



JUDGES MATTER

Judicial Service Commission interviews

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Supreme Court of Appeal

Interview of Judge T R Gorven

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CJ M. Mogoeng: Good afternoon Judge Gorven.

Judge T.R. Gorven: Good afternoon Chief Justice and members of the Commission.

CJ M. Mogoeng: Are you well?

Judge T.R. Gorven: I am thank you.

CJ M. Mogoeng: I know that I was not relaxed appearing before a body like this until, except for my last interview. Are you relaxed?

Judge T.R. Gorven: I am fairly relaxed, thank you, yes.

CJ M. Mogoeng: All right. When did you become a Judge of the KwaZulu Natal Division of the High Court?

Judge T.R. Gorven: With effect from November 2008. It is just over nine years ago.

CJ M. Mogoeng: And how long after your appointment were you then afforded the opportunity to act as the Supreme Court of Appeal?

Judge T.R. Gorven: It would have been just short of six years. My first acting stint started in June 2014.

CJ M. Mogoeng: How long was your first acting stint?

Judge T.R. Gorven: My first acting stint was five terms, it was initially four, but a person had to act in the Constitutional Court and I needed to intervene and act in that person's position at the last minute.

CJ M. Mogoeng: And was there a subsequent acting stint apart from the five terms?

Judge T.R. Gorven: Yes, from December 2016 to September 2017, a further three terms.

CJ M. Mogoeng: Was it the last or was there yet another acting stint.

Judge T.R. Gorven: That is my last one.

CJ M. Mogoeng: Yes, and is there anything about the workings of the Supreme Court of Appeal that you would have handled differently if you had it your way?

Judge T.R. Gorven: Well I have got a long way to go before I have any say in that sort of matter.

CJ M. Mogoeng: I thought judicial independence covered you somewhat.

Judge T.R. Gorven: I think things work pretty well. It is an extremely busy Court and one has to get judgement pretty quickly. There are often seventy appeals per term, so the system and method that they use there seems to me to be quite an efficient one. It mixes up panels of the different judges. So we all get to work with one another and to learn one another. People are designated to write a certain number of judgements and comment on those judgements, in a thorough kind of fashion. So it is a good process in terms of making sure that some of the excellence that is required of an Apex Court emerges in those judgements.

CJ M. Mogoeng: Did circumstances as they obtain then give you a sense of belonging or made you feel like an outsider an intruder of sorts in an environment best left for others?

Judge T.R. Gorven: Well I think the first time I arrived here is a lot more nervous than the first time I appeared before this Commission. But I was made to feel at home immediately on my arrival I met Judge of Appeal Mathopo who was also acting at the time. He took me under his wing and we became firm friends and still are. And all the members of the Court welcomed me with open arms, gave me warm support and any assistance that I required and affirmed me for what I was trying to do at the time.

CJ M. Mogoeng: And is it fair to assume that the quality of matters in which you were afforded the opportunity to write judgements was quite satisfactory?

Judge T.R. Gorven: Yes, thank you, very much so. As a result, there are a number of reported judgements from my time when I was acting in the SCA, I think fourteen altogether.

CJ M. Mogoeng: Is there anything more about your state of readiness that you either want to add on or add to or add because you did not state in the past?

Judge T.R. Gorven: I think I am ready. I think the Court is ready for me. I think I can bring to it a number of matters. I can bring to it a sense of unwavering commitment to the Constitution so that as a Judge I will do what the Constitution asks and requires of me and I will not do anything the Constitution does not allow me to do. I will not

overstep the mark. I bring to it a very high work ethic. I do work hard. I find the work incredibly stimulating and most enjoyable. I find the collegiality at that Court also stimulates me to better work. So I believe I am ready and I believe with the range of expertise, the range of exposure I had whilst both at the Bar and as a Judge it can fill a gap in the Supreme Court of Appeal, where a lot of people have not had quite the range of exposure to matters, in particular, Civil matters that I have had in the last – since I have been a Judge and while I was at the Bar, in fact. I bring also a sense of commitment to helping anybody who might need some assistance and collegiality as a whole and that is what I would like to bring to the SCA on a permanent basis.

CJ M. Mogoeng: Yes. President Maya?

PRES M. Maya: Thank you CJ. Good morning Judge Gorven.

Judge T.R. Gorven: Good morning President Maya.

PRES M. Maya: You were questioned at length during your last interview. I have sat in Court with you on a number of occasions and you have written judgments in matters in which I presided to enable me to discern that you are a hard-working sound and well-rounded Judge.

Judge T.R. Gorven: Thank you very much.

PRES M. Maya: I have also observed another important quality, you are very helpful to your colleagues especially the junior ones and that is very important in that Court because we work in teams under very pressured conditions. I also know that you are deeply committed to transformation and your CV and your last interview speak for themselves. Now I just have one very grossly unfair question for you.

Judge T.R. Gorven: Okay.

PRES M. Maya: There are three vacancies.

Judge T.R. Gorven: Yes.

PRES M. Maya: There are four women candidates. We have all been saying for years that the number of woman judges in the judiciary, especially in that Court, is remediable. Now if at least three of the women candidates fare well in their interviews during this round and they are found to qualify for appointment to that Court what would you advise the JSC to do?

Judge T.R. Gorven: You wanting me to do your job for you, as the Commissioner? I would simply say this, obviously, there needs to be full gender representatively and all sort of other representativity; demographic representativity. My contribution I believe is to assist persons perhaps who would not have the kind of background and experience to me, including woman judges in finding their feet. In deepening their knowledge and understanding. In standing alongside of those people. If you find that there are three candidates, three women candidates, and therefore you shouldn't consider any males, well that speaks for itself and that is an easy answer to that question. But I do believe that even as a male, I can make a contribution to the transformation of that Court even by way of gender representivity by increasing the expertise and increasing and standing alongside of people who might otherwise perhaps struggle in areas of the Law that they are not 100 percent familiar with.

PRES M. Maya: In the event that you are not recommended for an appointment now would you be willing to subject yourself to another JSC interview? Or even act in the Court to assist us as you have consistently done in the past? If the opportunity arose?

Judge T.R. Gorven: The first one of those if more difficult to answer than the second one. Of course, I will act, wherever I am asked to act I will most certainly act. Whether I make myself available for a fourth occasion I cannot answer that question right now. I would have to think about it carefully at the time. I would have to consult with colleagues, including those colleagues of all genders and races who have strongly urged me to make myself available on this occasion along with the person who recommended me who is also a black woman. So I cannot, I am afraid I cannot give a definitive answer to say, I will come back. I am not saying I will, I am not saying I definitely won't. But I certainly would make myself available to act.

PRES M. Maya: Thank you, Chief Justice.

CJ M. Mogoeng: Thank you, President. Commissioner Notyesi.

COMM N. Notyesi: Thank you, Chief Justice. Good afternoon Judge.

Judge T.R. Gorven: Hello Commissioner Notyesi.

COMM N. Notyesi: In fact, I only have one question. The Constitution of the Republic of South Africa instructs our Courts to apply Customary Law where it finds application as a separate legal system without involving principles of the Common Law. And the Constitution Court has insisted in this application, in several cases, however, there is a tendency by the Courts to import the principles of Common Law in a Customary Law matter, to resolve a Customary Law matter or to avoid dealing with a Customary Law issue. How best can we deal with this aspect in developing the Customary Law as a system of Law?

Judge T.R. Gorven: Well I think that is a very important question because it is one that is hardly reached the attention of Courts up till now. It has to a certain extent – I think I would like to say two things about that or maybe three. The first is this; I have recently assisted a Deputy Judge President Madondo in writing a book on basically getting the customary traditional courts up and running as the Constitution enjoins to take place. When I say assisted, I proofread it, gave him some comments and so on. And once that system is implemented then those courts will begin to apply the Customary Law and if there are any review issues arising from that the Courts of our land will deal with those squarely and that will come before us as Customary Law matters. Secondly, also Deputy Judge President Madondo and I were colleagues and friends at the Bar. We remain colleagues and friends, but when we were at the Bar and he did a number of Customary Law matters so I am familiar with some Customary Law matters but I do not by any means regard myself as an expert in Customary Law. The Courts though have this dilemma - which of the two do you apply in any one situation? And I am aware that of course, even Customary Law is subject to the infusion of the principles of the Constitution, not the Common Law but

the Constitution which infuses every aspect of our Law and that has been said to be so by the Constitutional Court. So that obviously is something which will need careful development and sensitive development so that in fact that Customary Law which is consonant or consistent with the Constitution is applied instead of someone attempting to simply make use of the Common Law to exclude Customary Law where it is appropriate.

CJ M. Mogoeng: Thank you so much Commissioner Notyesi. Commissioner Nayambi?

COMM A.J. Nayambi: Thank you CJ. Afternoon Judge Gorven.

Judge T.R. Gorven: Good afternoon, Commissioner Nayambi.

COMM A.J. Nayambi: It is just one question from my side. It is linked to the one of President Maya. If you can summarise the rate of transformation of the judiciary in our beloved country South Africa as an experienced Judge?

Judge T.R. Gorven: Summarise the rate? The rate has been slow in absolute terms. What I am saying by that is that obviously if all other things were equal this should have taken place a lot more quickly but there were reasons for it based on the whole apartheid system. Because many previously disadvantaged lawyers, both gender and race-based, were disadvantaged in their practices under apartheid for years and years and years. And we are not subjected or exposed to the kind of range of work that a lot of the white lawyers were. As a result, things developed in a very skewed fashion. They did not – they were not able to develop the kind of expertise that was able to be developed by many others. By the privileged people, such as myself, and I would think and assume that this commission in making its appointments has had to take into account that if one simply drew a brush and said, well we will simply transform into a situation that all of us want and the Constitution demands it may well be that people would have found themselves under a great deal of pressure and stress and unable to cope. I am not the person who is involved in the transformation process, you folk are really. I would say it absolute terms that it has been far too slow because we are still not fully transformed. But I suppose in realistic terms maybe it

has been a bit slow, but one can understand something of the reasons for why this commission has gone at that kind of pace.

COMM A.J. Nayambi: Thank you CJ.

CJ M. Mogoeng: Thank you Commissioner Nayambi. Commissioner Norman.

COMM T. Norman: Thank you, Chief Justice. Good afternoon Judge Gorven.

Judge T.R. Gorven: Good afternoon Commissioner.

COMM T. Norman: I have had the pleasure of appearing before you both in the High Court and at the Supreme Court of Appeals.

Judge T.R. Gorven: Yes.

COMM T. Norman: But I just want to understand how important was it for you to get a nomination from a black woman?

Judge T.R. Gorven: Well, when Miss Gabriel wanted to nominate me on the first occasion I was flattered. So it is important. It for me shows a stamp of somebody recognising who I am and what I can bring to the Bench regardless of my gender and race. So it was important in that sense and I felt deeply humbled that she was prepared to do it. Not only one time but three times, and she is a very competent practitioner, so I was extremely humbled.

COMM T. Norman: Yes. And then following up on that, the fact that she had nominated you three times. My concern only relates to the last occasion because she says in the nomination letter that she appeared before you in October 2017 in the matter that she goes to town about, about poor – school children and all of that. But what I want to understand was her opponent advised that she had nominated you twice when that opponent together with her appeared before you in October of 2017?

Judge T.R. Gorven: Yes. Commissioner Norman that is correct. The occasion on which this took place was one where I made the disclosure to her opponent. It was an opposed application where I had read the papers carefully and prepared for the argument and before the argument took place I said to both the parties I am ready to hear argument, I am ready to deliver judgement but in this matter if the judgement goes against either of the parties there may well be an appeal and the long drawn out process. And I said in the light of the fact that children are suffering and it was a common cause without any challenge that some young girls walk into school up to 20km to 25km per day had been – had found people laying in wait for them, because they knew that these girls would be walking to school alone or in couples and had been raped and had been brutalised; I said this is something surely which the two parties can put a stop to by resolving this matter and attempting to make sure that these young children are transported to school. I said I will hear it, I will deal with it and you can deal with the judgement as you feel fit but I strongly suggest that the two sides talk to each other so that these children plight can be resolved right now. And that is what the parties decided to do.

COMM T. Norman: Yes, and then she nominated you again. Thereafter?

Judge T.R. Gorven: She nominated me again after that, yes.

COMM T. Norman: Thank you. Thank you, Chief Justice.

CJ C. Mogoeng: Thank you Commissioner Norman. Commissioner Mpofu.

COMM J. Mpofu: Thank you, Chief Justice. Judge Gorven I just wanted to ask a follow-up question on transformation. You know you are the second person to sit there to point out the obvious fact that if we want proper transformation we are going to have to give people an opportunity to do the work. It seems quite obvious but for some reason, it just doesn't happen and so I wanted to ask you another difficult question, as President Maya wanted to ask you a difficult question. It is difficult because maybe it should be posed to the Chief Justice and President Maya.

CJ C. Mogoeng: Commissioner Mpofu do not run the risk that the Minister ran into.

COMM J. Mpofu: The question is this, do you think that the Bench can play any role in nudging the State and the mainly the traditionally white firms, the big firms, because I think those are the main culprits in ensuring that black advocates and woman, black woman, in particular, get access to the kind of work which will prepare them for the Bench and the other roles in the profession.

Judge T.R. Gorven: Thank you, Mr Mpofu, Commissioner Mpofu. On a formal level, I am not sure that the Bench can do anything other than make pronouncements that this should be taking place. On an informal level what can be done, and what has been done, and what I have done is to mention to practitioners that one rubs shoulders with that they should be looking to certain of the persons that they have ignored in the past and giving work to them on the basis that let us see how they do. And you need to be part of this transformation because until people get work the transformation cannot take place. And I have done that and I have done that successfully on a number of occasions made those kinds of suggestions to practitioners with whom I rub shoulders either socially or after they have made an appearance in Court or when they have come to take a consent order in my chambers or whatever it might be. And I think certainly the Bench must be doing those kinds of things. As regards representation practitioners.

Judge T.R. Gorven: Yes. Thank you, Chief Justice.

CJ C. Mogeong: Thank you Commissioner Mpofu. Commissioner Malema?

COMM J Malema: No, I just want to make a follow-up on that on the disclosure. When you were asked that did you disclose to the parties your - that the other one nominated you, you said yes. And then you went on to explain something that was not related to your answer. So when you disclosed that the other one nominated you, what was the attitude of the other party?

Judge T.R. Gorven: Well the disclosure, why it was relevant, Commissioner Malema is because I did not, in fact, hear argument in that matter. So I did not make any decision in that matter. Ultimately the parties agreed that they would resolve it by

getting transport for those school children. That is the relevance. I did not go ahead and hear the matter. If I had gone ahead and heard the matter I would have asked the other party whether they wish to bring an application for my recusal and I would have dealt with that application.

CJ M. Mogoeng: The question was what was the reaction of the other party? Was its silence, was it an objection?

Judge T.R. Gorven: There was no objection. I – to be absolutely honest I can't recall, they seem to be very happy for me to handle it and to make that suggestion.

CJ M. Mogoeng: What raised my interest was alluding to the possibility of an application for recusal.

Judge T.R. Gorven: Yes.

CJ M. Mogoeng: I was wondering what would have necessitated that, but anyway –

Judge T.R. Gorven: What would have necessitated that is if I have gone ahead and heard the application because at that stage the hearing had not taken place. Before the argument took place, I made the suggestion and they took up the suggestion and no argument took place in the end except by way of a consent order at the end of it. But if argument had taken place I most certainly would have invited any application for recusal they might have wanted to bring.

CJ M. Mogoeng: I do not understand that if another person has got no objection why would it have been necessary to bring an application for recusal? Why would you have invited that application in circumstances where there is no objection? There is happiness?

Judge T.R. Gorven: Well, there was not at that stage a form. I did not ask the parties what is your formal response, at that stage. So I do not know what their formal response was. If the argument had continued in Court I would have asked for a formal response in which case hopefully they would have said they did not object. If

they had said they objected, then I would have said well then do you need time to bring a recusal application? And if they said yes, I would have given them time.

CJ M. Mogoeng: Yes. Commissioner Matsuku?

COMM J Malema: No, Chief Justice.

CJ M. Mogoeng: Is it a follow-up?

COMM J Malema: No, no it is my question. It is not a follow-up. You are following up on my question.

CJ M. Mogoeng: Oh I thought you had abandoned it.

COMM J Malema: No, no.

CJ M. Mogoeng: Alright, okay. Carry on Commissioner.

COMM J. Malema: No.

CJ M. Mogoeng: I am sorry I thought you were done.

COMM J. Malema: No, no, no. My interest is that he says he disclosed the relationship and then did not deal with the matter because if he dealt with the matter he would have then asked if the parties are comfortable. But you dealt with the matter -

Judge T.R. Gorven: No I did –

COMM J. Malema: No, no, no. You dealt with the matter because you told them your relationship with the other party and you did not stop there. You proceeded to give them an advice. Cause that is dealing with the matter also as a Judge.

Judge T.R. Gorven: Commissioner Malema a disagree with you. I was dealing with the matter in the sense of inviting them to consider resolving it. That's different to dealing with a matter by way of making a decision in the matter and hearing argument and that is what I did not do and that is what a Judge is called upon to do if necessary. I agree that I was using my office as a Judge to see whether or not they could take time to resolve the matter they took up the invitation without any protest from any side and they did.

CJ M. Mogoeng: Commissioner Masuku?

COMM T Masuku: Thank you, Chief Justice. Good afternoon Judge Gorven.

Judge T.R. Gorven: Good afternoon Commissioner Masuku.

COMM T Matsuku: In your answer to President Maya's question about whether or not you – I am not sure – In fact, it was Commissioner Nayambi about the pace of transformation you said that transformation is going very slowly. Do you consider the slow pace of transformation to be a threat to the legitimacy of the judiciary and possibly a threat to judicial independence?

Judge T.R. Gorven: Sorry, possibly a threat to?

COMM T Matsuku: Possibly a treat to judicial independence.

Judge T.R. Gorven: It is very hard to know what the perception of the community is as to the state of the judiciary. It obviously could be a threat if there was an untransformed judiciary over a long period of time and there was a sense that the judiciary was being stacked unevenly with certain people. Your public perception might well think that there is a problem with the judiciary and believe that the judiciary was not independent and there was some kind of skewness in the judiciary.

COMM T Matsuku: Last question, so if the where three black judges who were appointed to, who could be appointed to the Supreme Court of Appeal your answer should be easy in respect of whether or not you would be – you would give up the

opportunity to be appointed there just to advance that particular Constitutional objective of transformation. Am I correct?

Judge T.R. Gorven: Yes, if those persons can bring to the Court similar expertise and experience to me I would have to agree with that. And as I have said to President Maya it is easy, if this commission decides that there need to be three women Judges appointed well then that is the end of the matter.

CJ M. Mogoeng: Thank you. Thank you Judge Gorven, you are excused.

Judge T.R. Gorven: Thank you very much.