



JUDGES MATTER

**Judicial Service Commission interviews
10 April 2018.**

**Supreme Court of Appeal
Interview of Judge M P Tsoka**

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CJ M. Mogoeng: - Judge Tsoka.

Judge M.P. Tsoka: Good afternoon, Chief Justice.

CJ M. Mogoeng: Are you well?

Judge M.P. Tsoka: I am well and, how are you?

CJ M. Mogoeng: I am very well, thank you. Are you relaxed or as nervous as everybody else?

Judge M.P. Tsoka: I think as nervous as everybody else.

CJ M. Mogoeng: Okay, let me try and ease that out. I was told by the former Deputy Chief Justice that in Mbombela he boastfully said that he runs 5km every day and to his shame, it was said that you run about 14km. Is that true?

Judge M.P. Tsoka: It is true.

CJ M. Mogoeng: Do you still run even now?

Judge M.P. Tsoka: Yes, unfortunately, two weeks back I strained my hamstring and I have not been running.

CJ M. Mogoeng: Do you participate in the Comrades?

Judge M.P. Tsoka: Yes, I have done eleven Comrades and twelve Two Oceans.

CJ M. Mogoeng: And when your schedule permits can you help me grabble a little bit with my athletic challenges?

Judge M.P. Tsoka: I am prepared if you are prepared to put time in it.

CJ M. Mogoeng: For how long did you practice law? And as what?

Judge M.P. Tsoka: I think I was admitted as an attorney in 1984, I left practice in 2004 when I was appointed as a Judge. In 1992 I was admitted as a Conveyancer and I solely practised as a conveyancer from 1992 until my appointment as a Judge of the High Court in Johannesburg.

CJ M. Mogoeng: It was a very tough test or examination. The conveyance examination were said to be very tough and very few black people and women filter through. How did you manage?

Judge M.P. Tsoka: Likely we had a lady who took up the challenge after we complained that there were very few black conveyancers in the country. She was a Director of one of the big firms in Johannesburg who was prepared to train us and to

expose us to practical documents and the drawing of papers and out of the group of seven, five of us passed the Conveyancing exam.

CJ M. Mogoeng: We often celebrate people only when they had passed on, who is that lady?

Judge M.P. Tsoka: It is -

CJ M. Mogoeng: Unless she does not want to be known.

Judge M.P. Tsoka: -- She has, unfortunately, Chief Justice, passed on. Her name is, I forgot the first name, but the surname is Nortén. She was with Weber Wentzel.

CJ M. Mogoeng: For how long have you been a High Court Judge?

Judge M.P. Tsoka: Since 2004.

CJ M. Mogoeng: And you have acted? Was it as Deputy Judge President at some stage? You came to our meetings?

Judge M.P. Tsoka: That was last year from the beginning of the year until the end of May, when I was invited to go back to the Supreme Court of Appeal.

CJ M. Mogoeng: Yes.

Judge M.P. Tsoka: To go and act there.

CJ M. Mogoeng: And which Division are you attached to?

Judge M.P. Tsoka: I am attached to the Johannesburg High Court.

CJ M. Mogoeng: Yes, now how many acting stints have you had at the Supreme Court of Appeal?

Judge M.P. Tsoka: I had two stints at the Supreme Court of Appeal. The first one was the appointment was effective from the 1st of December 2015 until the 30th of May 2016. The second one was the first of July, sorry 1st of June 2017 until the 30th of November 2017.

CJ M. Mogoeng: Colleagues who have acted at the Supreme Court of Appeal seem to have experienced that environment differently. There are those who were well received, were very comfortable; experienced collegiality as it should be. And those who have a somewhat unpleasant story to tell. In which of the two categories do you fall?

Judge M.P. Tsoka: I was fortunate, Chief Justice, because the majority of Judges that are at the Supreme court of appeal come from Johannesburg. But some of them I was in class with them and some of them we run together and some of them are my personal friends, and those that did not obviously welcome me I just took it as such. I mean you cannot be loved by all the people.

CJ M. Mogoeng: Was it a question of love or was it much more than share love or natural dislike?

Judge M.P. Tsoka: My impression was it is the fear of the unknown more than anything else. Who is this person that comes to act in this Court?

CJ M. Mogoeng: Well tell us more about that somewhat uncomfortable experience, how else did it find expression?

Judge M.P. Tsoka: I -

CJ M. Mogoeng: Obviously you cannot name people.

Judge M.P. Tsoka: Yes.

CJ M. Mogoeng: Yes.

Judge M.P. Tsoka: I had a matter consisting of a Bench of five Judges and it looks like the four of them, because they were permanent Judges., I got the impression that they met and discussed, and I was excluded, and they took a short adjournment and after the short adjournment they produce a document they said they want to imp the matter.

CJ M. Mogoeng: To do what?

Judge M.P. Tsoka: To imp.

CJ M. Mogoeng: What is imp now?

Judge M.P. Tsoka: Maybe the Judge President may explain it better, but it apparently to give judgment then and there. And I was surprised I said but how can that be.

CJ M. Mogoeng: You did not know what judgment was intended to be given then and there as a member of the panel?

Judge M.P. Tsoka: Yes, no I did not know.

CJ M. Mogoeng: But they all knew?

Judge M.P. Tsoka: It appears to me because all of them agree that judgement that the matter must be imp.

CJ M. Mogoeng: Was it imp?

Judge M.P. Tsoka: Yes it was imp.

CJ M. Mogoeng: And you concurred?

Judge M.P. Tsoka: Yes, I agreed. I was persuaded. But I am saying it was not discussed.

CJ M. Mogoeng: Yes.

Judge M.P. Tsoka: Outside I was persuaded, and I agreed with them -

CJ M. Mogoeng: Yes.

Judge M.P. Tsoka: -- But I am just saying it came as a shock to the system.

CJ M. Mogoeng: Yes, anything else? Anything that is noteworthy? Anything else that requires attention so that the system is cleared of any possible impairments for those acting or newly appointed?

Judge M.P. Tsoka: There is a rule in the Supreme Court of Appeal, unlike in the High Courts, that you do not discuss matters before you get into Court. In the High Court we do discuss matters before we go into Court but in the Supreme Court of Appeal, I came to know that matters are not discussed generally. But it may be the impression that I got after the imp judgement. And subsequent thereto when I notice that some Senior Judges or colleagues go to other Judges and discuss the matter with them to the exclusion of the one that has just come in. And if that rule need to be there, then it must be strictly applied alternatively it must be done away with.

CJ M. Mogoeng: Yes. Anything else that needs to be done differently in your view?

Judge M.P. Tsoka: Not really.

CJ M. Mogoeng: Now, otherwise how has your acting stint at the SCA been? How has it prepared you for the position you are applying for.

Judge M.P. Tsoka: The first stint was a little bit daunting as one has to learn even the new lexicon the imp but the second one was enjoyable, and I loved it.

CJ M. Mogoeng: Yes.

Judge M.P. Tsoka: I enjoyed my second stay.

CJ M. Mogoeng: So you are ready?

Judge M.P. Tsoka: I think so, yes.

CJ M. Mogoeng: President Maya?

PRES M. Maya: I do not have many questions you have covered most of the things I wanted to raise with the candidate, Chief Justice. Good day, Judge Tsoka. I am greeting you.

Judge M.P. Tsoka: Oh, good day. Good day, President.

PRES M. Maya: Just a point of clarification first. Colleagues do sometimes discuss matters before a hearing. This role you are referring to existed before my time I am told. So maybe as you have disclosed people just did not bring you in for whatever reason during your acting stints then, which is actually highly regrettable. I do recall that you struggled quite a bit during your first round I want to ask you about judgement writing. How were your draft judgements received by colleagues? I mean you wrote for me in one matter and we do not have to deal with that one. Or we should deal with that one because something happened there as well.

Judge M.P. Tsoka: The first draft judgement that I had referred to, I gave it to a senior colleague who had been there before me and he critiqued me, and I circulated the draft judgment and it was well received. The second one which was a little bit easier I send it to the presiding officer she did not find anything wrong with it other than that I unknowingly quoted somebody else apparently, they are not in good terms with. I should have quoted that person judgement. Which I did and after I did, and the judgement was received.

PRES M. Maya: So when colleagues did make contributions to your draft judgements it was only stylistic added nothing on substance really?

Judge M.P. Tsoka: It was more stylistic than substance.

PRES M. Maya: And you say you found the second round comfortable?

Judge M.P. Tsoka: Comfortable and more enjoyable.

PRES M. Maya: Had your style, because we do write differently at the SCA, were you – did you find writing judgement easier now?

Judge M.P. Tsoka: Yes, I found it very easy and, in fact, I have penned two judgements which the colleagues on the second stint that they felt those two judgements must be marked reportable.

CJ M Mogoeng: Thank you, President. So a Judge dislikes another and therefore require of you not to give credit or recognition to the judgement of another even though in your view it was worthy of consideration?

Judge M.P. Tsoka: Yes. Those who know the two judgements it is commonly as M Dumeni Judgement it deals with interpretation of legislation as well as contracts. I quoted that judgement and it was pointed out time that that is not good law I should have quoted Novartis vs McPhail Judgement.

CJ M. Mogoeng: Yes. Commissioner Norman?

COMM T. Norman: Thank you, Chief Justice. Good day, Judge Tsoka. I am just troubled by the answers you have given about these two judgements. The imp judgement and this other one where you had to remove quotations. It appears to me, please correct me if I am wrong, that you do succumb to pressure. Am I right?

Judge M.P. Tsoka: No.

COMM T. Norman: Then why did you not refuse? First of all in the imp judgement if you take that one you had not applied your mind to this document that you say had been produced without you knowing. Because you adjourned for a few minutes.

Judge M.P. Tsoka: Yes.

COMM T. Norman: And judgement had been delivered. So when did you actually apply your mind to the matter?

Judge M.P. Tsoka: What I am saying it after we adjourned we went outside the Court and we congregated outside the Court and I was persuaded that this, the point that – the fact that I was not consulted maybe it is an oversight and these are the view that they take on the matter. And I was persuaded that maybe I am mistaken on my approach on the fact of the matter, how I see the fact of the matter.

COMM T. Norman: But you are being pressured then, there and then because they want to deliver judgement. It is on the day of the hearing. They have adjourned for a few minutes. -

Judge M.P. Tsoka: Yes.

COMM T. Norman: -- And they want to deliver that judgement.

Judge M.P. Tsoka: Yes.

COMM T. Norman: So they had to then convince you there and then without you having taken time to say look I need a day or two to apply my mind to it.

Judge M.P. Tsoka: Yes, I am saying to you, I was because as Judges must be open to persuasion it does not help to be stubborn even if you see light. I was persuaded that this is the way and I have to be shown on what basis they arrive at that conclusion.

COMM T. Norman: And then with the second one, Judge Tsoka, somebody tells you. It is your judgement, you have written it and you believe that the law that you quoted is good law and you put it in your judgement. And somebody tells you no, do not quote this one, quote that one.

Judge M.P. Tsoka: Yes, there is a rule in our work that the – it is always preferable to quote the latest judgement. The Novartis judgement that I am referring to was later than the M Dumeni judgements.

COMM T. Norman: No, but then why did mention it? If then on that basis Judge -

Judge M.P. Tsoka: I am saying I preferred the way the Judge saw the issue in M Dumeni, however, there was a subsequent judgement dealing with the same issue, but it was a subsequent judgment on the basis of being a subsequent judgement I followed that.

COMM T. Norman: Thank you, Chief Justice.

CJ M. Mogoeng: Thank you. Thank you, Commissioner Norman. But did it overrule the principle in the other?

Judge M.P. Tsoka: No it did not.

CJ M. Mogoeng: So anyway I think I hear you. Thank you so much Judge Tsoka you are excused. If the room may be cleared please so that the deliberations can begin in five minutes time.

Judge M.P. Tsoka: Thank you.