



JUDGES MATTER

Judicial Service Commission interviews

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Western Cape Division of the High Court

Interview of Prof S Lötter

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2017 JSC Interviews of Prof. S. Lötter

CJ M. Mogoeng: Good afternoon Prof. S. Lötter.

Prof. S. Lötter: Good afternoon, Chief Justice.

CJ M. Mogoeng: I am greeting you on behalf of all of them. Don't think we are being unfriendly if they don't greet you; it is just in the interest of time.

Prof. S. Lötter: Okay I understand. Good afternoon, Commissioners.

CJ M. Mogoeng: For how many years were you a lecturer, including senior lecturer, before you became professor?

Prof. S. Lötter: I was for five years. I was appointed as a senior lecturer and then I was promoted to professor, to associated professor and then to full professor after five years.

CJ M. Mogoeng: How long did I take to migrate from associate professor to a full chair?

Prof. S. Lötter: I think it was two years.

CJ M. Mogoeng: Two years.

Prof. S. Lötter: Yeah, two years. I have been a full professor now for 20 years, so.

CJ M. Mogoeng: And in the course of being professor were you also appearing in court?

Prof. S. Lötter: No, I didn't appear in court.

CJ M. Mogoeng: Any how many times, well let me put it this way, in total, in how many months does your or do your acting stints amount?

Prof. S. Lötter: Acting stints? As a judge? I have never been appointed as a judge or an acting judge. My experience of tribunals is the BCCSA. I have been a member of the BCCSA for very long and I have I am the Deputy Chair of the BCCSA, but I have never acted as a judge.

CJ M. Mogoeng: What for, just to remind us, what is BCCSA?

Prof. S. Lötter: It's the Broadcasting Complaints Commission of South Africa.

CJ M. Mogoeng: Yes, what do you do there?

Prof. S. Lötter: At present I am a deputy chair at the Broadcasting Complaints Commission. I was, for about 10 years I was a Commissioner and also a Deputy

Chair of the BCCSA and then because of my workload at UNISA I had to resign. But then I was since the beginning of this year I was appointed again as Commissioner and I was elected as Deputy Chair.

CJ M. Mogoeng: And how does it, is it a quasi-judicial responsibility that you have there?

Prof. S. Lötter: Yes. We have panels and if people, you know they often advertise on television and radio and if people have complaints then they lodge a complaint and it is decided whether the complaint will be heard and then we have a hearing. We have SC's appearing before us sometimes because the broadcasters appoint law, legal people to represent them because it is a lot riding on it sometimes.

CJ M. Mogoeng: But for no fault of your own you have never been afforded the opportunity to write judgement either as Acting Magistrate or Acting Judge?

Prof. S. Lötter: No, I only wrote judgements for the BCCSA because it is also reported on a website, our judgements.

CJ M. Mogoeng: Yes. Do you think it will be a challenge for you to produce a High Court Judgement?

Prof. S. Lötter: I don't think so because in view of my background I have published a few articles and I know we have more time when we write an article. But also the judgements at the BCCSA it's quite technical as you know, it's a technical field and then no, I won't have a problem in writing judgements because as I said that's what we do, I publish and I write judgements as well and I know there is a time factor as well that you have to comply with.

CJ M. Mogoeng: Yes

Prof. S. Lötter: Which you have to manage very well if you want not to fall behind because once you are behind it is very difficult to catch up.

CJ M. Mogoeng: Yes. Thank you so much, JP?

JP J. Hlophe: Thank you, Chief Justice. Professor, the articles that you were talking about, were they confined to the field of criminal law or did you publish widely and if so, which other areas of the law apart from criminal law?

Prof. S. Lötter: If I could answer you like this, my mentor Professor Kallie Snyman once said to me “When are you going to write about criminal law?” Because I do write about criminal law, but I wrote about decriminalisation of criminal law and lately I have written about media law and the broadcaster, the National Broadcaster Editorial Independence. And then of course criminal law touches on various fields so I have written about what, prostitution, decriminalisation of gambling, stuff like that so I suppose in a sense it’s criminal law but it is also more multi-interdisciplinary.

JP J. Hlophe: Right, I am not understanding decriminalisation of criminal law, perhaps explain.

Prof. S. Lötter: No, no, no, of crimes, ja. Ja my view is that we are too soon to use criminal law to address a problem. Often we feel that if there is a law against it or if it is a crime then we have addressed the problem and it’s not. Seldom is a challenge whether these news crimes are being effected if someone can’t police it. I mean we – as it is my view is that criminal law should stick to what it’s supposed to do and that is to protect people, your property, people and people who need protection. But we tend to involve criminal law in instances where it does not have any role to play and that’s what I’m about.

JP J. Hlophe: So have you published, excuse me, I am not being rude. Have you published on Labour Law, Constitutional Law, Administrative Law, Human Rights?

Prof. S. Lötter: Well the last article that I wrote was about editorial independence and that was about freedom of speech and how that interlinks with the editorial independence of the National Broadcaster and how the balance between the public accountability and then how, the editorial independence because freedom of speech is so important, to me. It is one of the most important foundations of our, I know it’s not the most important, there is no differentiation between the Bill of Rights, the

different freedoms. But this is extremely important to me and then I have also written my, I am still working on the article but I wrote an article on the Subjudice Rule where I looked into the rule of law and where that judgement by Judge Nugent in Medicola Vision where he came to the conclusion that the administration of justice forms part of the rule of law, ja the rule of law, Section 35. So in that sense I have had exposure to the constitutional law.

JP J. Hlophe: Right. Normally Judges President, and myself included and I know Judge President Mlambo does that, would approach people with a potential and invite them to come and act in their respective divisions. Have you ever been approached by any Judge President in this country to act?

Prof S Lotter: No

JP J. Hlophe: What makes you want to become a permanent judge in Cape Town where you have never even acted before?

Prof. S. Lötter: Okay, why I want to do it is the following:- I have been a Lecturer at UNISA for 25 years where I have used my academic advantages to empower people and serve society by having the students, putting the students out in there in the law. I have many students that really made it in the legal profession and I see it now as the natural progression to serve society in a different way in using the knowledge and my expertise, academic as it may be, to the advantage of society.

JP J. Hlophe: Well, you haven't answered my question for the record, but I will move on. Did you apply to act in any other division other than Cape Town?

Prof. S. Lötter: Yes, I did, I applied in Gauteng.

JP J. Hlophe: You applied?

Prof. S. Lötter: Yes, I did.

JP J. Hlophe: I see. Given that you have never acted before and you are applying for a permanent position in a division which you don't even know where the

component of criminal law I can tell you is about 35%, the rest is Civil Law that your knowledge of which is rather limited. Do you think you would be able to cope if you were given the opportunity?

Prof. S. Lötter: Yes, I will because I like a challenge and I feel that I should be able to make myself comfortable in this stuff. I think what is needed is a good concept of the law, what the law is all about. Civil Litigation I agree, I was a Prosecutor but I wasn't a civil, I didn't do Civil Litigation. [Cross talk]. I think you can make yourself knowledgeable about that.

JP J. Hlophe: How do you prosecute in civil matters?

Prof. S. Lötter: I didn't prosecute in civil, I said I was a Prosecutor and I ---

JP J. Hlophe: Yeah, that's criminal law, ma'am, sorry.

Prof. S. Lötter: Ja I know, I am aware of that, thank you.

JP J. Hlophe: You see why I am asking this question, it is this. Were this Commission to recommend you for a permanent appointment, there is no probation. And in case you do not rise to occasion given your, with respect, your very limited exposure other than criminal law, the system will be stuck with you, Professor.

Prof. S. Lötter: It could be a positive thing because I think I could really make a contribution.

JP J. Hlophe: Don't you think the wise thing would be rather to try and secure an acting position elsewhere and if you prove your worth, you can come back and apply for a permanent appointment?

Prof. S. Lötter: That's good advice.

JP J. Hlophe: Given your very limited, there is no court experience that you have. You have not published widely at all. You have only looked at criminal law in different

ways. You have never sat as a Judicial Officer, you want to be permanent? Chief Justice, I have no other comments.

CJ M. Mogoeng: Thank you, thank you so much. Minister, you say you want to follow up? Let me apologise to you Ms Stewart, you are the one to follow-up. Yes Minister?

JM Masutha: Sorry, I just want to follow-up on the decriminalisation of criminal law concept. I accept that over the years many social practices -

CJ M. Mogoeng: Preamble [inaudible 10:38], please.

[Cross talk]

JM M. Masutha: It's going to be difficult, let me abandon it. Thank you.

CJ M. Mogoeng: Thank you Minister. Ms Stewart?

Ms F Stewart: I have a question. It relates to one of your articles that you wrote in 2000 and, sorry in 1997 and it relates to the decriminalisation which the minister has unsuccessfully prosecuted. You wrote an article saying the degradation clause in the Film and Publication Act offers no justification for restricting the freedom of speech nor the intervention of criminal law and you criticised the government for bringing out an Act which makes sexual degradation a criminal offence.

Prof. S. Lötter: Yes, I did.

Ms F Stewart: In the current climate in South Africa with the problems we are experiencing, especially in the Western Cape relating to sexual violence, what would be your solution to sexual degradation and how often it happens at the moment?

Prof. S. Lötter: I made a distinction between sexual violence and sexual degradation. Sexual degradation is commonly known as soft porn in a sense. Well, actually nobody knows what pornography really is, you know the old definition of "I know it when I see it." So my view was, I wrote it from my view that sometimes

speech is restricted, a writer is restricted for supposedly very good reasons and that was not the real reason for doing this. And then I wrote this in relation to the criminal law and I said that sexual degradation as you know, for a crime to be a crime it should be well-defined and sexual degradation was such a vague, there was no real definition of sexual degradation. And it is also in the mind - in the eye of the beholder and that is why I said it shouldn't be within the limits of the criminal law. That was what my point was.

Ms F Stewart: Sorry, just one follow-up. Have you ever approached any of the Judge Presidents to see whether there was a possibility of an acting appointment?

Prof. S. Lötter: Well I once spoke to Judge Mhlambo, but I only met him and he doesn't really know of me and I asked him and I sent an email, but that was it.

Ms F Stewart: Thank you Chief Justice.

CJ M. Mogoeng: Thank you so much Ms Stewart. Commissioner Mpofu?

COMM D. Mpofu: Thank you Chief Justice. Ok, let's say we appoint you, the President signs, now in two weeks' time you are in the Cape High Court. What is the difference between judicial review in terms of PAJA and on the rationality test?

Prof. S. Lötter: You know that I can't answer that.

COMM D. Mpofu: Pardon?

Prof. S. Lötter: I will not be able to answer that now.

CJ M. Mogoeng: Thank you, Ms Stewart, if you could switch off the mic, please. Thank you.

COMM Mpofu: And then, okay the following week then you are in the Urgent Court. In the Urgent Court, what are the possible orders that you can grant in the Urgent Court?

Prof. S. Lötter: You can grant an interdict, or I know that an interdict can - that's it.

COMM Mpofo: And in the Motion Court, how would you apply the Plascon-Evans rule?

Prof. S. Lötter: I think you have made your point, Mr Mpofo.

COMM Mpofo: Thank you. Thank you Chief Justice.

CJ M. Mogoeng: Professor. Motshekga?

Prof. Motshekga: Have you come across the principle of legality and the influence of the German Rechtsstaat Principle in Criminal Law?

Prof. S. Lötter: That is the German theory of criminal law, is that what you are referring to?

Prof. Motshekga: Have you come across that?

Prof. S. Lötter: I don't know, I don't think so.

Prof. Motshekga: So would you agree that even your knowledge of criminal law is not wide enough to make you qualified for what position you have applied for?

CJ M. Mogoeng: Colleagues, where I work there is something we call the efficient management of the scarce judicial resources and time is one of them. I thought we have to manage properly the scarce JSC resources. I have three Commissioners here. Commissioner Schmidt, you are top of that list.

COMM. H. Schmidt: Thank you Chief Justice. Could you from the position where you sit, clearly lacking the practical experience, indicate how would, from your position, there would be ways of bridging that practical, that problem of not having

practical experience. What would like to see happening in order to obtain practical experience?

Prof. S. Lötter: I would follow the advice that was given to me at the beginning of this interview and I would approach the JP in Gauteng and enquire if it is possible for me to act as a judge.

COMM. H. Schmidt: Or I would venture to say sitting as an assessor at criminal trials?

Prof. S. Lötter: Ja I have done that when I started at UNISA, I sat as an assessor but that could also be an opportunity or something to do. Yes. Thank you.

COMM. H. Schmidt: Possibly maybe considering the Bar Exam and Side-Bar Exam for the purposes of practical rules, civil practice rules, directives?

Prof. S. Lötter: I don't know if I have to go the Bar to do that but I can familiarise myself with the rules, that is very, that's how one does it.

CJ M. Mogoeng: JP Pumela, Professor Ntlama, are you sure you want to go on?

COMM Pumela: Yes, CJ, just one question, please.

CJ M. Mogoeng: Oh

COMM Pumela: Ma'am, would you be willing to set aside some time to attend an Aspirant Judge's Course offered by SAJEI?

Prof. S. Lötter: Yes, I would love to do that.

COMM Pumela: Thank you, CJ.

Male: CJ just hang on -

CJ M. Mogoeng: It's Professor Ntlama and then you will follow. Prof are you still proceeding?

COMM. N Ntlama: I have withdrawn.

CJ M. Mogoeng: Thank you Prof. Commissioner Malema [Cross talk].

COMM J. Malema: No. No. I just wanted to ask CJ that after saying to Commissioner COMM Mpofu that he has made his point?

CJ M. Mogoeng: Yes.

COMM J. Malema: Do you think it would be advisable for this Commission to continue to appoint you to the bench?

Prof. S. Lötter: Well, the Commissioner made his point in as far as my lack of knowledge of civil litigation is but I was hoping that I was short-listed for some other qualities that I have, so.

CJ M. Mogoeng: Prof, thank you very much for allowing us to interview you. You are excused.

Prof. S. Lötter: Thank you.