



JUDGES MATTER

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Constitutional Court

Interview of Justice B H Mbha

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Chief Justice Mogoeng: For how long were you an attorney?

Justice Mbha: I practised for about 20 years.

Mogoeng: You were in practice for about 20 years?

Mbha: Yes, almost about 20 years. I'm counting from the period when I started serving articles.

Mogoeng: And as a High Court judge? For how long were you there?

Mbha: I came in 2003. I acted for a year. And then I got appointed permanently in 2004.

Mogoeng: So that gives us how many years?

Mbha: Including the acting, it's 14 years.

Mogoeng: It's 14 years. And why did you do a Masters degree on Tax Law?

Mbha: Well I have always had an interest in tax, Chief Justice. You will see I started off with a diploma.

Mogoeng: Yes

Mbha: I then went on to do a Masters and then in 2012 I actually was admitted to a Phd programme at the University of Johannesburg. But before I could start I got invited to act at the SCA in 2012. And I just decided to concentrate on the SCA, and I never pursued that unfortunately.

Mogoeng: You don't want to be like your colleague Wallis who pursued his Phd while he was on the bench?

Mbha: I have given serious consideration to that, Chief Justice, but the work is just too much.

Mogoeng: Yes. And before I forget, what does a chancellor of a church do? Is he like a university chancellor, or what?

Mbha: Yes, in more ways -

Mogoeng: Or preside when there is some graduation or ceremony? How does it work?

Mbha: Our church is governed by its own Acts, by its own legislation and I am responsible for all the legislation that governs the operation of the church. There is an entire body. I oversee the appointment of the House of Bishops.

Mogoeng: The?

Mbha: The House of Bishops. I preside over synod ... and just ensuring that all the laws of the church, all the procedures are observed.

Mogoeng: Are you involved in some kind of a process like this where they are considered for positions, or what?

Mbha: Yes, we do have a screening, a very tight screening process. Candidates have to meet requirements, certain standards.

Mogoeng: A kind of a JSC set-up?

Mbha: That's correct.

Mogoeng: Now tell us about your experience at the Supreme Court of Appeal. Challenges? Positive experiences? That have shaped you up for the position you are applying for?

Mbha: Yes, I have been fortunate enough to have been assigned some challenging judgments to write. And many of the judgments I have written have had some constitutional implications.

Mogoeng: Yes

Mbha: I have been fortunate that in almost 100 percent of them I have had unanimous concurrence from my colleagues. I can't recall an instance where I had had a dissension in any of the judgments that I have written and I can also state that most of my judgments have been reported all over the law reports.

Mogoeng: Yes. And challenges? In that environment, in that space? What have they been?

Mbha: Yes. When I first went to the SCA in 2012 the first thing I discovered was that the atmosphere was not that conducive. To give an example, the first thing I discovered was that in the tea room for instance black judges would concentrate on the one area of the table while the white judges would sit at the other end of the table. And I spoke to the then head of the court at the time, Judge Lex Mpati, and I found that he was actually worried about that. We talked about that and the one thing I remember suggesting to him was that all of us had a duty to make sure that, it was incumbent upon all of us to fix that. And I would for instance sit anywhere and not concentrate on sitting at one particular area of the table. And I made sure that I reached out to everybody. I was not going to allow anything or anybody to deter me from doing my work. The position has changed somewhat. The demographics, as we speak now, there are more black judges overwhelmingly, I dare say, than white judges. So the position is quite different, challenges are still there, the leadership is attending to them. I can also mention that at the beginning of the year the acting head of the church -

Mogoeng: Not a church, the court (laughter)

Mbha: I mean court – I beg your pardon – Justice Maya organised diversity training for all of us and it has yielded positive results. I mean the seating arrangement in the tea room has changed dramatically, and people are more accessible to one another. The problem ... it's still there, but I think we are all working hard to make the court a pleasant working environment.

Mogoeng: Apart from which chair is occupied by whom, what challenges were there? What challenges of significance were there?

Mbha: Yes, there were also attitudes, negative attitudes Chief Justice.

Mogoeng: Like what?

Mbha: We found some people thinking others don't deserve to be there.

Mogoeng: How is the thinking expressed?

Mbha: Well you could see comments being made about the work of others, badmouthing of other colleagues, that sort of thing.

Mogoeng: Yes. Now , why did the black judges, who are in the majority, not do anything about it? Because I get a sense from what you are saying, that ... the suggestion seems to that white colleagues were reluctant to have you mingle with them. Why did the body of judges not do anything about it?

Mbha: Yes, it is quite a worrying factor -

Mogoeng: Let me tell you where we are coming from, as South Africans. South Africans have had a tradition of rebelling against anything that doesn't sit well with them. We will not permit this. Now as colleagues, as equals, nobody has employed you there, you were not employed by your colleagues, you did not employ them.... Why was it so difficult to break this conservative tradition, this unacceptable tradition?

Mbha: Yes, it is something that has worried me personally.

Mogoeng: As independent people -

Mbha: Yes, you are quite right Chief Justice. It is something that has always worried me, that people would just complain in their chambers and not talk openly about things that are troubling them, in particular -

Mogoeng: Please, if you could just come closer to the mike.

Mbha: I have always been worried by the fact that people have not spoken out openly about this issue, and instead you find people complaining privately and in their chambers and so forth and not speaking out, which is wrong. It is an issue which I have personally taken up with the heads of court, Justice Maya knows, I have raised this with her. We are all tackling this issue.

Mogoeng: Yes. And how did you find your acting stint at the Constitutional Court?

Mbha: It was very interesting, eye-opening. I was assigned to write two very difficult judgments, I think you are aware of it, you assigned them to me, Chief Justice. The one -

Mogoeng: And you complained about one (laughter).

Mbha: Yes (laughing). The complaint was that the approaches were so different, from the various colleagues, and in the end you recall that I actually asked that you convene a conference where we could sort of thrash out the opposing views and I had to sort of work through them and scale them down and bring everybody on board to a similar sort of approach and that worked. Of course in the end there was a colleague who wrote a different concurring judgment. But there was unanimity after the conference, which really made it easier for me to write and produce a judgment.

Mogoeng: A question which I didn't ask any of your colleagues who were here before, why you?

Mbha: I beg your pardon?

Mogoeng: Why should it be Justice Mbha who is elevated to the Constitutional Court?

Mbha: Well Chief Justice, I believe I have got what it takes to - I value the constitution, I live the constitution, in all my judgments, I try to look at them through the prism of the constitution. I have always maintained that it is no longer business

as usual for judges. In all matters that come before us, we should try and look at them through the prism of the constitution, and that is reflected I think in all my judgments. Just to give an example, the last term at the SCA I was assigned to write two judgments, which were both delivered last week. The one was a criminal matter dealing with confessions, and the appeal was against the conviction based on the confessions, which we all know are governed by Section 217 of the Criminal Procedure Act. But what I did was, I looked at the case through the constitutional prism and it brought in Section 35 – the right to a fair trial – and what has to be done, the entitlements of an accused. So I always try to introduce the constitutional element in all my judgments. The second matter was a civil matter. It was a civil case or civil appeal rather. It concerned locus standi of an association where the association was denied the right to bring an action on behalf of its members. Even though from a common law perspective, the decision was wrong, but I approached the matter from the constitutional perspective and introduced the whole element of Section 34, because the dispute involved a right that was protected in the Bill of Rights. So I tried to promote and live the constitutional values, which we are expected to do as judges all the time.

Commissioner Motshekga: Judge Mbha, is it correct that the first anti-colonial and anti-racist campaigner was Rev Mangena Maake Mokone, founder of the Ethiopian Church? Secondly, is Nelson Mandela's observation correct that the seeds of the governing party, the ANC were planted in the Ethiopian movement? And if so, why has the church, under leaders of exceptional calibre like yourself, not continued to support the efforts of Government including the efforts of the judiciary to continue the struggle against racism that is necessary for the creation of a new South Africa, united in its diversity? Lastly, would you support an interfaith and human rights symposium to address the roots of racism and their negative impact on the evolution of our democracy as well as the greed and corruption that is threatening to derail our constitutional democracy?

Mogoeng: On a lighter note Professor/Doctor, now I understand why you are reported to have passed your LLB with distinction, and passed your LLD in German, because you may still make a preamble but you stop and put the question so that it doesn't look like a preamble but it is (laughter). Please answer the question Sir.

Mbha: Thank you Commissioner Motshekga. My starting point would be this. I think it would be an illusion to try and write the history of the liberation of this country without any reference to the role that was played by the Ethiopian church. Our founder, Mangena Mokone, the name Ethiopia - perhaps I should start there – it has got no relationship whatsoever with Ethiopia as a country. The name – our founder - if you go to the Bible, the Old Testament, the Book of Psalms, the Book of Psalms in Chapter 66, Verse 31, there it is written, it is in the Old Testament, that ambassadors shall come from Egypt and Ethiopia shall stretch his hands into the heavens, but if you look at other versions, the new international version, the black man shall stretch his hands to God, so our founder established that the black man had a relationship with God even before the arrival of the white missionaries. Having said that, when the country became a union in 1910 and blacks were excluded, the Ethiopians were the ones who led a delegation to the United Kingdom to go and protest. And in 1912 in Mangaung, the meeting that led to the formation of the African National Congress, even there the Ethiopians were the chaplains of the movement, they actually opened the conference in Mangaung 1912. So the Ethiopian church has been in the forefront. Presently – before I come to this, in 1992 our church was bedevilled by a very large schism, and the cause of that schism was that in the synod of that year we had passed a resolution, the synod had passed a resolution that women must be allowed to become priests and to become bishops and to be the leaders of the church. So we have been fighting inequality between the sexes, even to this day one of our bishops, Bishop Mpumlwana is a leading member of the South African Council of Churches. Our church is involved with the students, the FeesMustFall, we speak against corruption – it's in our papers – and we encourage people to report corruption wherever it raises its head. So my church – I'm proud to report that we are actively involved in the day-to-day happenings in this country. We are also members of the Interfaith Consultative Forum, even there we are represented by Bishop Malusi Mpumlwana, who many of you will know was Steve Biko's right-hand man – he is actually mentioned in Steve Biko's book, *I write what I like*.

Mogoeng: Now I know that this is not a lesson on the Bible, but what is that scripture that you referred to?

Mbha: Psalms 68 Verse 31.

Mogoeng: All right... (laughter) yes, it's correct. Yes, Commissioners?
Commissioner Modise?

Commissioner Modise: I must confess CJ that my familiarity with the Bible is very scanty. So I will not go to the psalms. But Ntate Mba, your being a chancellor in a church, which you say is so closely linked to the social issues and your being a judge – does that present any conflict in any space?

Mbha: Thanks Commissioner. It does not. In fact I will tell you that my faith has had a really positive impact on me in being a judge. The values that one finds and must espouse as a Christian - loving thy neighbour, caring for the poor, helping widows and so forth – that is what our constitution actually calls upon us to do. So I find that the two supplement one another very well. So I don't have any conflict between my church and being a judge. They actually complement one another. And in one of the books, one finds in one of the books – I think in the second Book of Chronicles – the Chief Justice, it's his favourite, he has quoted it before – judges are actually told how you are expected to behave. It's there in the second Book in Chronicles. Firstly you are reminded that you are not judging for yourself – you are judging for God. You are warned against taking bribes, you are warned against impartiality. So there is a correlation and the two work hand in hand. I do not find any conflict.

Modise: Judge Mbha, are you satisfied that the current system of discipline, disciplinary processes for lawyers and judges is effective?

Mbha: Well, no system can ever be perfect. But the system that is in place for disciplining both judges and lawyers – I think it is more than adequate and it is doing a good job. We have seen the results and I think it is working well. As I say, I think there is always room for improvement.

Modise: If that is your opinion, why is there this continued perception that – and just to go back a little bit to the last interview CJ, one of your colleagues actually likened the disciplinary processes to peer review. Now when peers review one another, they act as, on the level – there is nobody above the other and therefore it is usually very collegial and nobody gives and receives their judgment or the sentences, whichever measures that need to be, the sentencing is very, for lack of a better word, a

gentleman's agreement – please behave – don't do that - and therefore we do not see a marked improvement in the perception that, if you go back to the Judge Motata case, we don't see any difference, we don't see anything that is happening. We don't see a finality of such measures. So if, for instance, these processes are adequate, why is it that we who are outside your system continue to see you as just doing what you want?

Mbha: Yes, it is true that these perceptions are there and they continue to be there. But you but you must remember Commissioner Modise that - you may have the best system in place but if you do not have the proper people of character – I'm not saying that is the case here – the system is there and I think it is more than adequate but it has got to be implemented to the tilt and people who are there must implement it without any fear and without any favour. You are quite correct that the perception is that some judges are getting away with it – their cases are not being resolved, that is very, very unfortunate, we are worried, we have spoken out against that, but unfortunately in some instances some people will delay the process on the basis that they are exercising their rights – their constitutional rights – the case in point is the one that you have mentioned, where people want to challenge this and raise this constitutional point, just to delay the process. So I think it is really (incumbent) on us to implement what is there. Unfortunately I cannot think of how we can do that off the top of my head. But the system is there, it just needs committed people who can really implement it and bring some of these cases to an end. They are actually an embarrassment to all of us – some of these cases.

Modise: My final question to the judge CJ is: Have you ever lain awake at night and wondered whether you have dealt with a particular case the way you really should have? And if it is so, would you like to share (it) with us?

Mbha: Yes, as I mentioned earlier, I really have been blessed, I can say, to have always been assigned some challenging judgments and there were instances where I would worry about a particular aspect of a judgment. To give you an example, the judgment I wrote at the Constitutional Court which concerned the right of same-sex partners to inherit intestate from one another, the one aspect which was worrying me was whether I had to go and veer into a particular area of marriage as defined, and in the end I decided I was not going to go into that area, I was just going to confine

myself to the issue, as to whether same-sex partners could inherit intestate from one another. So that troubled me for days and I think at some point I actually spoke to the Chief Justice about it if I remember or one of the other judges at the Concourt, so it has happened – more than once – where I would really worry about a particular area in the judgment – whether to deal with that or not.

Modise: CJ I thought that would have been the particular case that would have brought him into conflict with his religious beliefs (laughing). Thank you.

Mogoeng: I'm taking it up. How was it possible for you, as a chancellor of this church, to arrive at a position that some would say was in conflict with your religious beliefs? How was it possible for you to arrive at that conclusion? Why did you not go the religious way?

Mbha: The constitution is the supreme law of the land. The constitution criminalises discrimination based on sexual orientation. My church, when it comes to such issues, we preach the Gospel of love, love everybody you come across, be it a homosexual, be it gay, whatever. So it did not present any problem to me – I had to apply the supreme law of the land.

Mogoeng: But isn't this the bottom line? It's either you become a judge or you become a preacher. And if it is a judge you want to be, then follow the constitution.

Mbha: I don't agree Chief Justice.

Mogoeng: You don't agree that the constitution is supreme? If you can't apply it on the basis of religion, then rather go and preach the Gospel?

Mbha: As I said Chief Justice – if one looks, for instance, at the Old Testament, which is against homosexuality, but when you come to the New Testament – the Gospel of Jesus is the Gospel of love.

Mogoeng: I thought that maybe I must interrupt you so that you answer the question I'm asking. I'm saying, whatever your perspective might be in relation to faith, the constitution is supreme. If you want to be a judge, you must apply the constitution, whatever your beliefs might be. Is that not what the attitude of a judge in South Africa should be? I'm going to apply the constitution. Whether you have reservations or not, you must apply the constitution.

Mbha: Quite correct.

Commissioner Malema: Will I be correct to say that when you deal with a case, the only thing you look for answers from is the constitution and nothing else?

Mbha: That's correct

Commissioner Nyambi: Is there any connection between democracy and the rule of law?

Mbha: Definitely. The two complement one another.

Nyambi: In what way?

Mbha: The rule of law means that all people must observe all laws and laws are binding on everybody. And democracy is the other side of the coin. The two speak to the same issues.

Nyambi: Can you take us through your understanding of the doctrine of the separation of powers?

Mbha: Our courts, in particular the Constitutional Court, have warned, we have consistently warned ourselves to be careful that even though courts are the final arbiters of disputes, there has to be trust, respect and deference to the other areas of government. It is only in exceptional cases and where it is permitted by the constitution, where the courts may intervene in the process of the two other legs of government. Otherwise the separation of powers doctrine is very important and there has to be deference to what the other organs of state are doing. It is only in clear cut cases – in exceptional cases where the courts should be able to intervene and pronounce on the constitutionality of the other legs of government.

Nyambi: Is it right for a judge to write an opinion for a newspaper?

Mbha: Definitely not. Definitely not. I think as judges we should keep away you know, from the public space. I believe that judges should only speak through their judgments.

Inaudible section.

Nyambi: You said your church is involved in fighting corruption, FeesMustFall, so if they request you to assist in that regard, how can you deal with that situation?

Mbha: I have actually been asked to comment, to be involved in that and I have refused. I have refused, I have stayed away. I do my bit. We have got programmes to assist students, we have programmes to assist students from poor backgrounds, but I don't get involved in debates and such things in public. As I say, I think I can only speak through my judgments.

Mogoeng: Thank you. Commissioner Malema? A follow-up again?

Malema: No, you know Chief Justice, Judge and the, the problem is that every time a question on the separation of powers is asked, judges are only confining themselves to the judiciary. You never teach us, what is the separation of powers from the executive, the legislature and the judiciary? You are always saying: no, we must be careful – and especially the Constitutional Court ruling - that's what we hear. It has taught us not to get involved in a manner that is unacceptable in other spheres of the state. But you don't tell us – what is it that other spheres of the state should not do, for instance, in interfering with the independence of the judiciary itself? You only talk to the judiciary not being tempted to enter into other spheres of the state. So what is this separation of powers - the executive, the legislature and the judiciary?

Mbha: Yes, I hope I have understood your question Mr Malema. It simply means that we have got different spheres of government. Government consists of three legs – we have the executive, the legislature and the judiciary. Now as far as the executive is concerned, we know what its functions are – they are well set out in the constitution. As far as the legislature is concerned, we also know what their functions are. Our constitution has got some checks and balances that these two, for instance, don't overstep their mark. To give an example, the executive must be accountable to Parliament – Parliament has an oversight role over the executive. Whether that is happening or not – I won't go into that. But - all that you will find in the constitution – but as far as the judiciary is concerned, the judiciary has overall oversight over the other functionaries including, for instance, the state president. But that has to be limited – courts have got to be careful not just to get in – and all of that is in the constitution. So that is what I mean by the separation of powers. Of course I can only

- and I think the same goes for the other colleagues to whom you have asked the same question – we will always answer in relation to our own area, the judiciary.

Malema: But the judiciary doesn't have an oversight role over anyone else....

Mbha: But the judiciary can declare an Act of Parliament, can declare the conduct of the president, can declare the conduct of the executive to be unconstitutional.

Malema: But that is interpreting the law, and not oversight.

Mbha: You can call it oversight, I think we are really playing with words. The constitution states expressly Mr Malema, that the judiciary can declare an Act of Parliament unconstitutional, can declare the conduct of the president unconstitutional. Whether you want to call that oversight or whatever, but that is what the constitutional powers of our courts are.

Malema: Yes, but judges must be very careful with the usage of words, you have to be precise -

Mbha: I thought I am.

Malema: Is there a difference between a state and Government?

Mbha: I beg your pardon?

Malema: Is there a difference between a state and Government?

Mbha: Yes there is. When you talk of the state you talk of the Government, the country, the people - but when you talk of the Government you are talking of governance. So the two are different.

Malema: I'm not sure if I am getting the answer. I'm not sure. What is the difference between the Government and the state?

Mbha: I think I have answered that.

Malema: Chief Justice, can I please be assisted to get an answer, on the difference between the state and Government.

Mbha: Mr Malema, I have answered you. It's either agree or you don't agree with me. I will repeat for your benefit. I say to you that when you talk of the state, you talk

of the country, you talk of the country, you talk of the people in the country. That is the state. South Africa is a state. You mean people who live in it geographically, but when you talk of Government you are talking about specific organs whose duty is to run the country, to govern. I think I can't - I can't put it better than that.

Malema: Thank you the judge of the Supreme Court of Appeal.

Mogoeng: Judge Mbha, I just want to quickly run through something with you. This notion that judges speak through their judgments - if traditional leaders were to invite you to come and address them, whether it is on traditional governance, whether it is on royal etiquette, whether it is on traditional judicial system, because it would not be writing a judgment, are you permitted to go and speak to them?

Mbha: I would rather not, Chief Justice.

Mogoeng: Why not?

Mbha: One has got to choose one's audience. I do a lot of judicial training. I do a lot of work with the Law Faculty of the University of Johannesburg. And I go there for a specific purpose, but to get involved in general social issues – I think one should stay clear of those as a judge. But for instance, if at all the traditional leaders were to invite me at their gathering to speak about how courts work, how judges work, for instance, I wouldn't see anything wrong with that. But if at all the topic is going to veer into general social issues, then I think one should stay away from that.

Mogoeng: If you were invited by a group of public protectors from around the world to come and address them, it's not judgment writing, are you supposed to - is it permissible? Is it advisable to go and address that audience?

Mbha: Well I think it would depend on what the topic is – I mean the topic would guide me. If for instance I would have to come and explain the relevance of our Section 9 bodies in the constitution, I wouldn't see anything wrong with that.

Mogoeng: What is the principle behind discouraging judges from speaking in public? What is sought to be avoided?

Mbha: Well, because it's easy for a perception to arise, you know, that your mind would already be made up if that case would land on your lap.

Mogoeng: Exactly, if you were to go there and say 'all people who commit murder must be sentenced to life', that's not permissible.

Mbha: No it's not, definitely.

Mogoeng: If you were to say 'all husbands who abuse their wives – this is the appropriate sentence' - that's not permissible because the likelihood is a case like that would come before you and your mind is already made up.

Mbha: Precisely.

Mogoeng: Is it impermissible to say murder is bad and domestic violence is completely unacceptable? Is it permissible for a judge to go and address people along those lines?

Mbha: Yes

Mogoeng: Even if it's not a judgment you are writing?

Mbha: Yes. I think if you were to, for instance, address youngsters on behaviour, I really see nothing wrong with that, as long as it's not a matter which could be judicious and which could, in all likelihood, land on your lap.

Motshekga: It's a follow-up. Judge Mbha, look at us as a university community now and we have invited you to address the question of whether or not Section 25 of the constitution allows expropriation of land without compensation. Would you say please, I won't answer because this matter may arise before me in future?

Mbha: No, talking about or explaining what the constitution says, what is contained in the constitution, I see nothing wrong with that as long as I am not going to be expected to pronounce on the pros and cons of what is in the clause. Explaining what is in the constitution, teaching about the constitution – I don't see anything wrong with that.

Motshekga: The students ask questions about the pros and cons – what would you do then?

Mbha: I would stick to what the constitution says, what the clause says, Commissioner. I would steadfastly avoid getting into that debate.

Commissioner Stock: I just wanted to follow up on this notion that judges speak through their judgments. Now I want to pose a specific question to you by saying that do you think that if a judge, for example, is invited to render maybe a lecture about the life and times of one of the struggle heroes that has passed on, or, for example, the OR Tambo lecture and then you go and address that lecture and then there's a question that comes out of the lecture that you have rendered. What is going to be your response to it? Are you going to say 'No I will still have to write a judgment about this lecture' or are you going to say 'This is my response on the lecture that I have given.' I want us to be practical about it.

Mbha: Yes.

Stock: Can you please give us a clear picture as to what would be your response? Can you put yourself in those shoes? Thanks.

Mbha: Thank you. Firstly there are two things that would be very important. Firstly, who is inviting me to come and address them? That's the first thing. Secondly, what is the topic? Thirdly, of course, is that topic an issue which is likely to result in a case that could land on my lap? Those are the three main considerations. I have on numerous occasions spoken, been invited to speak about some of our heroes. I have addressed gatherings on Mangena Mokone for instance. I have spoken about Robert Sobukwe for instance, the struggle and so forth. It is not an issue that is likely to result in a case that would land on my desk. So the guiding principle here is: who is my audience and what is the topic? I hope I have answered you.

Stock: Thank you for your response Judge Mbha but lastly I want to find out from you – do you think it is the wrong thing for judges to be invited to do lectures around the life and times of struggle heroes? Do you think it is the wrong thing for judges to do that? I am posing a specific question because we have got a number of judges that get invited and that provide a response immediately. They don't wait for the opportunity to write a judgment to communicate to the audience or the ordinary public. So do you think that it's the right thing for those judges to do those things? Or do you see anything wrong in that?

Mbha: I don't see anything wrong with that. As I say, it's the topic. I mean if at all it's for instance the Bram Fischer memorial lecture, I see nothing wrong with a judge

being invited and going to talk about the life of Bram Fischer. There is no likelihood of any case arising from that. So I would see no problem with that.

Mogoeng: Isn't the problem really about what you say and how you say it?

Mbha: Yes, exactly.

Malema: Yes, just a small follow-up because they are talking about personalities. Let's talk about an issue. Can a judge speak about a land question for instance? Can you come and give us a lecture on land dispossession in this country and what are the possible solutions to that?

Mbha: I wouldn't, Commissioner Malema. Incidentally, quite incidentally, last year I was part of the bench that wrote a judgment involving land that was occupied by the 1820 settlers. That matter came before the SCA and I think it's on its way to the Constitutional Court. Once again, anything that is likely to result in a case – I think one should stay away from that.

Commissioner Msomi: [Inaudible section]...was the commentary from a constitutional expert, Professor Pierre De Vos, who says that when the Constitutional Court handed down judgment in the case of *Laubscher NO v Duplan & Another*, you guys, I'm sorry to say you guys, the judges, used (inverted) commas when you were referring to marriage or civil unions. And his view is that by so doing you are almost saying that these unions are not fully-fledged marriages and therefore you lost an opportunity basically to put these marriages on a par with any other marriage. Obviously the impression that is being created here is that you lost an opportunity to portray an image of a progressive bench that is going to see these marriages for what they really are - marriages. What is your comment?

Mbha: My starting point is this. When you sit in judgment the first thing as a judge you have got to determine is: what is the issue before you? What is the mandate that has been given to you by the litigants? Now in *Laubscher*, the judgment of which I of course wrote, the issue was whether same-sex partners who are in a permanent relationship and who are owing reciprocal rights of support to one another, can inherit intestate from one another. That was the issue before the court – that was the issue that I had to decide. Now the outcome was that such spouses can inherit intestate. The issue, in my view, had nothing to do with the definition of marriage

before or after the amendment. The Civil Union Act (CUA) deals specifically with civil unions –that is people who have opted to marry. Now the case before us was not concerned with that. In fact the whole debate with my colleagues was whether we should go that route and also deal with the marriage, as defined – precisely the point you are raising. And my take was that, there is a case called *Volks*, which dealt with the issue – and my take was that the two issues are different. We are not dealing with the issue of marriage, how it is defined, who it involved and that. So from that point of view, I think De Vos’ criticism was unjustified.

Msomi: Thanks for clarifying that. Because he also refers to that particular judgment and he says that it was written in a sexist manner and that the judge, the court had an opportunity to correct perceptions perhaps about its sexist approach to these kind of matters.

Mbha: Quite right. You see *Volks* concerned the question of the right of surviving partners to claim maintenance after the death of a partner – of a spouse. Now in the *Laubscher* judgment I actually draw a distinction – I spent two pages explaining that the two cases were distinguishable and there was no need for us to go and talk about *Volks* and I actually said the court will be presented with an opportunity to deal with that. I might share this with you, in the course of writing that judgment I actually asked my researchers to (inaudible) the whole country and try and find out if there was a case which was ongoing and as fate would have it, in the Pretoria High Court in September, the court was faced with that type of situation and the judge – Acting Justice Siwendu granted - actually said in the judgment that the matter warranted the attention of the Constitutional Court. I also said that I don’t support the view that courts should veer into areas where they are not called on to decide, and that is why I felt we should confine ourselves to the issue that was before us.

Msomi: Given that comment then Judge Mbha, would it be fair to characterise you as someone who exercises judicial restraint vis a vis judicial activism? You are not a guy who is going to descend into the arena and basically expand and give, as I say, reasons so as to be labelled a judicial activist -

Mbha: No, I am a judicial activist. Starting with the case of what is called *Gory v Kolver NO* judgment, where the Constitutional Court read in a particular angle, a particular right into existing legislation, and in the *Laubscher* judgment I actually

emphasised that principle. Within of course certain defined parameters, there is, you know, leeway to be active but of course it must be within a certain confined space.

Msomi: Finally Judge Mbha, there is one vacancy in the Constitutional Court. There are five applicants. Let us assume if you were to give counsel, candidates being of equal stature, equal experience, of the same capabilities, but one was a woman and one was a man, what advice would you give to this commission as to the name to put forward, given the present composition of the Constitutional Court? Thank you.

Mbha: Well, gender, the promotion of gender on the bench, it is a constitutional imperative. I am for the promotion of gender equality on the bench and if at all there was or there is rather a female candidate with equal or better qualifications or capability than me, I would have no problem with that candidate being elevated. I may also mention that in my whole career I have actively actually promoted upliftment of women. When I was at the Johannesburg High Court I chaired the Committee for Continuing Education and the special focus was on female acting judges and I am proud that actually two of the people I mentored have recently been appointed. There's Lebo Madiba, there's Tina Siwendu, they are both my protégés and I am proud, and the reports I'm getting is that they are doing a good job. Yes, gender is important.

Mogoeng: Thank you very much Justice Mbha, you are excused.

Mbha: Thank you.