again that is not adjudicating on an actual trial itself.

Maya: Lastly, you've mentioned in your form, in your application form, that a complaint addressed to Judge Jappie I assume, against you. Unfortunately I could not find your memo. Can you just briefly tell us -

Topping: Yes, I do apologise. What happened is - I'm just trying to recollect myself - my first acting stint was in an unopposed motion court. What appeared, there were two matters on the roll when I looked at them, it was a person acting in person, not represented, if I recollect correctly did deal with - I think there was a default judgement granted and there was some sale of a property, but the two matters were

consolidated at some stage that I could pick up from the files, and there was also a notation on the file, although there was no court order that we could trace, that the application - leave had been given for the application, so when the person appeared before me I explained and there was an endeavour made to try and listen to the tape of what actually transpired in court when the leave was given to withdrawn and we couldn't finalise that, and I asked Counsel who was representing the respondents in the matter to get a transcript. I explained to the litigant that the matter could not be heard until this has happened, and he didn't agree with me, and I explained to him that the matter had to be adjourned and the complaint was raised because I didn't actually hear the matter on the day because I did adjourn it. I've heard nothing since then, since the memo I wrote - I explained all that in a memo which I understand has been passed on to the relevant authorities, but I've heard nothing further and I don't envisage anything further happening.

Commissioner Ntlama: Listening to your responses on how you've advanced the cause of transformation, are you individualistic in your approach?

Topping: As I understand the comments on me, both support my competence and ability to be a Judge. As far as competence is concerned they do support me, and the two persons that nominated me are part of Advocates for Transformation, and I hope they see in me the ability to advance transformation. But again it came up in the last hearing, I don't view things that are done correctly or done for the right reasons as one should stick points on ones CV- I have done things in the past that although it's not in the law - my love is soccer, I've been involved in sports clubs, developed teams, dealt with, managed teams. At a time when I was disciplinary chairman of one of the bigger schools in Durban, again there was conflict with the traditions of the school in terms of dress code, and I put in procedures there, and there was no conflict, so in my little way there yes, I have helped towards transformation, but I don't see it as something to score points on a CV - it's something that's personal to me, it's something I did because I think it was the right thing to do at the time

Ntlama: Let me follow up, so is it appropriate to go solo, that was my question. What if there is a body that is also committed to what you want to achieve?

Topping: I don't think, with respect, I'm going solo. What they saying is that they support me and think I'm competent to do the job, to carry myself properly on the Bench. All they saying is that because the demographics, maybe I should explain, motivate myself. So I don't think I'm going solo - I think I'm supported to the extent of my abilities and my experience and my qualifications, I am supported by them the way I read those comments.

Ntlama: Advocate, they say they don't know which values you subscribe to.

Topping: I think my values at the level of - I treat everybody as individuals, and I think one of my biggest values is I try to treat everyone the way I want them to treat

me, irrespective of their race, beliefs and so on, and I think that's one of my biggest values. I will never treat anybody differently because of a belief or because of a different skin colour, that I can assure you.

Nkabinde: Mr Topping, just two matters that need to raise. One relates to the comment by BLA that while they recognise your expressive judgement, they do not think that you have acted sufficiently.

Topping: I think that flows from the fact at the time those comments were made was based on what was in my application at the moment and my last acting stint wasn't evident from that, so in other words what they are seeing is that I only acted twice – that's the way I read that comment. If one looks at the comment, there is nothing mentioned of my final acting stint.

Nkabinde: And your final acting stint, for how long was it?

Topping: Five weeks, it was from - it was the last week of August to the last week of September so it comes to five weeks of this year.

Nkabinde: Thank you. There is another matter that continues to be of concern to me as a person, and that relates to issues of land tenure. Now that you were brought up in a farm, you may not be able to express a view, but I'm raising it with you particularly in light of the fact that the legislation, ESTA for instance, if you secure the interests of land owners and those of the occupiers, but when you look at litigation, the pattern of litigation, there seemed to be a pattern that suggests that there is some resistance of accommodating the interests of occupiers in farm land – is that your sense as well?

Topping: Again, I haven't been involved in actual land, apart from Land Claims Court, claims as such, I haven't been involved in labour tenancy and those type of claims, so I haven't got an experience in it, but I think that is the case, and I think that flows from the past when a farm owner expresses his authority, I think wrongly, over the persons that reside and have been on his farm, and traditionally been on his farm and in those areas long before he came along.

Nkabinde: Precisely. That's why you have legislation such as ESTA that seems to me to give effect, or is intended to address, that inequality, because you have people who have lived in a farm for many many years and who consider it to be their home, but all of a sudden they come bury their fathers, their grandfathers and they have to be evicted – we have that kind of litigation from time to time. Now I ask myself the question, why is it so that with our democratic order there is that kind of resistance to social justice – why is it so? Do you have an answer?

Topping: I think apart from just commercial reasons, the land owner just thinks because the land is demarcated to the property he has rights over it, but sight is totally lost of traditional values and traditional - the persons who have lived there, their homesteads are at that very sight for years and years prior to 1913 and that's

why my one comment - there's gravesides that I've visited that go way back into the previous century, that's why I feel it's wrong. It needs to be addressed, and it needs to be recognised.

Nkabinde: Yes and in your view, is there a need to sensitise the land owners about issues of Ubuntu and issues of social justice in that way?

Topping: I think educating, yes. Again there's just a commercial decision that's blindly made, very much so that one needs to embrace and accept traditional values and the fact that persons were on those farms way, way long before that before the land owners owned it.

Nkabinde: And if this were to be done, to sensitise land owners in that regard, who has to take that initiative?

Topping: I would say the state, I don't know. It's certainly not the land owners who would have that initiative amongst themselves, but I think education needs to be done. One thing also, a lot of the time where the farmer has just purchased the land recently, you get a resistance at the level of that they think I did nothing wrong, and I think that is very short sighted approach to things and I think we need put something in place, and I think only a legislature can sort that out.

Nkabinde: But I suppose all of us have a role to play?

Topping: Yes. I have never seen an initiative coming from the land owners – it has to come from elsewhere and I suppose it would be from the state - an education programme.

Nkabinde: I am quiet because I don't know what the answer is, but you agree we all have a role to play?

Topping: I'm glad I'm not the only one without an answer, but it's a complicated and very delicate situation that needs to be addressed.

Nkabinde: There seems to be no raise of hands from the Commissioners – do you have anything else? Mr Topping, any last comments?

Topping: Thank you all for time. I ask you all to please assess me on my merits and demerits. Thank you very much.

Nkabinde: I thank you. You are excused.

Topping: Thank you very much.