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MATTER

Judicial Service Commission interviews

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Supreme Court of Appeal

Interview of Judge M B Molemela

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Judge B. Molemela: Good morning Chief Justice and Commissioners.

CJ M. Mogoeng: Are you well?

Judge B. Molemela: I am well CJ and, how are you?

CJ M. Mogoeng: I am very well thanks. Are you relaxed?

Judge B. Molemela: Not yet.

CJ M. Mogoeng: All right.

Judge B. Molemela: I have many butterflies in my tummy.

CJ M. Mogoeng: Okay. Let's try and address that. When you became an attorney where there already many attorneys in the Free State in South Africa who were women, and black women in particular?

Judge B. Molemela: No, Chief Justice. In the Free State, there was just one black female attorney that I knew. Mamoloki Kubushi who is now a Judge at the Gauteng High Court. She was the first black female attorney and I became the second. At the time they use to call me a rose amongst the thorns. Because at my firm I was the only female.

CJ M. Mogoeng: And you clubbed together at some point to form a firm?

Judge B. Molemela: Yes CJ.

CJ M. Mogoeng: Now, what about work. Was good quality work coming your way? Where you the lucky ones or did you experience the prejudice that many women and black practitioners have experienced over the years in relation to the distribution of quality work.

Judge B. Molemela: Yes, indeed CJ, I experienced that. Work was allocated to me, but I soon noticed that it was just, you know, from one stream. Family Law matters, collection matters and so forth.

CJ M. Mogoeng: I noticed that you have been nominated by a body of women Judges. Does that suggest that there is still contact, you still maintain contact with them?

Judge B. Molemela: I am in fact a member of that organisation CJ.

CJ M. Mogoeng: In your interaction with them, and practitioners including those who appear before you, or appear before you as a Judge, Judge President even at the Supreme Court of Appeal Acting, do you get a sense that there has been meaningful change in relation to instruction giving and briefing patterns?

Judge B. Molemela: There has been an improvement CJ, but we are not where we should be yet.

CJ M. Mogoeng: If you were to evaluate it in terms of percentages, considering that say 50% – I am putting it at the bare minimum – of the lion's share between the previously advantage and the previously disadvantaged ought to give us some comfort that progress is being made. At what percentage does the change lie?

Judge B. Molemela: I am not sure, I am following your question CJ. Could you please rephrase?

CJ M. Mogoeng: You see, I am saying we are moving from - at your time it was more or less at the level of zero.

Judge B. Molemela: Yes.

CJ M. Mogoeng: Zero percentage in terms of receiving quality work that your white competitors were receiving.

Judge B. Molemela: Yes.

CJ M. Mogoeng: Now that there has been an improvement would you say we are at 10%; 20%; 30%; 40%; 50%? At what level are we in terms of improvement?

Judge B. Molemela: I would estimate it may be at 20%, Chief Justice. And I am saying this because recently I was requested to go and give a speech on the challenges that young practitioners face and I did not want to be anecdotal, you know, and just go and give my own experiences which I experienced a long time ago. So I contacted a few of them to find out what the position is. And the overwhelming majority of them say that they are still not getting anywhere near what they should be getting. So I would place is at 20%.

CJ M. Mogoeng: Now with the Constitution we have and the commitment we all declare to its fundamentals why is it that not all South Africans seem to be acting in

keeping with the promises we all openly profess and embrace that are in the Constitution? Why is it? Why is it difficult to appreciate that we made a commitment to free the potential of each person but when we give instructions, when we brief, nothing much seems to reflect the commitment we have made to that end? Why is it?

Judge B. Molemela: I think it is because a lot of things have become paper tigers in the sense that CJ verbally you are told that this is going to happen. We are going to make sure that we have an even distribution to avoid the historically skewed distribution of work and so forth and so forth. And most of the time it is not monitored, and it ends there. I remember that in 2011 already the Department of Justice had given a firm undertaking to give support to previously disadvantaged Attorneys and Advocates and females in general. But I mean that was in 2012 and in 2017 there was an outcry to such an extent that there was a march by some legal practitioners to the Union Building to register their complaint. I was present at a forum where a protocol was signed, where various organisations were committing themselves to see to it that there is a redress. So I would attribute that to the lack of monitoring of whether that in fact happens or not.

CJ M. Mogoeng: I have just had a chat with the Minister before you stepped in. And he was telling me that the statistics from the State Attorney shows, and he intends to share them with us. With this body; they show that 80% of the work that the State Attorney distributes with fees reflected, go to women and black people. But you acted at the Constitutional Court, how much of State Attorney work, how much of the work that comes from State Owned Enterprises did you see distributed to black attorneys and to black advocates and women? How much of it? I mean forget about what you actually experienced while you were there, what was your experience?

Judge B. Molemela: Very few black practitioners appearing there, and especially very few female practitioners.

CJ M. Mogoeng: At times you would find that it is several State Departments involved, parastatals and Attorneys and whites, seniors and juniors however many would all be white.

Judge B. Molemela: Indeed CJ. And that was in 2105 but I was at the Supreme Court of Appeal from December last year to the end of September this year, and that was the case also at the Supreme Court of Appeal. So it certainly does not translate to seeing black faces or females at the Court with the frequency that is desired.

CJ M. Mogoeng: So there seems to be some stagnating or retrogressive mind set that seems to have captured everybody who ought to be at the forefront of the transformational agenda that we are all talking about.

Judge B. Molemela: Indeed CJ.

CJ M. Mogoeng: Why is that so? If you were to – what is the problem? Why does the action not match the talk? Even from those who were previously disadvantaged but now occupy positions of authority in Government: Nationally, Provincially, Local government, SOE's why is it? Because I heard that some Ministers actually say: "No, no, no I want a white lawyer". Why is it? Do you know? Or are you as blank as I am?

Judge B. Molemela: I do not know, CJ. All I can say is that it is really a pity that that is the situation. But I am still hopeful that it is a situation that will be redressed but certainly, there needs to be more monitoring of the situation.

CJ M. Mogoeng: And to monitor it you need to be committed to the cause, isn't it?

Judge B. Molemela: Indeed CJ.

CJ M. Mogoeng: And the idea has never been, never give any work to white compatriots its let's share.

Judge B. Molemela: Let's share.

CJ M. Mogoeng: Let everybody get a sense that South Africa belongs to them.

Judge B. Molemela: That is so, CJ.

CJ M. Mogoeng: Anyway, you have been a judge for how long?

Judge B. Molemela: Since –

CJ M. Mogoeng: High Court Judge?

Judge B. Molemela: -- Since 2008, CJ.

CJ M. Mogoeng: And when did you become Judge President?

Judge B. Molemela: I was recommended at the 2014 interviews and become Judge President with effect from the 1st of January 2015.

CJ M. Mogoeng: So you want to abandon us at the Heads of Courts meetings? And then we have few women who are leaders in the judiciary. Is that fair to the judiciary?

Judge B. Molemela: CJ, when I –

CJ M. Mogoeng: Or are you making spare room for other women?

Judge B. Molemela: -- Definitely CJ, I have actually made room for other women. There are two women from my Division who have already acted in the position.

CJ M. Mogoeng: So you have a clear succession plan in the event of being appointed?

Judge B. Molemela: I started making a succession plan immediately upon my appointment, CJ. Because I have always believed that any leader should have a succession plan. We never know what is going to happen. I mean I could have died the very next day after my appointment –

CJ M. Mogoeng: Yes.

Judge B. Molemela: -- So I have done that CJ.

CJ M. Mogoeng: Now, how did you experience arrival and acting at the SCA as an Acting Judge? Arrival, operating there? What was the environment like? Was it welcoming? Was it indifferent? Was it somewhat cold? What was it? According to your own experience?

Judge B. Molemela: CJ there were, it was a mixed bag. There were colleagues who were going out of their way to make us feel welcome and unfortunately there were colleagues who were cold and unfriendly. I remember that –

CJ M. Mogoeng: Cold and unfriendly?

Judge B. Molemela: -- Unfriendly I remember that at some stage it was during the recess I went to chambers and there was a colleague there I knew him, so I went to him and introduced myself. And well, he was cordial and at the beginning of the term I was walking around the passages and saw him approaching and I greeted him, and he did not greet -

CJ M. Mogoeng: Maybe he didn't hear you?

Judge B. Molemela: -- I thought so CJ. I thought so and he just walked passed me and I said to myself, okay next time I will make sure that I am loud enough.

CJ M. Mogoeng: Yes.

Judge B. Molemela: And next time I greeted him, and he did not respond, and I said to him, maybe you do not remember me. I introduced myself the other day, I am so and so. And he said yes, I know you and walked on. So -

CJ M. Mogoeng: A judge?

Judge B. Molemela: Yes, a judge.

CJ M. Mogoeng: Now tell us more about this negative experience. Obviously, you cannot name and shame but -

Judge B. Molemela: Yes.

CJ M. Mogoeng: -- We need to know more about this state in which the South African judiciary is so that even as we interview people we are mindful even as we recommend people for appointment we are mindful of the kind of judiciary that we are building. If, for instance, if Judge treats another that way the question is what about the public? I had a very nasty experience with some of my colleagues in KZN, I said wow if they can treat me like this what about members of the public? So tell us more about the negativity?

Judge B. Molemela: Well relating to that same incident CJ, it really bothered me, so I went to another colleague who had recently been appointed in the same Court and said this is what happened to me. And she said to me, do not worry he does that to me as well. And I am now talking about a colleague that has already been permanently appointed there. And it does have an impact on you, CJ. I mean, I come from a very collegial Court. I have acted at the Constitutional Court it was a very, very collegial environment. I have acted at the Labour Appeal Court. You actually look forward to going to the tea room and all the other Courts. So for me, it was really a shock to find an environment where a colleague can hardly even afford to say hello when you say hello. But as I said, CJ those ones are in the minority actually. Most of them are very welcoming.

CJ M. Mogoeng: Yes.

Judge B. Molemela: President Maya?

PRES M. Maya: Thank you, Chief Justice. Morning JP.

Judge B. Molemela: Morning President.

PRES M. Maya: Are you well?

Judge B. Molemela: I am well, thank you.

PRES M. Maya: Apart from the unfriendly and rude colleagues were you able to fulfil your judicial functions in Court? Participate fully? Go to conference do the same? And produce judgements were you expected to write?

Judge B. Molemela: Yes, indeed –

PRES M. Maya: Did anyone hinder you in the conduct of that duty? Sorry execution of that duty?

Judge B. Molemela: I did manage to participate fully in Court and even in conferences. But I think I must mention this that it so happened that I asked a question. I posed a question to counsel and while I was waiting for counsel to answer me the answer came from the Presiding Judge. And to me, it suggested that I had asked a stupid question. Because of that, on the same Bench, there was another colleague who was also acting. So when she asked questions I actually made it a point of looking at him to see his reaction. And it was – he did not give a good impression. So those are some of the things that happened there, but I told myself that I will not allow them to derail me. So despite the fact that he had answered my question I repeated the question and said to counsel I am interested in getting your response to it. So I did manage to participate in Court, in conference. I did manage to produce my judgements timeously. In one matter where I wrote a judgement, my first draft was well received. Both colleagues said that it was well crafted.

PRES M. Maya: Now as a Head of Court in your own right, what advice would you give me in my effort to improve things in that Court? What could I have done to make your stay easier?

Judge B. Molemela: Well President to be quite honest you did your best that you could have done under the circumstances. You went to the chambers of the Acting Judges to put us at ease. You enquired whether we were comfortable. We shared

some of our problems with you. I remember at one stage I went to you and I said to you, here is a colleague that is communicating with me via his secretary. We have already had a meeting and at that meeting, it was agreed that if you are aggrieved by the conduct of any colleague you should confront him or her. So I went to you and said to you, now that we have agreed that if there is a situation like that you can confront the colleague in question can I do so? Because I wanted to make sure that I am not stepping on anybody's toes. And you said, well that was the agreement. That was the resolution of a meeting, so go ahead. And I went.

PRES M. Maya: The difficult thing is changing people's attitudes. How do we stop them from behaving badly towards colleagues and practitioners who appear in that Court? And litigants behind those practitioners? What do we do?

Judge B. Molemela: The solution as I see it, I thought about it long and hard, while I was there, and I said to myself you know you cannot change people's personalities. Let's face it, we differ. Some people are affable other are not so friendly. But I thought to myself that perhaps fostering collegiality by actually encouraging colleagues to have social interactions could help. I am not saying that it will. It could help. At our Division on every Wednesday we agreed every Wednesday we meet in the tea room for lunch. You bring your own lunchbox and we just sit together and chat. Not everybody attends because sometimes you have things that you have to attend to during your lunch break. But the vast majority of the colleagues are attending. And actually, you look forward to a session like that. And I am thinking, fortunately in our Division they all participate, but I am thinking if you could have something like that the unfriendly colleagues could perhaps feel out of place when they see that they are left out. And maybe they could on their own start joining in. That is what I am hoping for. I think that it might sound maybe like you are going – it is a losing battle but maybe you should try it out? To say, even if it is not once a month maybe just - so even if it is not weekly just once a month have a session like that. We even have the end of the year functions that are completely informal where we invite our spouses and partners. And I remember on one occasion it was actually a sleepover function at a guest farm some 200 km from Bloemfontein. And I remember when I was telling a colleague from the Western Cape about it she was very, very surprised and said that all we do is to have a formal lunch as the end of

the year function and that is it. But we really get along and I think that you could try that.

PRES M. Maya: Thank you, Chief Justice.

CJ M. Mogoeng: Thank you, President. You know JP -

PRES M. Maya: Oh sorry just another question, Chief Justice. One more question JP. Sorry. There is an advocate Maluleke who has objected to your candidacy.

CJ M. Mogoeng: From Limpopo.

PRES M. Maya: Can you just explain to us what that complaint is all about?

Judge B. Molemela: Yes. President, I am a member of the Judicial Conduct Committee. And the Judicial Conduct Committee is chaired by the Deputy Chief Justice. And when complaints are received they are channelled to the Deputy Chief Justice and he then decides on two members that will attend to a particular complaint as a first committee, to see whether there is any merit in the complaint. It so happened that I dealt with the complaint of Advocate Maluleke together with Cohen J. It was channelled to us by the DCJ to see whether there was merit in the complaint and we both assessed it, assessed the merits and demerits and decided that it was a frivolous complaint. We then dismissed it. I happened to be the scribe because we take all complaints seriously and so when you make a decision it is a decision in writing. So I was the scribe. I wrote the decision and he agreed with me. And I must maybe mention that therein as far as the complaint process is concerned the right of appeal is automatic. So even where a complaint has been dismissed it is never the end of a matter. It is never prejudiced to a party because there is an automatic right of appeal to three judges of that committee. That is what happened there, President.

PRES M. Maya: Is there any procedure that you failed to observe in adjudicating the complaint?

Judge B. Molemela: He states that we did not, I did not observe the Audi Alteram Partem Rule. But you see he filed an affidavit with annexures. We read the affidavit, we considered his affidavit and so we considered his complaint. And with respect, I do not think there is any basis for saying the Audi Alteram Partem Rule was not observed. His version was taken into account.

PRES M. Maya: Thank you, Chief Justice.

CJ M. Mogoeng: Thank you, President. You know JP what you are raising worries me a lot. I react very sharply to any form unfairness or injustice when it comes from a Judge and I will tell you why. If you can manifest unfairness to a colleague, disrespect to a colleague as a Judge, what about members of the public? When they litigate before you and you have this mind set, you have this ingrained capacity for injustice and unfairness the desire to deal with some people or show them that they do not belong, what kind of judgement are you going to produce? Are you not going to decide and then look for reasons for dealing with this person that you dislike? That is the problem about colleagues that you are alluding to. And maybe we should find a way to know them. What kind of justice do we get from there? That is my worry.

Judge B. Molemela: CJ if I may respond to that. Collegiality is very, very important and it is emphasised. You have a look at the Bungalow Principles of Judicial Conduct collegiality is emphasised. Our own Judicial Code of Conduct it is emphasised. And it says that we must foster collegiality. Collegiality is very important, especially in an Appellant Court CJ. Because we have different views. We have divergent views we should be able to have an open discussion an engagement. Where I am free to say whatever it is. To express my view without the worry that you are going to judge me and say this is a stupid view. I really – there are a number of articles that have been written by even retired Judges of Appellant Courts that emphasise the importance of collegiality. And CJ if I may make this example because at the High Court we have appeals where it is two judges sitting. If there is no collegiality between those two judges, then there is not going to be any engagement. I will come with a stance, my colleague will come with a stance and there will not be any fruitful debate and we will then say okay well, we cannot agree. What does it mean to the litigants? To the litigants, it means they must come back

again because then the matter must be enrolled again now before three Judges so that it can be argued. We all know that litigation is very, very expensive. So I mean that is expense that is time-consuming.

CJ M. Mogoeng: Thank you JP. Minister?

MIN M. Masutha: Thank you, Chief Justice. Please allow me, Chief Justice, to just put one or two points and perspective to illustrate the point around the issue of transformation. Firstly, I want to confirm that it is true that according to the audited statistics held by the State Attorney that are published on the website of the Department, which are open for anybody to look at of the work that goes through the State Attorney's Office in particular 80% of that goes to historically disadvantage categories. Qualifying that on the basis that not all work of the State goes through the State Attorney. So your parastatals, some provinces, certainly you big metros and many municipalities do not litigate through the State Attorney and that is something we are working on because even the State Attorney has its own inefficiencies that need to be addressed as well. So it is an all-around issue. But given and accepting the challenges of the State in this regard is it not so that there is still a resistance within the profession itself, both the Bar and the Side-Bar in ensuring the inclusion of black people, women, black women in particular, from participation, meaningful participation in the work of big law firms in the work of counsel who should tag along those that are not experienced to acquire the necessary experience?

Judge B. Molemela: Thanks, Minister. I do not have any personal experience of that, the resistance, in other words. Because I am not on the ground in as far as that is concerned so I can only go by what I am informed about and what I read about. And what I have been informed about and what I have read is that there is, in fact, such a resistance.

MIN M. Masutha: Do you believe that State intervention through legislation is the way to go? To compel counsel, to compel law firms to ensure that there is full inclusivity or is it a matter that you believe is best dealt through self-regulation within the professions themselves?

Judge B. Molemela: Well Minister as a last resort perhaps that is something that needs to be done. Because measures have been put in place, and they do not seem to be working. Or they are yielding very, very few results.

MIN M. Masutha: Thank you, Chief Justice.

CJ M. Mogoeng: Thank you, Minister. Commissioner Nkosi-Thomas?

COMM Nkosi-Thomas: Thanks.

CJ M. Mogoeng: Please proceed Commissioner.

COMM Nkosi-Thomas: Thank you. Thank you, Chief Justice. Good morning Madam JP.

Judge B. Molemela: Good morning Commissioner.

COMM Nkosi-Thomas: My question goes to Institutionalised chauvinism and sometimes racism. And I pick up from the answer that you provided to the Chief Justice about the visibility or lack thereof of African counsel and female counsel, in particular, in the Superior Courts SCA and the Constitutional Court. And my question is; could it be that the category of Judges that are categorised as rude and intemperate are also contributory to this lack of this ability because if one were to appear and be treated in a rude fashion in an intemperate fashion would-be clients would be loath to approach that counsel going forward. Now shouldn't we talk to the judiciary as well and say judiciary please work with us and not put the blame solely at the door of Government etcetera, etcetera?

Judge B. Molemela: Thank you. I take your point, but I am wondering whether there is much that the judiciary can do. Much more that the judiciary can do other than to lament, as we have been doing all these years. You must remember that the judiciary is responsive. Complaints are brought to us in Court and we deal with them.

I am just wondering to myself whether there is any role that the judiciary itself can play in this regard?

CJ M. Mogoeng: No, her question is, is there – let me put it bluntly: Does the rudeness of some of us not discourage transformation agents from developing? From appearing before us as regularly as they should? -

Judge B. Molemela: Okay.

CJ M. Mogoeng: -- Therefor undermining the very transformation agenda that we saying we are embarking upon?

Judge B. Molemela: Definitely. It does CJ and it needs to be attended to. I think it is one of the contributing factors CJ.

COMM Nkosi-Thomas: So how would you propose that issue should be dealt with in order to clear the way for this transformation project?

Judge B. Molemela: Yes, I would propose that the victims of conduct lake that should not suffer in silence. They should actually report it. Because that actually is a breach of our Judicial Code of Conduct. And I think if we start dealing with it on that basis a lot of us will do some introspection and will shy away from conduct that can land us before a disciplinary body.

COMM Nkosi-Thomas: What remains for me to do, this is my last comment, Chief Justice. Is to congratulate you. Your profile is very impressive and to wish you all the best. And I trust that your acting stint in the Constitutional Court has prepared you for this position that you are aspiring towards.

Judge B. Molemela: Thank you very much, Commissioner, and yes, I agree it was a very enriching experience and it did prepare me. Thank you.

CJ M. Mogoeng: Are you saying that it is your experience that unfriendliness and arrogance do manifest itself when Judges are presiding? Because we used to be

victims of that many years back? Does it still happen in open Court? And people are not complaining? Does it happen in your Division?

Judge B. Molemela: No CJ, I have not seen it in our Division. And even at the Supreme Court of Appeal, I have not seen many instances of it. I have seen colleagues being impatient –

CJ M. Mogoeng: Yes.

Judge B. Molemela: -- With counsel, but I would not say I have really seen it happening. I know that we have been warned by the Constitutional Court in the case of ABSA versus Bernert because there were a complaint with regards to the manner in which some of the Judges –

CJ M. Mogoeng: A particular Judge.

Judge B. Molemela: -- Yes, a particular Judge of that Court had conducted himself during the argument of the Appeal.

CJ M. Mogoeng: Yes. Very well. Commissioner Msomi?

COMM S. Msomi: Thank you so much CJ. Morning JP.

Judge B. Molemela: Good morning, Commissioner.

COMM S. Msomi: JP I must also just add my congratulatory note. Your CV is quite impressive. Your profile, well done.

Judge B. Molemela: Thank you, Commissioner.

COMM S. Msomi: When you joined or assume a position you assume a position in matter of term - I could be wrong - as a leader, you set yourself targets that you want to achieve.

Judge B. Molemela: Yes.

COMM S. Msomi: I am looking at you, you joined in 2015 as the JP of the Free State. And I can imagine you would have set yourself goals.

Judge B. Molemela: Yes.

COMM S. Msomi: And the reason why you are now availing yourself for the higher position I can imagine you are saying this is what I wanted to achieve. I have achieved it, it is time to go. What was it? Why do you want to go? It looks like, to me, it is too short a period of time for you to go? Perhaps I am not sure you are needed there more to consolidate, continue with your transformational agenda which seems to be going very well before you avail yourself for a higher office

Judge B. Molemela: Yes. As I said in response to the question from the Chief Justice, I started planning from the get-go. And there are certain goals that I set for myself and this is an interview process and the CJ has often said people are allowed to blow their own trumpet. So I am going to do that and say that the statistics of our Division speak for themselves. The Division is doing very well. On a number of occasions, it was voted number one in the country. I recently had a meeting with the Provincial Heads of Court, in other words, the cluster leaders and the Regional Court President. The Division is doing very well. We also recently, this year, had a survey where practitioners had to complete a form to rate us. Those who submitted their forms, the vast majority of them are impressed with the service delivery in our Division. We received accolades all the time and I share these accolades with my colleagues so they all know about them. That when we have counsel coming from other provinces they usually commend us on the quick turnaround time in the Division; on the management of the Division; on the roll allocation and so on. You will recall that the gripe, if I may put it that way, that was raised with regards to our Division in the last interviews was the roll. So I made that my priority. And the roll is issued timeously. The Records of Appeal are issued timeously to the Judges. The case files are given to the Judges timeously. So the Division is really running like a well-oiled machine. And I had a session with the Deputy Judge President, Judge

Musi where we both set down and assessed the performance of the Division. And we are both very happy with the performance of the Division.

COMM S. Msomi: Thank you so much, I think that gives us comfort -

Judge B. Molemela: Yes.

COMM S. Msomi: -- That you have done so well.

Judge B. Molemela: Yes. May I add something. Sorry, to say if you have set goals for yourself and you achieve them, and you are happy with the product that you have. Then there is no reason why you cannot aspire to go and apply your trade elsewhere. That happened with Judge President Mlambo he was the Judge President at the Labour Appeal Court; Labour Court and he achieved a lot at that Court and in two years' time he moved. He left that Court and become the JP of Gauteng. So there is also a precedent for that. And he left, and that Court did not collapse. So I am quite sure that if I am recommended for appointment the Division will be in good hands and it will not collapse.

COMM S. Msomi: Brilliant answer if I were to score you ten out of ten. Second question and perhaps it is a question that has not been delft into by other Commissioners and that is a question around what I will call your legal brain. To any doubting-Thomas please again gloat as you have just done now. To a doubting-Thomas who says perhaps jurisprudentially you are not fit to go to the SCA please tell us about the significant judgements or judgement you have done, or you have handed down which develops our jurisprudence and it develops or Common Law. So that whoever is looking at you is not going to say she is not only a good manager, but she is a giant amongst giants when it comes to the legal fraternity. Thank you.

Judge B. Molemela: Thank you, Commissioner. Well, there are a number of judgements that I have authored. I must maybe say this, that even unanimous judgements of Courts, even the highest court sometimes get criticised. Judgements get criticised all the time and we as Judges accept it and take it in our stride. So I am quite sure that there might be views that a particular judgement had certain flaws but

certainly the vast majority of comments that I received were that they were good judgements. Without wasting time by, you know, quoting judgements by judgement I would just refer you to the judgements that have been commented upon by the Legal Bodies. One of them, of course, is the judgement of Pilane a very recent judgement that I authored at the Supreme Court of Appeal which was very, very well received. Where I was getting calls from Magistrates who were also commending me about the judgement.

CJ M. Mogoeng: Colleagues let me just caution against something, and I am sure it will be well received. Many years back when Dr van der Merwe was a member of this body he would often say; oh you are a good Judge, that is why I am going to vote for you. And as soon as I took over I said, this must stop. Because you congratulate some candidates you do not congratulate others, the perception is this one is definitely going to be voted for. In circumstances where other candidates are still coming your objectivity might unfairly be questioned. So let's keep our appreciation inside of our hearts. Illicit favourable information and then you can praise them behind closed doors. Please. That is important because we have not congratulated anybody so far. Please. Commissioner Mpofo?

COMM J. Mpofo: Thank you CJ. So I will cut out the congratulations.

CJ M. Mogoeng: And the preambles. Your preambles are increasing I noticed.

COMM J. Mpofo: Yes, thank you. No CJ what I will do, I am not sure if you were in the panel of Mabel Jansen case?

Judge B. Molemela: Yes, I was.

COMM J. Mpofo: Yes, okay. I found that very traumatic re-perceiving the complainants in that case. And the reason I am asking you that question is what you have said about collegiality and also what you have said about that people should not suffer in silence, which is correct. I am wondering whether – two questions which are related. One is doesn't this mean that this should not be a question of oh well so and so did not greet me? And you kind of take it on the chin? It is actually a breach

of the Duties of being a Judge. One of which is, as you have correctly pointed out, collegiality. So shouldn't we maybe tighten our Rules of Conduct in that regard? So that it is not just something that happens in passing, number one. Number two, of course, it would be inappropriate here to say so and so did not greet me in the passage and so on. But is there room for you to share that kind of information with somebody like the Chief Justice on a confidential basis? -

Judge B. Molemela: Yes.

COMM J. Mpofu: -- Because it is quite a direct affront, I think to what Judges should be as a CJ pointed out.

Judge B. Molemela: Yes, thank you. I will share that information confidentially with the Chief Justice. In terms of tightening the Rules of Conduct. It is there already. The complaints must be lodged where there is a need to do so.

CJ M. Mogoeng: But just interjecting I supposed once the name is out, the President and I can confront those Judges and if they persist expose them. Let the public know the kind of Judges they are.

COMM J. Mpofu: Thank you CJ.

CJ M. Mogoeng: Thank you very much. Commissioner Fourie?

COMM C.P. Fourie: Thank you, Chief Justice. Good morning JP.

Judge B. Molemela: Good morning, Commissioner.

COMM C.P. Fourie: You look a lot more relaxed now than earlier. JP when we interviewed you in October 2014 for the position of Judge President of the Free State
—

CJ M. Mogoeng: You are a bit too soft Commissioner, maybe draw the mic closer? Or let it be on the direction you are facing as you speak.

COMM C.P. Fourie: Yes. When we interviewed you in October 2014 for the position as Judge President of the Free State I shared my view with you that a Judge President should be at his or her Court and devote his or her time to the Court like a captain should be with a team on the field with a team.

Judge B. Molemela: Yes.

COMM C.P. Fourie: You agreed with me at the time and part of your answer was that for some time I would like to devote 100% to my Division especially because there are a few problems. Now if I look at your questionnaire when you completed it in December of 2017 since you were appointed JP you acted in the Constitutional Court and in the Supreme Court of Appeal. You actually acted in the Constitutional Court for five months from the time that you were appointed as JP and for the bigger part of 2017, you acted in the Supreme Court of Appeal. I calculate it to be a period of about fifteen months. So for a very good portion of the time that you have been Judge President you could not have been the captain that were on the field with the team. I would like to canvas that with you. Is that desirable? Have you been able to devote 100% to your Division as you said in your October interview? And if not why not?

Judge B. Molemela: Well I have been able to dedicate 100% of my time to my Division. The interviews were conducted in October of 2014. And immediately when I went back to the Division I was given the task of preparing the roll. As I mentioned the biggest problem there was the roll. So I started doing that in October 2014 already. I was invited to act at the Constitutional Court in January 2015, if you have a look at my transcript you will see that at some point there was a question about acting and I did say at that stage that acting is so beneficial. It is beneficial to you as the person who is acting there because it gives your personal growth. It is also beneficial to your team, wherever you come from. Whether you come from the Magistrate, the Bar, the Side-Bar because when you go back you are not the same person you were when you left in terms of experience. There is a saying that, and I think it was made by a Judge, Judge Holmes that a mind once it has been stretched to new dimensions, it will never be the same again. You go back there, your

colleagues there respect you because they know you have acted at the highest court in the country. They approach you for advice, for consultations. You give them. That benefits the entire administration of Justice. Now, the entire time I was at the Constitutional Court I kept in touch with my Division. Emails will bear me out. The entire time I was at the Supreme Court of Appeal I kept in touch with my Division and in that regard the emails will also bear me out. With regards to Bloemfontein, to the Supreme Court of Appeal, my Division is also in Bloemfontein. I kept close contacts with the Deputy Judge President and I think he will bear me out. We spoke, I think, every single day. I normally have a hands-on approach, in fact, when we had a discussion he is the one that mentioned that, that we have a hands-on approach. And so my Division did not miss out because of the fact that I was acting. Now, here is the third advantage of acting. When you go and act you create a vacancy. I left the Division, acted there, created a vacancy for somebody to act in my position. Two ladies, in fact, three ladies have acted in the position. And two gentlemen have acted in the position and that has benefited the Division so much because then we have many Judges that share the same vision in terms of the leadership in the direction of the Division. So, my acting stints have actually benefitted the Division. Not only the Division they have also benefited other candidates. I have mentioned the number of candidates who acted in either as JP or as DJP and I have twenty-two ladies who in that period acted in the Division at my invitation. And I think that is a very, very good achievement if you consider that my Division is a relatively small Division to have had twenty-two women acting in that time. I think it is something good that happened there. So my answer to you is that although I might not have been physically present in the Division my footprint was always firmly there. And it was followed by whoever was acting in the Division. I remember that when I was acting the Supreme Court of Appeal, and I have always considered myself part of my Division irrespective of where I am acting when I was at the Supreme Court of Appeal I missed one or two emails that stated that there was going to be a celebration of Heritage Day. And I heard on the day, and I was already in chambers at the Supreme Court of Appeal. I went to Court and when I came back to Court it was half past twelve, I think, when I heard the news. I rushed home to go and change. Because when having occasions like that we wear traditional attire. Because I am part of a team, I rushed home to go and change to be like the rest of the team members and went there. And, yes, I think I will leave it at that.

COMM C.P. Fourie: Thank you, Chief Justice, I leave it at that as well.

CJ M. Mogoeng: Now, a leading question, am I mistaken in thinking that you put systems in place to ensure that whether you are there or not whoever steps in is by reason of that system able to run the Court efficiently?

Judge B. Molemela: Definitely CJ. And if I may say this the DJP is a very able man. Both in terms of the leadership of the Division and generally as a Judge. He has the advantage of also having acted at the Constitutional Court so what I mentioned about colleagues feeling comfortable to come to me for advice will still happen because he has also acted there. So one thing for sure, there is not going to be a vacuum in the Division.

CJ M. Mogoeng: Commissioner Nayambi?

COMM A.J. Nayambi: Thank you CJ. Morning JP.

Judge B. Molemela: Morning Commissioner.

COMM A.J. Nayambi: Mine is only one question. I was a little bit worried, but I was comforted when CJ said at some stage you have to have a way of getting the names of those people that are problematic. So my only question is in relation to collegiality in your Division in and CONCORD. It is totally different to the situation in the SCA.

Judge B. Molemela: Definitely.

COMM A.J. Nayambi: So, I do not want to assume and interpret my understanding of what you are telling us. But why are you opting to go to that situation in your own words?

Judge B. Molemela: I think that I can be part of the solution to that problem. I enjoy the work at that Court and I do not think that colleagues should be discouraged to go

to that Court merely because of the treatment they receive at the hands of a minority of colleagues because they are in minority.

COMM A.J. Nayambi: You strongly believe that you are equal to the task to assist that situation?

Judge B. Molemela: I am. That is why I had the courage enough to go to that particular colleague to say; why are you doing this?

COMM A.J. Nayambi: Thank you CJ.

CJ M. Mogoeng: Thank you very much, Commissioner. Commissioner Didiza?

COMM T. Didiza: Thank you very much CJ. And good morning JP.

Judge B. Molemela: Good morning, Commissioner.

COMM T. Didiza: How are you?

Judge B. Molemela: I am fine, how are you?

COMM T. Didiza: I am good. Not so good though JP. Not so good because I think at the time at which you had been here, and I am sure you also are aware of the concerns that women constituencies outside including the gender commission had decried the fact that there are very few women in the judiciary and more so in the leadership of the judiciary at various levels. And one was excited when you got appointed as a JP because it started to shift the balance in the leadership of the judiciary, particularly in heading the Divisions. So I inwardly have a tension, and that is why I am saying not so good. Because on one hand, it is encouraging that there are more women that have made themselves available for the vacancies in the Supreme Court of Appeal, as it has happened now. But at the same time, one worries what will be the shift in demographics if you were to be given an opportunity to go to the SCA in that Division. So that is why I am saying I have a tension.

Judge B. Molemela: Yes.

COMM T. Didiza: The issue probably not only in the Free State Division but generally knowing this background about our concerns in terms of gender representation what is it that you have done, and you will continue to do to ensure that we are able to attract more women to be at the helm of the various Divisions and various Courts. So that indeed we try to ensure that women's leadership does contribute in the transformation, even of those Divisions, given what you have done in your own experience. But I am just saying that you know, it is one of those things where you say; uhm good, and you so oh wow. What would you advise?

Judge B. Molemela: I understand your sentiments Commissioner. In terms of what I have done, I have held the hands of so many ladies having encouraged so many ladies to make themselves available for appointment to all the Courts. I have mentored those that I could mentor and I will continue to do so, irrespective of where I will be based in terms of a Court. I do not see that role ending. I have consciously contacted professional bodies to say please recommend females that you think have the potential and they have done so. I will still continue to do so and make those names available to the President of the Supreme Court of Appeal. It is an on-going process. It is what the IAWJ is all about. I am a member, as I said, so I will gladly continue to participate.

CJ M. Mogoeng: Prof?

Prof N.T. Ntlama: Thank you, Chief Justice. Morning JP.

Judge B. Molemela: Morning Prof.

Prof N.T. Ntlama: How are you?

Judge B. Molemela: I am fine, how are you?

Prof N.T. Ntlama: I am also well. You were once a part-time lecturer at UFS?

Judge B. Molemela: Yes.

Prof N.T. Ntlama: How has that experience prepared you for your career particularly as a Judge? And secondly, the appeal by Advocate Maluleke was upheld by the CJ so how do –

CJ M. Mogoeng: Prof you are too soft. Maybe the mic should be in the direction your mouth points?

Prof N.T. Ntlama: -- Okay. The first question is you were once a part-time lecturer at UFS?

Judge B. Molemela: Yes.

Prof N.T. Ntlama: So how has that experience prepared you in your career as a Judge? And secondly the Appeal by Advocate Maluleke was upheld by the CJ, so how did you feel when that Appeal was upheld?

Judge B. Molemela: All right, thank you, Commissioner. The experience that I gained from being a part-time lecturer helped me a great deal. It made me a well-rounded lawyer. I always say every experience is beneficial it does not matter what it is. It adds to the whole. So my answer to your question is that it benefited me a great deal and I was able to interact with the youth and I like that. The second question I noticed that Advocate Maluleke does say that the complaint was upheld by the DCJ. I am not sure that that is the correct way of using the word upheld. Because in support of that he attaches a document that requests him to comment on Justice Makoba's response. My understanding from the letter that he sends is that he was requested to provide more information in the form of comments but that the Appeal is yet to be decided. And the fact that he was requested to comment is not strange at all. Because if we have a look at the Act, it makes room for that. That the Appellant Board can ask for more information. And even if the Appeal itself were to be upheld now, you know in the true sense of the word, I would take it in my stride. We learn all the time. Judges make mistakes they are not infallible, so they make mistakes, and we learn from our mistakes. So that would be a mistake that I would learn from. The

Judicial Code of Conduct mentions it in so many words that sometimes Judges will err in terms of the application of the Law or the facts.

Prof N.T. Ntlama: Thank you.

CJ M. Mogoeng: Thank you. Thank you, Prof. Advocate Norman SC?

COMM N. Norman: Thank you very much, Chief Justice. My question has been taken care of, Thank you.

CJ M. Mogoeng: Thank you so much. Honourable Singh?

COMM N. Singh: Thank you very much, Chief Justice, and good morning JP.

Judge B. Molemela: Good morning, Commissioner.

COMM N. Singh: Thank you, Chief Justice, for calling me Honourable, and not Commissioner. Because my question –

CJ M. Mogoeng: I will do that interchangeably. Because you are still Honourable whether you are here or in Parliament.

COMM N. Singh: -- Yes. No, my question relates to Parliament. And trying to understand higher hierarchy. So I think it was very appropriate that you did that at that time. From my knowledge and forgive me for my naivety if I do not understand how the Judicial system works. But in terms of spheres of Government and not levels of Government. We have local Government, Provincial and National and one would think that being a MEC at Provincial Government is higher in status than being a Chairman of a Committee at National Assembly. I am trying to understand the hierarchy in the judicial sector. vis-à-vis being a Judge President and then being a Judge in the Supreme Court of Appeal. Where in lies the higher hierarchy in terms of status and even salary which is important. I am just trying to understand that from my own mind. Thank you.

Judge B. Molemela: In terms of hierarchy I am not sure how to answer this. The Judge President is the most senior Judge in a Division. If I go the Supreme Court of Appeal I would not be in the leadership of that particular Court, I will be Judge of that Court, a Justice of that Court. And in terms of salary, I think there is a slight difference in salary. In terms of the status, my answer to you would be: I do not think the status matters so much. Because Justice Mlambo used to be a Justice at the Supreme Court of Appeal and opted to go back to the High Court. So whether you are moving that way or moving that way your status is still the same. You are still a Judge.

CJ M. Mogoeng: Commissioner it is different. You become chauffeur driven as JP, so she is sacrificing actually. She does not care about position. She does not care about the benefit of people opening doors for you as if you do not have hands to open. It is a sacrifice, in that sense.

COMM N. Singh: But that was the answer I wanted, Chief Justice. To say that she is sacrificing from being a Judge President to being an ordinary member and sacrificing a leadership position as well. Thank you.

CJ M. Mogoeng: Honourable Malema?

COMM J. Malema: No, Chief Justice, I must raise my dissatisfaction with what you have just done now. I think it I wrong what you said that she is sacrificing and doing all sort of things. It is not different to saying people should not congratulate her.

CJ M. Mogoeng: I don't – you want to debate it now or later?

COMM J. Malema: No -

CJ M. Mogoeng: You want to debate it on air or when we are alone?

COMM J. Malema: It is being said here, I mean people congratulate people here and you call them to order here.

CJ M. Mogoeng: Okay. Raise your point.

COMM J. Malema: And I am uncomfortable with what you just said. The question is given to her about the difference and she must answer that for herself.

CJ M. Mogoeng: She had finished.

COMM J. Malema: And for you to come and say she is sacrificing that for opening doors and all that is in a way not different from congratulating messages that Commissioners did before. So you are being complementary without saying congratulations.

CJ M. Mogoeng: Commissioner Malema, what are you doing? Are you calling me to order or what?

COMM J. Malema: I am -

CJ M. Mogoeng: Or are you rising on a point of order, what are you doing?

COMM J. Malema: I am raising on, I do not want to call it that.

CJ M. Mogoeng: No, I am adding to what Commissioner Singh is saying just in case he wants to follow-up. I am raising an additional benefit that she is leaving behind. It is a reality. I am not – it is a reality. She won't be chauffeured driven anymore. She won't be leading a Court anymore.

COMM J. Malema: Well I am uncomfortable with those utterances.

CJ M. Mogoeng: Yes.

COMM J. Malema: That is the point I wanted to -

CJ M. Mogoeng: That is noted.

COMM J. Malema: Yes.

CJ M. Mogoeng: That is noted.

COMM J. Malema: Yes, thank you very much, CJ. JP, I wanted to raise a simple question are you a feminist?

Judge B. Molemela: My answer to you is that I believe in equality of sexes.

COMM J. Malema: My question is, are you a feminist?

CJ M. Mogoeng: JP, you may wish to understand what he means. It may help Commissioner Malema she has given an answer. You may wish to explain what it means if you are not happy with her answer.

COMM J. Malema: Are you fighting for the rights of women? That women should be treated the same as their male counter-part and that anything else that seeks to perpetuate patriarchy, you will do anything in your power to fight it and expose it?

Judge B. Molemela: Definitely, yes Commissioner.

COMM J. Malema: So why are you reluctant to give out the names of those people who might be engaged in a conduct of masculinity and racism if you are committed to fight any form of discrimination?

Judge B. Molemela: Well I did say I am comfortable giving the names over to the Chief Justice and if that ends up in disciplinary action so be it.

COMM J. Malema: So what is the point of giving it to us here if you are not going to help us because if you say there are such people who engaged in the conduct that you have mentioned which is unacceptable without isolating and exposing such individuals you are planting in our mind a negative attitude that when we see a male person or a white person from the Supreme Court of Appeal we then treat them with the suspicion that this one looks like the one who is not greeting people at there. So

we really do not know. You are setting us for some failure because we will now look at how people walk, we will now look at how people express themselves and anyone that fits your description will then say maybe this is the one.

Judge B. Molemela: I hear you, Commissioner, and similar statements have been made by other colleagues in this room who had been interviewed previously and they did not name the people in question. I do not feel comfortable in naming them to the whole body and the country at large. And I feel comfortable in disclosing the names to the Chief Justice as the leader of the Judiciary.

COMM J. Malema: Thank you.

CJ M. Mogoeng: Thank you, Thank you. JP you are excused.

Judge B. Molemela: Thank you CJ.