



JUDGES MATTER

Judicial Service Commission interviews

7 October 2016, Afternoon session

Limpopo Division of the High Court

Interview of Mr M F Kganyago

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Chairperson, Chief Justice Mogoeng: Mr Kganyago, you have quite a number of degrees. Where did you acquire your B. Proc?

Mr Kganyago: University of the North – now it's University of Limpopo.

Mogoeng: When?

Kganyago: '98.

Mogoeng: '88?

Kganyago: '98.

Mogoeng: Did you do some lectureship on a part time basis?

Kganyago: I used to be an instructor at the law school.

Mogoeng: Yes.

Kganyago: But I'm no longer, no.

Mogoeng: And since when have you been practicing as an attorney?

Kganyago: I was admitted in, on the 15th of November 1993.

Mogoeng: And you've been an attorney ever since?

Kganyago: Correct.

Mogoeng: Is it still as lucrative as it once was, or has the market dried up a bit?

Kganyago: It depends the type of area in which you are practising. There are some over-concentration in some areas and in other areas there are still some areas where there are still some cake.

Mogoeng: In a nutshell, how has your practice, coupled with acting stints, prepared you for the position you are now applying for?

Kganyago: I've got a PA who is taking care of the practice if I'm not there, and when I went back to the practice the knowledge which I've gained on the benches would add to the practice and also to train my PA to do the job which I've learnt on the bench.

Mogoeng: As an attorney, do you appear, or have you appeared, fairly regularly in our courts?

Kganyago: Yes, I've appeared fairly regularly in the High Courts.

Mogoeng: How many times in a month? Magistrates' Court, High Court, how many times in a month more or less?

Kganyago: Mostly it was Magistrate and Regional Court, and in the High Court since early. By then it was in Pretoria and we were not appearing regularly with the correspondents and the advocate.

Mogoeng: Yes. Very well. I forgot to do something – I just want to welcome Judge President Makgoba and MEC Sekoati on behalf of the Premier. Welcome good people. JP

Judge President Makgoba: Mr Kganyago, the last time you were here on interview during April this year, there was a question raised regarding membership of a political organisation, and you mentioned the organisation as such, and that if you were to be appointed, you'd resign – what's the position now?

Kganyago: After the interview, I did a reflection on the interview and upon that it was inappropriate for me to be a Judge and at the same time to belong to the organisation, hence I immediately resigned from the political organisation.

Makgoba: You have quite a sizable number of days regarding your acting stint both in Pretoria and Limpopo division. Now, hasn't this time which you spent most of the time away from your practice affected your practice to such a manner that you felt disadvantaged?

Kganyago: As I already indicated, I have a very efficient PA who also makes the legal right of appearance in the High Court. He is able to take care of the practice if I'm not there.

Makgoba: Mr Kganyago, I've worked with you closely for many occasions. I know your work rate, no doubt about that. Now there were instances where your term of acting would expire and you always took upon yourself, even with no remuneration, to say I'm going back to go and finalise the matters – were you not feeling as if you'd been disadvantaged?

Kganyago: In some instances I just felt it that, no, I'll be disadvantaged in the practice if I'll have to wait for my term to be reappointed again, of which I will not know when I'll be appointed, and usually I will do those matters during recess time when it will not interfere with the court roll.

Makgoba: As you know we have two divisions, the main division in Polokwane, the other division in Thohoyandou, and you have worked in both divisions. Now, what will be your view regarding the flow of work, the nature of work and your performance in both divisions?

Kganyago: I don't have any problem with - in appearing on bench on both divisions, and I've acquainted myself very well, I've adjusted myself very well. Even on this last term I was in Thohoyandou where the work was too much, and then I have to do criminal and civil and motion court at the same time. I've made arrangement with the parties that in the morning I'll start with the criminal work which is 9 o'clock up to 10 o'clock. From there, I'll proceed doing some civil work until I finalise in the afternoon and thereafter, I'll proceed with the criminal trial – fortunately that, the accused was out on bail up until 5 o'clock, and that matter I was able to finish it. Because in that particular matter the state was saying that the complainant was about to go write the Matric exam and if this matter was going to be postponed to next year it was going to disadvantage, as they don't know as to, if she passed Matric and where she'll be going, so I had to sacrifice and accommodate them in the morning and in the afternoon when I finished there.

Makgoba: Surely you know my motto – I'm very much against undue reservation of judgement, especially regarding time factor and, am I right to go on record that in all your judgments you've never delivered judgement more than 30 days, always less than 30 days for delivery of your judgment? Am I correct?

Kganyago: Correct.

Commissioner Mampuru: I just wanted to find out how many indigenous languages you can speak. You are based in Limpopo – you've got Tsonga, Venda, Sepedi, Afrikaans and English, but in terms of priorities, in terms of priorities, you start with Sepedi, Venda, Tsonga, that's what I want to know but now I understand you are clear. Thank you Chief Justice.

Commissioner Nyambi MP: You responded to JP that it's important to deliver your judgment in time. What do you understand to be the impact of the delayed judgment?

Kganyago: The delayed judgment is going to affect the parties, after all it is - the parties when they come to court want to see justice being done and being done expeditiously, so I took it upon myself that if I finalise the matter, it is imprudent of me to wait for another time. If I wait for another time, the facts will also fade up and then by the time I write the judgment, I'll be writing something else if maybe it takes almost a year to be written.

Nyambi: Share with us your understanding of the doctrine of separation of powers.

Kganyago: The doctrine of - there is no universal mode of doctrine of separation of powers, and there is also no separation which is absolute. The doctrine of separation of powers entails the checks and balances. Each - it operates between the three state organs which is the executive, legislature and the judiciary, and each of the three state organs should have autonomy to operate without any interference of the other branch of government.

Commissioner Singh MP: In response to the JP, you did indicate that you were interviewed the last time. Unfortunately we don't have copies of the transcript and I can't quite recall, but I'd just like to know what lesson did you take back from your last interview besides the fact that you did resign from the political organisation that you served or were a member of?

Kganyago: According to me, that was the main issue which, when I reflect on those interview, I've seen that I've not dealt with it appropriately. The rest of the question which have been raised, I have not found any problem in them.

Singh: So did you learn, did the experience help you for this interview?

Kganyago: Exceptionally more than that, I've realised that it was inappropriate hence I took it upon myself that being influenced by or being told by anyone to resign.

Judge President Mlambo: Just to say, I counted your acting stints in total – I come with 16 months.

Kganyago: Correct.

Mlambo: Is that correct?

Kganyago: Correct.

Mlambo: And the bulk of that was in Pretoria and Johannesburg – am I correct?

Kganyago: Correct.

Mlambo: And in your acting stints in those two courts, you've done work in the opposed motion courts?

Kganyago: Correct.

Mlambo: Unopposed motion courts?

Kganyago: Correct.

Mlambo: Appeals?

Kganyago: Correct. And even the third court.

Mlambo: You also did the third court?

Kganyago: Correct.

Mlambo: Ad you also did a number of acting stints in Limpopo whilst it was still being run as a Gauteng division – is that correct?

Kganyago: Correct.

Mlambo: Right, and it's quite an extensive acting period you've had?

Kganyago: Correct.

Mlambo: Right, and you think it has prepared you?

Kganyago: It has prepared me very well, more especially the time I've spent in Gauteng.

Mlambo: Have you done the criminal circuit court in Limpopo?

Kganyago: Not yet.

Mlambo: Not yet.

Kganyago: The criminal circuit court I've done in Gauteng.

Commissioner Magadzi: You're in trouble today because I just want to test as to, are you proficient in the languages of Limpopo?

Kganyago: Yes, I'm not well conversant with all the language, but I am very fair on them.

Magadzi: Okay anyway, having said that Mr Kganyago, the Limpopo is very diverse in terms of cultural issues and we still have a whole - I'll say almost the whole of Limpopo where there is observant of traditional practices, cultural practices and in the main, some of these things, as and when there is issues which don't go right, they don't end up in our courts, or when they end up in our courts they sometimes not very properly handled. And I will just give an example that in some instances,

there were in some traditional courts where they will adjudicate over a rape case which actually, in the end, it doesn't - justice is not mooted against the perpetrator of that particular heinous act. What, firstly, what would be the critical things that you believe we should be able to do to assist our people to understand that the courts are very very important, as such that they should be able to take into consideration that there are certain things that actually they can or can't do, but also take into consideration that the laws, you know our customary laws and other laws which are African in nature are not as elevated as such, and being in a province like Limpopo, what are the things that you believe we should be able to do collectively as a society to be able to can highlight some of these things?

Kganyago: My starting point will be that customary law is being protected in the Constitution, being protected in the Constitution for the courts to develop it. And it is also being protected in the Bill of Rights. It run parallel with the common law. Even though the Constitution does not specifically state that customary law should be developed and refers to the development of common law, the courts still can develop the customary law, and if there is a rule which is inconsistent with the customary law, it can be struck out or, and replaced with the a statue or the common law or it can be developed to be in conformity with the Constitution. After all, the - those rules of customary law are also there to govern the lives of the people and it also adjust, together with the living of the people. So customary law is a living system of the people which develops with the people and since it is unqualified, it is for the courts to develop it in such a way that it is in conformity with the Constitution together with the Bill of Rights, and if the chiefs who are closer with the people are educated on that, they will be able to take those issues which they think that the court will not be able to assist, to assist them. More especially I can give you an example like in Thohoyandou, mostly it's rural and there is also a vast dispute which, according to custom and those dispute, they come to court. If there is any law which needs to be developed, it will be interpreted in accordance with the Constitution to be it in line with the Constitution of the Bill of Rights, since it is being protected, and that's how we are dealing with it.

Magadzi: Are we doing that in earnest?

Kganyago: Correct.

Magadzi: And, what do you understand by transformation of the judiciary?

Kganyago: Transformation of the judiciary is not a question of number play, it is a question of also the transformation of the mind and in transforming, in transforming, we must also look at the issue of the gender and the demographics of the country, and it to be reflected in the courts and for the courts to also be legitimate it should reflect the demographics of the country.

Magadzi: Working in Thohoyandou and talking to issues of transformation, I know that most of time, if it's an elderly woman like myself coming from that area, when I

arrive in court, it's a difficult thing for me to sit on a chair – I want to sit on the floor. Will you allow me to do that because that's how I'm used to dealing with matters? Will you be allowing me to do that? Because to me, I take it - it's about transformation and also incorporating the cultural practices that you always find, because when I do that I'm better and very comfortable to be able to deal with the issues at hand? Will you take that as transformation to be able to adapt to the systems that are being practiced in that particular area?

Kganyago: As long as it does not affect the decorum of the court, I will not have any problem with that.

Commissioner Schmidt MP: Mr Kganyago, it was indeed heartening to see that you voluntarily resigned from a political party while still acting but can I just ask, and we don't have the record so I can't remember what your reply could have been or was in fact, the directorships and the interest you hold in business, there is about six of them listed. Can you just run through them and indicate what your interests are?

Kganyago: Most of them are dormant. It's only one which is active and I say that if I am appointed, I'll resign my directorship.

Schmidt: The only thing I can't really understand is, or decipher - the two last ones - what are they? Are they both still in existence still?

Kganyago: The trust is the one which is active on the national list of insolvency practitioners so I do not mix it, the insolvency work together with the legal practice. I've separate them so I can be able to see which one, and how do they perform.

Commissioner Motshekga MP: Mr Kganyago, I just want to commend you for the willingness to finalise cases even if your term has expired – this, I think, is what we should expect from lawyers.

Kganyago: Thank you.

Motshekga: But the question I have is, in Limpopo, you have Ndebele language, Lobedu, Venda, Tsonga and Siswati and Setswana.

Kganyago: Correct.

Motshekga: And all these languages also have customary laws associated with them. Now, is it not still true that our universities don't offer some of these languages and indigenous laws associated with them?

Kganyago: Correct.

Motshekga: Now when we say the courts must develop customary law, where do we get competent people who can develop this customary laws, or the competent judges who can develop this?

Kganyago: Usually they will call the elders who understand the custom very well, and those elders is like your expert witness who will assist the court like - how that community lives, how, that it is being practiced, and it assists a lot. It is like when the witness does not understand a certain language, we call an interpreter to assist – that is how we are being assisted.

Motshekga: But I'm also aware the course which used to be called "conflict of laws" is not offered in the universities. Now if you find a Tswana married to a Tsonga, and then you want the elders to come and interpret, which elder are you going to call?

Kganyago: They will both have to come – the Tswana will have to come and tell us their Tswana custom and the Tsonga will also have to call the elders to come and testify about their Tsonga custom, and then it will be up to the judge to decide which version will be the most appropriate.

Motshekga: Don't you think that South Africa, being an African country at the southern tip of the continent, should actually be prioritising teaching indigenous laws and languages than the dead Roman Dutch law and English common law?

Kganyago: It should, because remember in most cases you find that as a Judge you are Pedi, the witness is Pedi and the prosecutor is Pedi, and all the witnesses are Pedi, but we are still compelled to hold the proceedings in English.

Motshekga: Lastly, don't you think that to say the courts must develop customary law, we may be running the risk of getting some judges simply infusing Roman Dutch Law and customary law principles into indigenous African laws?

Kganyago: No, I've said that customary law is a leading system – it must adapt to the community, the way the community decide to live. It is not dependent on historical precedence – if the custom change now and again it means that customary law will also change and adapt to their present - the way they choose to live.

Motshekga: Thank you for that understanding. Thank you.

Commissioner Ntlama: Just one question, a follow up too, on your legal background, on section two of the legal background, you made reference to the publications where in you wrote the cases. As you are aware that, the judiciary is required, is requiring a high level of decisions, and this question refers you to publications, are these cases, if you take them in the context of being publications reported and also what are they all about because you made reference to cases not publications. Are they published these cases you refer to?

Kganyago: Correct.

Ntlama: Or let me say, are they reported?

Kganyago: Yes.

Ntlama: Okay, what are they all about? Just one.

Kganyago: Oh it was about an unlawful arrest - it was a case which I've dealt with in Thohoyandou .

Commissioner Nksoi-Thomas: It was such a pleasure to see you after very many years – last time we saw each other must have been 20 years or so ago.

Kganyago: You're correct.

Nkosi-Thomas: It has been many years ago, but I just want to find out, put a few questions to you in relation to your commercial experience and mining experience, and I tell you why one is putting that question, because you know that province is growing rather quickly economically because of the emergence of the mines and so forth in the province, so one imagines there would be a lot of commercial disputes coming through to the courts, mining disputes coming through to the courts, and judging by the information that you gave us on the questionnaire, it does not appear to be the case that you've had exposure certainly in mining. But perhaps just enlighten us, do you think you are adequately ready to deal with such disputes when they find their way to the, to your court?

Kganyago: As long as I know where to find the law it will not be a difficult - most of the cases, they are just presented to you and then you just have to go to do your own research and then you'll be able to deal with it appropriately.

Nkosi-Thomas: But what exposure have you had as, both as a practitioner and as an acting Judge, in commercial litigation?

Kganyago: I haven't, I have not yet dealt with any case specifically in relation to mining.

Nkosi-Thomas: Well let us deal with commercial first, we'll come to mining later.

Kganyago: In relation to commercial, I'm a member of the Companies Tribunal where we are dealing with complex dispute in terms of the new Companies Act, and then we also write several decisions in relation to those complex disputes at the Companies Tribunal. I'm also on the SARS Tax Appeal Board, where we deal with dispute of commercials where I've also written decision in relation to that.

Nkosi-Thomas: Well thank you. Now in relation to mining disputes, wouldn't it ordinarily fall under perhaps administrative law ,you know, because of the statutory disputes flowing from the MPRDA and all of that? Have you had any exposure there? You know the MPRDA would be the mining and petroleum, you know the Mining of Resources Development Act, that one, we just call it MPRDA so I hope you know which Act I'm referring to.

Kganyago: Yes, no I haven't dealt with any of those at this stage.

Nkosi-Thomas: But I'm sure you've had exposure in administrative law, that's what the questionnaire tells us.

Kganyago: That's correct.

Nkosi-Thomas: So you'll be able to draw from that experience to tackle issues to the extent that they emerge from the MPRDA and the Constitution – am I right?

Kganyago: Correct.

Commissioner Gcabashe: Can I actually pick up on this point, because when I look at paragraph 6.2 of your questionnaire you say, in answer to the question, what proportion of your litigation work has been in the field of, one, criminal law you say 20 percent.

Kganyago: Correct.

Gcabashe: Two, administrative law, which is what my colleague has just been asking you about, you say five percent.

Kganyago: Correct.

Gcabashe: Constitutional law, zero percent.

Kganyago: Correct.

Gcabashe: Labour law, 35 percent.

Kganyago: Correct.

Gcabashe: Now on two levels I have a little bit of a discomfort – one, my understanding of the Constitution is that it infuses every single that we do, quite frankly. Certainly as lawyers, it infuses the criminal law and that's very obvious because you've got section 35. It infuses administrative law, and you've just talked about the administrative law within the mining context in relation to whether it's in relation to issuing licences, whether it's in relation to dealing with disputes that are the implementation of legislations, so that's admin law stroke constitutional law, so I'm just a little concerned about your zero percent in relation to constitutional law. Labour law, employment rights, the right to strike, all those are constitutional matters. Please help me understand why you have zero percent under constitutional law?

Kganyago: My understanding was in relation to matters that actually went to the Constitutional Court raising constitutional issues, that's why I've written zero percent. Because at this stage I've not have any matter which went to the Constitutional Court raising any constitutional issues, hence I've written zero percent.

Gcabashe: Can we explore that just for one minute – so you are saying in relation to fair trial rights, and I, I hesitate to elevate everything to the Constitutional Court because they've often said, the Judges of the, the Justices of the Constitutional

Court, that they do not like being the court, a court of first and last instance, so that constitutional element that arises in your criminal case will start downstairs before it gets to the Constitutional Court, and that's why I'm concerned about your interpretation of what constitutional law is. Another example – mining, which is what my colleague just explored with you, anything to do with mining licences, at the end of the day, it's a constitutional matter. You've talked to us about tax disputes because of the commission you sit on, those are rights that you are dealing with. Constitutional matters – the Constitution infuses everything we do, and you don't seem to share that view. Help me understand, or say to me I'm wrong for these reasons.

Kganyago: No, you are not wrong. As you are now explaining, I've realised it was a oversight.

Gcabashe: What was an oversight?

Kganyago: To say that it was zero percent instead of stating the case which I've already done. Even on that application, now I realise that you can see that I've referred a certain case where it deals with some human rights of a criminal matter where I've assisted a lady who was vulnerable. It in actual fact, it also raises some constitutional matters. I agree with you.

Gcabashe: And that's why you have section 16(a) of the, I beg your pardon, rule 16(a) of the Uniform Rules of Court because anybody, and I like to say if they can justify that's what the rule says, can decide they are joining in on a particular matter or apply to come and give a view on a constitutional matter that's as been raised in the papers that are before you – are you comfortable with that?

Kganyago: Correct.

Gcabashe: Because as a Judge, you need to be able to determine whether, one, you are in fact dealing with a constitutional matter. Two, whether you in fact require the input of anyone who applied in terms of rule 16 (a) etcetera etcetera, and I would like to think the JSC would like to be comfortable knowing that, should you be appointed, one, you'll pick on all these matter and two, you'll know exactly how to deal with them.

Kganyago: Correct. As you have now explained, I understand your concern and I appreciate that.

Gcabashe: Last aspect, customary law as raised with you and the development of the customary law, and you agreed that no courts could develop customary law. As you were speaking I quickly looked at - you know this Commission has such long name, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. It's a Chapter Nine institution. In what you were proposing, in relation to the development of the customary law, how would this Commission be of assistance to you, if at all?

Kganyago: In this case I'm referring to, a dispute which had been referred to court, mostly you'll find that there is a dispute wherein, just to give an example, a partner has passed away and now they are fighting for the burial or the right to inheritance. Someone will say that I am the rightful wife and someone will say I am the girlfriend, you are not entitled – that dispute will not have to be referred to that Commission. It's a dispute which the court has to deal with and determine who is the rightful wife and in most instances you will deal with it in terms of the customary law.

Gcabashe: I agree. In fact those are matters I dealt with as a first year article clerk 20, 30 years ago, but one of the questions which was put to you was a question around a member of a community wanting to come into court and her comfort zone is around sitting on the floor because that is what she would want to do, and your answer to that was it would depend on whether the decorum, is the word you used, of the court, or the dignity of the court would be impaired. Would you take a matter like that where you were challenged on what you call the decorum of the court to a Commission such as this? I just want to understand how you would use the services of a Commission such as this.

Kganyago: That matter yes - it will depend if ever the community of that area will be comfortable in sitting in that arrangement – that matter can be referred to that Chapter Nine institution to deal with it and come with some directive.

Minister Masutha: Ntate Kganyago, the profession, the legal profession, continues to be bedevilled by a legacy of racial exclusion and inequality as happens in many other fields of endeavour – would you agree with that?

Kganyago: Correct.

Masutha: How can we reverse that legacy in the profession specifically, based on your own experience? Is there anything that can be done to transform the profession and if so, where do we start, in your view?

Kganyago: The starting point in my view will be with the distribution of work. In the past, I can say the commercial work was reserved to a particular group and then whereas as black practitioners, they were reserved to a certain work. If it can start by distributing the work equally or partnering those with experience together with the junior ones, that would go a long way of addressing the inequality of the past, the imbalance of the past.

Masutha: And who is liable to do that? Who should make sure there is equal distribution of work?

Kganyago: The bulk of the work comes from government, it must start with the government by distributing the work equally to the practitioners.

Masutha: And that's as far as we should go?

Kganyago: And also make sure that in appearing in court, in representing they make sure they are not just there to observe, they actually participate in the representation, because it does not make any difference just to partner the practitioners whereas the actual work is still going to be done by the same practitioner who is skilled and who is not prepared to transfer any skill.

Masutha: The Limpopo province is experiencing, and I hope my assumption is beyond dispute, a significant economic, I wouldn't use the word explosion, but partly because of certain industries developing at a rapid pace, reference was made to mining which should create new opportunities even for the legal profession. How do we ensure that this new economic prospect translates into new opportunities for young, historically marginalised practitioners who come into the space to, so to speak, get a piece of the slice of the cake in also getting opportunities to do lucrative, complex commercial work mostly coming from the private sector, naturally I would imagine not excluding government because you've referred mainly to government needing to do something about transformation?

Kganyago: The problem with the private sector is very difficult to regulate, but the government should also do something, because remember the example which you are giving, it is big corporate companies who will come with their own legal practitioners who mostly are from those big firms and will not prefer a smaller firm. If maybe there's a legislation which will force them to partner with the junior ones in the province, more especially from the disadvantaged, it will go a long way in addressing that.

Masutha: There is a new Bar that has been launched about a year or so ago in anticipation of the opening of the new court, the new High Court and a lot of practitioners who were based in Gauteng have started moving in there to populate that new Bar, bringing with them the requisite experience – has the side Bar begun to position itself in similar vein, or what are the development there and in what manner is the side Bar positioning itself in order to, early in the day, to take full advantage of this development?

Kganyago: What I remember is that when they constituted that Bar, they were prepared to even train those who were side Bar in that area, even equip them to become more efficient and not even - they were even prepared that they will not serve articles, but they will assist in training them over a certain period of time.

Mogoeng: Thank you Minister. Colleagues, in relation to the next candidates, let's never forget these people are here for us to test whether they are fit and proper for judicial appointment. Let it be the primary focus. I don't mind some side issues here and there, but let us never forget that's the key issue. Thank you sir, you are excused.

Kganyago: Thank you.