



JUDGES MATTER

Judicial Service Commission interviews

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Constitutional Court

Interview of Justice L V Theron

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Justice Theron: [initial portion missing] I lived there for most of my life, well not most of my life, my earlier years when I was in standard six, which would be the grade 8 now. My father got a job as a caretaker for a block of flats. And one of the reasons that he had applied for that job was because it came with housing. And then that meant we had to move to an area called Sydenham, and thereafter we were allocated a house by the Government in Maron Ridge. And I completed my high school. And I went to university as KZN. I did a BA and a LLB, and I got a scholarship to study in the US. And I came back to South Africa, I worked for the Community Law Centre for about two years. I then did pupillage in KZN. I practised as an advocate for about ten years. I then was appointed as Judge in KZN, in 1990 I think, by this Commission, in 2010 I was elevated to the Supreme Court of Appeal.

Chief Justice Mogoeng: Why did you work at OK Bazaars?

Theron: My mother was a cashier at OK Bazaars. And we also needed extra income at home. And I had a love for music, but the income that my family

received at that time couldn't extend to what they considered as luxuries. So I learned at an early age to work for the extras that I needed.

Mogoeng: And how did you manage to get a job in America?

Theron: I don't know if it was a job as such.

Mogoeng: Special assistant to the Director. Wasn't it a job?

Theron: It was more like an internship, Chief Justice.

Mogoeng: Yes.

Theron: Yes. I enrolled to do the Masters, and because I always knew I would be coming back to South Africa, I didn't want to do a Masters that involved studying the content of US Law, but I rather wanted to learn skills. And that is why I focused on dispute resolution. And my courses were offered primarily in the evening, and I sought opportunities to work during the day and to use the time while I was there to its full extent.

Mogoeng: And that applies to all your roles while you were there? Even your attachment to this Ray Gadel [?] and Cross Law offices in Los Angeles?

Theron: That is correct Chief Justice.

Mogoeng: That was not a job?

Theron: The firm in Los Angeles was arranged specifically by the programme that we were on, as part of the programme for us to gain practical experience.

Mogoeng: Yes. Very well. And the SCA? What was your experience during your first few months of your arrival there? Either acting or permanent?

Theron: If my dates are correct I first acted in 2006 Chief Justice. It was difficult. To some extent it was, I don't know if I'm being too harsh in saying it was an unfriendly environment, but coming as an acting judge, you didn't automatically feel settled. And in addition to that feeling of unsettlement that one had, there were incidents which made one even more unsettled.

Mogoeng: Like?

Theron: From my own experience I remember, we were in court, it was a panel of five judges, and a senior judge had asked a question, and I saw an opportunity to tag onto the question.

Mogoeng: Come up with a follow-up question?

Theron: It was linked to that question, yes. And the senior judge very -

Mogoeng: Impolitely?

Theron: - told counsel just to answer *his* question.

Mogoeng: To focus only on his to the exclusion, his or hers to the exclusion of yours?

Theron: Yes. It made me feel very small. It made me feel like I had done something stupid or silly. And I think also what was worse is that, nobody came to me afterwards to say "Leona, perhaps in the future consider doing this and not this, and this is the way we do it here at this court". And now I can see what would probably have happened, they will probably have sniggered about it amongst themselves.

Mogoeng: They would have?

Theron: Sniggered about it amongst themselves. That was one of the incidents.

Mogoeng: While we are still busy with that incident, what have you to say about, I understand there is tradition there in terms of which, if you are say a panel of five, you wait for all the seniors to ask questions and only when they are done are you permitted to ask questions. Is it correct or was I told an incorrect story? That as a junior you can't just say, go for the opportunity to ask a question before your seniors are satisfied?

Theron: As I understand the policy Chief Justice, that is not altogether correct.

Mogoeng: Okay.

Theron: As I understand the policy, is that you don't, as a junior, ask a question before the senior judge has asked questions. But that policy is not written

anywhere. It's indirectly communicated and you learn about it over the years. But it's not written anywhere.

Mogoeng: Should it be changed? Or have you all become used to it and are comfortable with it?

Theron: I think, and I give a general answer... that if and when we find out that something doesn't work, or there's ways to improve it, then we must sit down and address it, and see how we can improve it, and change it for the benefit of the institution that we serve.

Mogoeng: Does it work? This particular one?

Theron: If I can go back a bit Chief Justice. You will recall the visit to the European Commission of Human Rights and -

Mogoeng: The European Court of Human Rights. Yes.

Theron: The European Court of Human Rights. And the system that they adopt there, of no-one asks questions for the first whatever, it's ten or fifteen or twenty minutes. That counsel just address the court, and thereafter the judges ask questions.

Mogoeng: I must rush to say we've adopted that system. At the Constitutional Court.

Theron: Well I think it's a very good system. And I know the Acting President is here and perhaps we can look towards that, there's benefit in that. Because counsel come and they are given an opportunity to address before the judges start questioning them.

Mogoeng: What else made you uncomfortable or unsettled, or what else do you wish could be changed in the way things are done there? Where you are.

Theron: I can speak to my personal experience Chief Justice. This was now 2006, it was eleven years ago. And I'm much more mature now I know, as a fact, as I was then. And if what had happened to me then would happen now, then I would have approached the matter much differently. I wrote a judgment that was allocated to me by a senior judge, on a very difficult matter. And a

matter, and area of the law I had not encountered too often or else very rarely in the High Court. And it was also a panel of five judges. Three of the judges, after I had circulated my judgment, came back to me, with comments and suggestions as to how to improve the judgment. One judge didn't. I circulated my judgment on the Thursday. On the Monday morning I had a dissenting judgment from the other judge. And in addition to that, two of the colleagues who had made input on my judgment, signed onto the other judgment.

Mogoeng: Without an opportunity for a discussion to say "But here we don't agree with you, would you consider accommodating our positions?"

Theron: Without any of them - the two who had made comments on my judgment - without any of them coming back to me to say "We've reconsidered and we don't agree with you". My impression was that the comment, because they had made those comments and I had taken into account their views, and they hadn't told me that they don't agree with what I had written, that they were in agreement with the judgment.

Mogoeng: Are you aware of other colleagues who subsequently went through the same uncomfortable situation, or not?

Theron: I know that there have been situations where other judges have written despite the scribe producing a judgment. I don't know of all the exact circumstances under which that happened.

Mogoeng: Yes.

Theron: Unfortunately, and I say also this with hindsight, is that, we tend not to address issues like that head-on. And for me in 2006, coming as a junior judge ...

Mogoeng: Take your time Ma'm. Should we take a short adjournment?

Theron: My first feeling was one of inadequacy.

Mogoeng: Are you satisfied that the situation has changed enough to create - to constitute, not to create - to constitute a climate conducive enough for acting judges and newly-appointed judges to thrive in that environment? Or is there a

need for a lot of change for that court to be the homely environment that a court atmosphere ought to be? Even for new entrants or appointees.

Theron: Chief Justice, I acted in 2006, I acted again in 2009, I was appointed permanently in 2010. Since my appointment in 2010, gradually, the atmosphere at that court has changed. It is not at the optimum of where it should be. We do not as yet create a wholly enabling environment for our acting judges. And that is why some of them may fail there, and some of them may not want to come back.

Mogoeng: What about the newly-appointed judges? Are there support systems or structures in place to help release their potential?

Theron: Chief Justice, I don't think there are formal support systems in place. And maybe that is something we need to consider. But informally, there is a lot more support now for junior judges and acting judges, than there was before. But I think Chief Justice, both at the Supreme Court of Appeal and at the High Court, there needs to be an enabling environment. And we as judges need to be educated about that. Whether it's the Judge President or the head of our court, who sits down with our judges and says, explains to the judges "We are in a process of transformation. And during the process we're going to have ups, we're going to have downs. But in that, we are looking to build an institution of excellence, an institution that will serve the public to the best of its ability in terms of delivery of justice". So that all the judges are on par to know that when a new person comes here, this is how we treat the new person, with dignity, with respect. And yes, people who come in, are bound to make mistakes, even senior judges make mistakes, I make mistakes, we are not infallible. But it's how we treat the mistakes that people make, that shows whether we build them up, or we break them down. And it's not only the people that we affect - it's the institutions as well. Because the people serve in the institution, so if we're building up the people, we're building up our institutions.

Mogoeng: You came to act at the Constitutional Court and, I don't know, you struck me as a free person. I remember you teasing a colleague about the word or the expression he or she used. What have you to say about that environment? What needs to be improved? And there is no perfect

environment, so please speak out. What needs to be changed, so that if appointed, you can be as comfortable as you should be in that environment?

Theron: Chief Justice, regarding making an acting judge in that environment comfortable, I don't think there's more that the judges of that court, and let me add, it doesn't only extend to the judges of the court - when you come in at security, it's the way the security, the cleaning staff, it's the way everybody deals with each other, it's just that ethos where you know that everybody it's, you can feel the Ubuntu, the spirit there at that court. So regarding making people feel more welcoming, I don't think there's anything more that that court can do to make people feel welcome. I have not heard a single acting judge come back from the Constitutional Court and say they did not feel welcome, they did not feel comfortable. In regard -

Mogoeng: Didn't you create that environment by making us all those cakes yourself and those muffins? (Laughter)

Theron: I contributed and I added to an environment that I found. It was an environment that allowed me to excel and to thrive and to be comfortable.

Commissioner Motshekga: Judge, would you agree with me that from your family and professional background, you have never been inadequate. And if so, would you agree with me, that you were a victim of racism. Thirdly, that judges - both black and white - require a programme to combat racism within the judiciary, in order to deepen and entrench Ubuntu philosophy and its inherent values and principles?

Theron: Good afternoon Commissioner. Yes. When I look back now, I know that I'm not inadequate. And I know that I'm capable. But at that time I felt inadequate. And the actions that were directed against me were intended to make me feel that way. Yes, I have been a victim of racism. I've also been a victim of sexism. Yes, judges require training. Recently, at the High Court we underwent diversity training. Recently at our court, we did a similar exercise. And I must say for myself as well, as a black person, I also got to look at some of my white colleagues who participated in that session, a bit differently.

Motshekga: Lastly, I just want to assure you that you have not come to a wrong forum here. Because there are many young women who would find themselves, or already find themselves in the situation you found yourself. And that, if appointed, I think you should be, you would be a very good role model to lead them out of that situation.

Theron: Thank you Sir.

Commissioner Notyesi: Firstly, when you were led by the Chief Justice on an answer, I don't know why you don't mention that in 1998, you were -

Mogoeng: I'm sorry Commissioner, we couldn't hear.

Notyesi: I am saying as you were just introducing yourself here, I don't understand why you don't mention that in 1998, very young, you were already acting in the Transkei division and inspiring a lot of young people, bearing in mind, at that time we have just been allowed our right of audience in the High Court. And also at that time you were one of those judges who were willing to assist in terms of the young practitioners. How did you do that? What is your perception? That of allowing young practitioners who come to the practice to be given that opportunity within the High Court?

Theron: Commissioner I believe in the saying "Ubuntu mubuntu ngabantu". And I am where I am because of people who assisted me. And the least I can do in return, is to assist others. And that is why I'm passionate about getting involved in organisations that empower, particularly our youth and women. I think coming to act in Mthatha was a turning point for me. I was very, very young at the time. And at the time I had been serving on a commission, appointed by late President Mandela with Judge Somyalo. And it was Judge Somyalo who was the Judge President, and I think he saw something in me, that others hadn't seen up to then and gave me the opportunity to act in Mthatha, And if you would allow me to digress for a moment Chief Justice, I know that some of what we've been dealing with here at the Commission, have been ways to increase the pool, or available pool of women for appointment. And something to consider, is to appoint women to act in smaller divisions, and not just in the huge divisions where they can get sucked in, and also be intimidated, where you have a motion

court roll of a 140 matters, as opposed to having a motion court roll of between 30 and 40 matters. I had that experience, where I had that motion court roll, and it was 40 matters in Mthatha, as opposed to 140 in Durban. And after that, I was in a much better position to succeed in a bigger division, and especially where people are looking at you to fail.

Notyesi: Thank you Judge. I note from your CV that you indicate that you have an understanding of Zulu as a language. You have a little understanding. In your words, how can languages enhance access to justice? In terms of influencing or understanding the cultures, of particularly the indigenous people. Why is it important for justice at least to have some understanding of languages?

Theron: Commissioner, I have tried to, I am originally from KZN, I have tried to learn Zulu. But not with the greatest of success. But many people in my family speak Zulu. And unfortunately, at the time when we were growing up, we were discouraged from speaking Zulu. My grandmother was a Zulu woman from Umlazi and somehow she managed to get herself reclassified, because she looked across the road and she looked to Wentworth. And she said, in Wentworth, people who are classified by that government as coloureds were getting better houses. And so she got herself reclassified, and her children. And then she said to the children "Now if they know that we are Africans, we will lose this house. So you are not to speak Zulu". And it's a sad indictment on our society, and I regret that I can't speak the language of my grandmother. I studied Zulu I at university, but I came out knowing vocabulary. I cannot speak it. And as a High Court judge, because sometimes I knew a few words here and there, there were times when I could pick up that the translator, the interpreter, didn't understand the witness. And, if we just go back a little bit in history, it's important to know people's culture and custom. Before you know, you know, that judges, when a witness looks down then judges say that this witness is disrespectful. But by looking down, the witness is actually showing respect to the court. Because in some cultures you don't look a person straight in the eye because it's almost like you might be challenging them. So, yes, language is important. But I think learning culture and learning custom, is equally if not even more important, for judges.

Notyesi: My last question Judge. I see that you are one of those active judges in the SAJEI programmes, in fact I was one of the students, I mean in the SAJEI, where you were actually training. What is your view on the judicial training? I mean, particularly, I mean the aspirant training, that the CJ has introduced, advanced courses. How do you think they can assist, in terms of enhancing the capacity, the competence of those who are appointed to the judiciary ultimately? What more needs to be done? What can you say on that?

Theron: I have participated and I continue to participate in judicial education programmes, organised not only by SAJEI, but also by the Bar Council, by the attorneys' societies and I give guest lectures at university. I think that is a start, the programme that the Chief Justice is running. But I also think we can do more. And when I look especially at women, and I think that there should be some programmes aimed particularly at women.

Commissioner Schmidt: I just want to continue where you left off now. And looking quickly at your CV, you've survived about eight years at the Bar in KwaZulu-Natal. And appointed as a judge at the age of 33. You've already indicated that one should look at specific programmes for women judges, candidate judges, as well as an enabling environment for new candidates. But what in particular, would one learn from the lessons you learned? In order to facilitate a process where A: More women candidates make themselves available and B: What should we be more aware of in possibly enabling more candidates to be appointed as judges? Because you know you most of us here see it from our perspective. And I am not sure that our perspective has been correct in the past number of years. But, maybe you could -

Theron: If I can address the first question, Commissioner Schmidt, about creating a bigger pool. I'll give you an example of what the Chief Justice did in 2014. In 2014, he announced publicly that he was making a concerted effort to increase the pool from which appointments can be made, a pool of women judges who would be available for the Constitutional Court. In 2015, he invited, at least if I can recall, seven women judges to act in that year, of which I was one. Again in 2015 he announced... he said "We have a vacancy on the court..."

we are looking specifically at the gender imbalance of the court". In May 2017, when there was a vacancy on the Constitutional Court, there were four women that made themselves available, here to the JSC. And it was as a direct result of the positive intervention of the Chief Justice. I'm saying it needn't stop there. Look at what results that achieved within a period of 18 months. We can continue with instances like that. The Chief Justice can again say, after this sitting, he can announce, that he's going to focus on women and bringing women to act in that court. And it must go down to the judges' president as well. That they're going to say "We're looking", and make it public let people know let everybody know "We're looking to address the gender imbalance in the court. And we are not just saying that we're unhappy with the lack of gender representivity. We are doing something, and this is what we are doing. We are looking to invite more suitable women to come and act in that position". And for the JSC as well, it's always open to the JSC not to make an appointment and to say to the Judge President "We are not satisfied that you have made sufficient effort in getting suitable women candidates". So you first make the effort, and if after that, you still don't come up with suitable candidates, then we can revisit the situation.

Schmidt: So basically in a nutshell you're saying that considered deliberate approach towards ensuring more candidates make themselves available and that more people are invited to act?

Theron: That's where it starts, Commissioner Schmidt. It starts with giving capable women, women who have potential, the ability to act. And I'm not saying that everybody then who has acted, is then automatically suitable. But that is just the start of, of being supported further and built up further. I'll tell you, when I was nominated for a position as judge, permanent judge of KZN, the newspapers weren't too kind to me. And quoting my lack of experience, my lack of experience in commercial work, which I accepted I had. I didn't have a lot of commercial work, I didn't have a practice that had had a lot of delict. But you know what they did say, and I took this as my greatest asset, they said in a kind of throwaway line 'At least she has potential'. But I'm saying that is what must be looked for candidates. And the candidates that have potential must be built up, in the same way that I have been built up.

Mogoeng: But of course you know that that effort to attract many women to the Constitutional Court was attacked through articles, in the newspapers, in journals, by women, letters written to me even by organisations that are supposed, that are established to create gender representation. Why was that so? Suggesting that no, no, no, once they are there, they will do everything to, basically to please President Zuma so that he can appoint them, permanently.

Theron: Chief Justice, I cannot speak for people who were critical of that -

Mogoeng: The motivation -

Theron: The motivation for them. But their criticism would apply to any candidate who's in an acting position. It's too generalised. It would apply to an acting judge in the High Court, it would apply to acting judge in the SCA.

Mogoeng: I'm saying, in circumstances where you would expect women, who claim to be concerned about gender representation, and who should be concerned about the need of more gender representation and organisations established to further the good cause of gender representation in the judiciary. To support any endeavour to that end, what would explain this opposition, to efforts that you have referred to at the Constitutional Court, of bringing in many women to come and act. What would explain, 'it has never happened before, this can't be right'?

Theron: Unfortunately Chief Justice, I cannot explain it. I cannot go on the basis because something has not happened before, it can't be right. And also, I think it's for those organisations who criticise that, to say "Instead of following X, this is what we should be doing, to come with alternative proposals". And then it's for people who are in the position to make decisions, to consider that proposal, and to say "Well, this is a better proposal to what I have, and will achieve more results".

Professor Ntlama: I just have one question. You have been nominated by one of the organisations, Association of Judges, and the President, Judge Kgoele signed that nomination. I want to establish as to what are the ethos that are foundational to that association? It's because of the reservations that I have on Judge Kgoele. Let me leave it there.

Theron: Commissioner, I was one of the founding members of that organisation, together with Justice Lucy Mailula and a few other judges and magistrates. The purpose, the foundational purpose of that organisation, is to focus on the development and advancement of women in the judiciary and issues affecting women. Whether the organisation has achieved that fully over the past few years, is questionable. But, there is an activism within that organisation. They do organise training sessions for, in particular for their members who mainly are women judges.

Ntlama: Just to follow up CJ. And then what about the calibre of the persons put on as [inaudible] office-bearers in the organisation?

Theron: The office-bearers are elected through elections by the members. Members vote for their leaders.

Ntlama: What is it that you are looking for in that person, who's elected into office?

Theron: Well, it should be the person that will carry the interests of the organisation forward, and serve its members. In reality it doesn't always happen, but that's what should be the guiding principles.

Ntlama: Okay. Let me leave it there. Thank you.

Commissioner Norman: I have read your judgment in the Gumedde matter, which was subsequently confirmed by the Constitutional Court. But my question is: how difficult was it for you, to balance the rights of the women in customary marriages, their rights to property in terms of their marriages, a lack thereof at the time, balancing that with the patriarchy of the society that they live in as women in the rural areas? Or even if they are not, but being subjected to those marriages?

Theron: Commissioner Norman, one has to balance up, balance the practices of customary law and where they live, with the constitution. And where a custom or a practice, does not, or it operates adversely to a woman, then we have to look at the Constitution, because the right to equality is one of the founding

principles of our beloved rights. And you compare the two and do a balancing act. And at the end of the day, it wasn't difficult to do.

Commissioner Fourie: Just one aspect that I would like you to, just to expand on, clarify. You say in your questionnaire, "In particular when presented with the opportunity, I have protected the dignity and rights of vulnerable people, especially women. See *Nkomo v The State* and *Gumede v the President of the Republic of South Africa*, "even if it meant being a lone voice". That's quoting your words. Now in *Gumede*, which has been referred to by another commissioner, the, you sat as a single judge I assume in the KZN High Court?

Theron: If I recall correctly, it may have been a full bench. I am not sure.

Fourie: And the decision was upheld by the Constitutional Court?

Theron: Yes.

Fourie: And then the matter of *Nkomo* which you refer to, you as an acting judge of the Supreme Court of Appeal, gave a dissenting judgment and you did not disagree with Lewis JA and Cameron JA. Could you just expand your reference to and explain 'even it meant being a lone voice'?

Theron: It means, in a case, even if I'm the only one that holds that view, I'm prepared to stand by it, especially where it's a view that serves, in my view, in my judgment, to advance or to protect vulnerable groups. So I'm saying I will stand alone if I have to.

Fourie: And are you saying that *Nkomo* and *Gumede*, underscores that and confirms that?

Theron: I would say so, yes.

Minister Muthambi: I see you are a founding member of the South African Chapter of the International Association of Women Judges. I know when this Chapter, association was established, was to champion the cause of women judges. I'm linking it with what CP Fourie, Commissioner Fourie has just raised recently to say, you still have association where in you have lone voices. I want to understand your leadership role that you've played. To say since the, the

chapter, the association was formed in the country. Are there achievements that you can showcase with us to say “This is what we’ve managed to do, to achieve, to make sure that our women judges are put on par”. I’m raising it based on the fact that I see that the Commission on Gender Equality has supported your nomination. And when they are saying that, they are saying there’s a lack of transformation when it comes to the issue of women in the judiciary. So linking to that to say, how has the work of the association assisted in making sure that there is transformation and also women are taken seriously. I’m raising it based on the fact that the other time I heard you asking the Chief Justice to make conditions for women judges to be better, but I’m looking at you as well here, being also a mother, a wife, but you are still doing what you are supposed to do. To say, maybe share with us to say, how did you make it yourself, and how do you intend maybe also assisting those that are struggling, using the issue of gender SA problem?

Theron: Thank you Minister. If I can talk about the organisation first - the South African Chapter of the International Association of Women Judges. At the time of its establishment, Minister Brigitte Mabandla was the Minister of Justice, and I think Cheryl Gillwald was Deputy. We had specific engagements with the Ministry, about ways in which to develop women magistrates and judges in this country. We partnered with them in the 16 days of ‘no violence against women’. Under the flagship of the organisation, we created awareness at our courts, for the first time in the history of the courts. We had celebrations on 1st of December, World AIDS day, at the Durban High Court, and at the Pietermaritzburg High Court, as well as at the Magistrate’s Court. And its traditions which since have continued. We have also supported women prisoners, women who are incarcerated with their children, and with literature. Regarding being a mother, and a wife, and a judge, it’s not easy, Minister. In the United Kingdom, quite a while ago, they did a survey amongst executive women, that occupied top management positions. And they asked them: “What would make your life easier?”. And most of them said “A wife”. Sometimes I also wish that I had a wife to help me. But it’s only with support. I could not have done what I have done, or achieved what I have achieved without support. Be

that friends, be it family, and be it colleagues. And that is why I say, the person I am today has been contributed to by so many other people.

Muthambi: Okay. And then, I see you are also a regular speaker at schools around Durban. Being a Supreme Court of Appeal Judge, what actually motivates you to still go to talk to school children in Durban, and why are you doing that? Is there a reason behind that?

Theron: Because I love it, because I know I'm good at it, and because I know I leave an indelible and a positive impression on those children. I have met people who have come to me 10 years later or 20 year later, after I have spoken to them, and they have told me how they were impressed, how they were motivated by what I had to say to them. That's why I do it Minister.

Muthambi: Are you a team player? And if so, we've heard instances of what happens in your court in Bloemfontein. Of the issue that we need to still need to deal with, the issue of social cohesion. The colour issue, and you have indicated when you stated how you have suffered oppression yourself. Saying that you can't even speak your own mother tongue. The grandmother's language, that's Zulu.

Theron: Yes.

Muthambi: So, then under the circumstances we have heard instances of certain issues that are happening there in your court, how have you managed to reach out to your colleagues and also try to explain to them "We are a one united country, full of diversity, wherein we need to find each other, and live with each other"?

Theron: I would definitely say that I'm a team player, Minister. But I would also be the first to say that I can be difficult. But, I must qualify it. I say I would be difficult in the interest of the institution. And I try to make sure, like just give you an example of about our judgments, I try to make sure when I'm involved in a panel, that I contribute - sometimes maybe over contribute that I even have to apologise for - but that is because I have the interest of the institution at heart. When I first came to that court and colleagues would make comments about the judges, about the judgments, and make valuable comments, and I look at it

and to me everything would just look right, and I wondered to myself when would I reach the stage when I have the insight to look into a judgment, or read it and to say “No but something doesn’t flow right, or something doesn’t”. So I think I have reached that point at the SCA, where I can make a valuable contribution to that court, to colleagues, to junior colleagues, and to acting judges.

Mogoeng: Thank you Minister. Colleagues, the last commissioner to put questions would be Commissioner Masuku, but, before he does that let’s reflect on whether we would want to take a lunch break, or bring in Justice Wallis, go through him, deliberate, decide, and only thereafter break. Commissioner Masuku?

Commissioner Masuku: The question I want to ask you relates to your view on whether the requirements for the granting of interdicts should be developed in order to fit with the Bill of Rights. I ask this question because firstly, it was discussed in the OUTA judgment of the Constitutional Court, that perhaps the requirements for granting of interdicts require that it sort of be developed in such a way that it fits with the Bill of Rights. But also because you were part of the panel that decided a case involving FeesMustFall students who had been interdicted by their university and that interdict had been granted by the High Court, it was upheld by your court. And part of what - I was counsel in the matter if you recall -

Theron: I do.

Masuku: I’m not trying to re-argue the matter before you, but part of what concerned me was that I felt that if there was an acceptance of the legitimacy of the FeesMustFall campaign, that students had undertaken, that there would have been a way of finding, within the acceptable legal framework relating to the requirements for granting of interdicts, that would harmonise that acceptance of the legitimacy of the protests and those things that you were not happy with, for which you granted, you upheld the order of the High Court. But I’m not really trying to ask you to debate the merits of the matter. I’m just asking about the principle. Whether there is a moment in our legal, in our law, in which interdicts are going to be developed in such a way that, they are not applied

mechanically. That they accept that there is a Bill of Rights which grants people the right to express themselves in whatever lawful way they need to.

Mogoeng: Is that the Hotz matter? Is that Hotz?

Masuku: It is the Hotz matter.

Mogoeng: Okay.

Theron: Yes Commissioner. If I can address the answer this way. The constitution enjoins us to develop the common law in accordance with the prism of the constitution and the Bill of Rights. And if a situation arises where a case is made out for the development of the common law, in any area of the law, be it interdicts or anything else, and that case is presented, then it must be judged on its merits. And if the court believes that 'Yes we must develop the court, the law in that way', then that is what will be done. And it's also, like in response to an earlier question, I am not opposed to change, but change mustn't just be for the sake of change. It must be considered change. It must be change based on reason. And change based on enhancement of the law and enhancement of the institution that we serve. And for now that's the best way that I could answer your question. But what we did do at that case, in that case we said "We accept that students have a legitimate claim, but we cannot accept the violence, we cannot condone violent acts in advancement of that". And that is why in order to determine whether or not the interdict must be upheld or the evidence establishes it, we must look at the requirements thereof. And as at that stage when we decided the case, that was the law. And we were doing our duty as judges, in applying the facts of that matter to the Law as it stood, and there was no constitutional challenge to the law.

Mogoeng: Thank you Commissioner Masuku. Thank you very much Justice Theron. You pronounce it *Teron* or *Tron*? Or any?

Theron: Chief Justice, some people say '*Tron*'. One of my first appearances in the Magistrates Courts, we had to go introduce ourselves to the magistrate, and he looks at me and he looks at me and he says " 'n bruin Theron - waar vanaf kom jy?". And then Charlize Theron.

Mogoeng: 'Bruin Tron'?

Theron: A 'bruin Tron'. A 'brown Theron'.

Mogoeng: Yes.

Theron: And then on the other hand you have Charlize Theron, and that's *Teron*. I am told that the lineage actually comes from the French Huguenots. And that's where Theron comes from. And it should actually be 'Theron'.

Mogoeng: Theron?

Theron: Yes. And Theron was one of the first families that came from the French Huguenots. They evaded persecution there, and settled in the Western Cape.

Mogoeng: Thank you very much. You're excused Ma'm.

Theron: Chief Justice, Commissioners, thank you very much.

Mogoeng: Thank you.

Theron: If you're always so nice to me, I'll keep coming back.

Mogoeng: It may not be a good wish for you. (Laughter)