



# JUDGES MATTER

**Judicial Service Commission interviews**

**09 April 2018.**

**Supreme Court of Appeal**

**Interview of Judge Y T Mbatha**

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CJ M. Mogoeng: Good afternoon Judge Mbatha.

Judge Y.T. Mbatha: Good afternoon Chief Justice.

CJ M. Mogoeng: Are you well?

Judge Y.T. Mbatha: Yes, thank you.

CJ M. Mogoeng: And comfortable?

Judge Y.T. Mbatha: I beg your -

CJ M. Mogoeng: Are you comfortable and relaxed or as nervous as I have been? Or some of us have been appearing before this body?

Judge Y.T. Mbatha: I am nervous. But –

CJ M. Mogoeng: All right. Let us start at the beginning.

Judge Y.T. Mbatha: Yes.

CJ M. Mogoeng: When and where did you acquire your degrees?

Judge Y.T. Mbatha: My degree. Yes, I acquired my BProc degree at the University of Zululand.

CJ M. Mogoeng: When was that?

Judge Y.T. Mbatha: That was in 1983.

CJ M. Mogoeng: 83? So we met there? Without knowing each other or were you not a – you were not a student in 83? But 81, 82 you were there?

Judge Y.T. Mbatha: Yes.

CJ M. Mogoeng: Okay. I cannot disclose the reason why I do not remember you very well.

Judge Y.T. Mbatha: Yes.

CJ M. Mogoeng: It might be quite interesting. So –

Judge Y.T. Mbatha: Yes.

CJ M. Mogoeng: And then what happened after 83?

Judge Y.T. Mbatha: Then I served Articles of Clerkship whereupon then I worked as a Professional Assistant for a few months. And then I opened my own practice –

CJ M. Mogoeng: Yes.

Judge Y.T. Mbatha: -- In Newcastle.

CJ M. Mogoeng: Yes.

Judge Y.T. Mbatha: Yes.

CJ M. Mogoeng: And for how long in totality did you act as a High Court Judge?

Judge Y.T. Mbatha: I acted as a High Court Judge from 2005 to 2006, which were two sessions in 2005 and again two sessions in 2006. Then I returned back in November 2010 up to the time when I was appointed as a Judge on the 1st of June 2011.

CJ M. Mogoeng: And when were you – you were the 1st of June 2011 you were appointed permanently?

Judge Y.T. Mbatha: Permanently, yes.

CJ M. Mogoeng: Have everybody there including your male colleagues been welcoming? As welcoming as they ought to be or not?

Judge Y.T. Mbatha: Where? At the KZN High Court?

CJ M. Mogoeng: Yes.

Judge Y.T. Mbatha: Yes, yes. They were very much welcoming.

CJ M. Mogoeng: And they gave the support that ought ordinary to be extended to an Acting Judge and a newly appointed Judge?

Judge Y.T. Mbatha: Yes, I got the support.

CJ M. Mogoeng: When did you begin to act at the Supreme Court of Appeal and until when?

Judge Y.T. Mbatha: I started acting at the Supreme Court of Appeal from the 1st of December 2016 up to the end of November 2017.

CJ M. Mogoeng: Was it the last time you acted?

Judge Y.T. Mbatha: Yes.

CJ M. Mogoeng: How did you find the environment? Let's first deal with the environment? Was it a welcoming environment? Everybody available and willing to help? What is it you can say about the environment at the SCA upon arrival and sometime after you had been there?

Judge Y.T. Mbatha: Yes, upon my arrival at the SCA I found the colleagues that were very much keen to help and very much keen to assist. When you start there you cannot tell the first or the first few weeks how things are going to shape then you start to get to know people as you start writing the judgement. Then you can see the extent of the help and the extent of the collegiality that you receive from them.

CJ M. Mogoeng: Broadly speaking would you say everybody was very helpful and welcoming? Or not quite?

Judge Y.T. Mbatha: Yes. Not everyone, but the majority were very helpful, I would say. Which made it much easier for me to adapt, yes.

CJ M. Mogoeng: From time to time we receive comments in relation to candidates to the effect that, you know, they are not ready. They could use additional acting stints. If any such comment were to be directed your way what would be your response?

Judge Y.T. Mbatha: My response would be I do not think that I need any more acting stints. I think having the whole year spending the whole year at the SCA showed to me that I could cope with the work at the SCA, as it was an unbroken stint. And as I progressed I saw the improvement from each term compared when I started at the SCA.

CJ M. Mogoeng: Are there any areas in relation to the operations of the SCA that you would say require urgent attention? Or even if not urgent serious attention?

Judge Y.T. Mbatha: At the SCA I would say it is important that everyone should feel accepted if you are coming there as an Acting Judge. That they should accept that we have been invited by the President of the SCA to Act. That they should not decide who should be invited at the SCA.

CJ M. Mogoeng: Elaborate on that. What does that mean? In simple terms? What is the real nature of the challenge so that we can understand exactly what a concern is there.

Judge Y.T. Mbatha: Yes. In simple terms, I would say that I felt that there was some kind of a date-keeping process from a very few, very few people. Because you would hear comments that this one is not suitable to be here. This one should not have been here to come and Act. And you also see it when you have got to write a judgement because this starts even before you write a judgement. I don't mind any robust criticism of my judgement but when the criticism starts before you even write a judgement, and you get tracks the judgement is going to be taken away from you, I find that very much intimidating.

CJ M. Mogoeng: Taken away in what sense? That you no longer be allowed to write it? It will be given to someone else to write?

Judge Y.T. Mbatha: Yes. If I can elaborate. We had heard a matter, I think it was then when we started the 10th, three or two days later the presider was already asking if my draft is ready. -

CJ M. Mogoeng: How?

Judge Y.T. Mbatha: -- And my response was that it is a huge matter. It was about 17 volumes and we have just finished, and I am still preparing myself to revise for the other sittings. I was not ready. He was not happy with that. The following week the same thing happened then he threatened that he will take the judgement away from me. Before the end of that week again, then he said if I don't give him the draft he will give – I have to co-write with someone. But however, I felt strong I said, no I am going to write the judgement because all my hearings are within the first two weeks. I will be left with the full four weeks. When I am ready then I will write the judgement then I will give you the draft.

CJ M. Mogoeng: Now, was that your experience alone. Or as some as people often do during your wound licking process or exercise did it come across as a shared experience with some of the acting colleagues there? Past or present at the time?

Judge Y.T. Mbatha: We use to be more or less on the same panel with Judge Molemala from the Free State. That is where in this panel whenever we were with this particular person we would get this intimidating attitude which I found it was very – I found unsettling.

CJ M. Mogoeng: Yes.

Judge Y.T. Mbatha: Yes.

CJ M. Mogoeng: And what would you say has prepared you or how would you say you have prepared yourself for the Supreme Court of Appeal to have applied as you have now done? In your own words as briefly as you can.

Judge Y.T. Mbatha: Yes. I have prepared myself in terms of my work. In my judgements, they show that I have applied the Constitutional Principles and besides the judgements, I get on very well with other Judges at the SCA. And whenever I have got problems I approach them, and I have found that having Justice Maya as

the President at the SCA - as a female and as a person who always checks up on us on how we are doing - that has helped us quite a lot to settle in that environment.

CJ M. Mogoeng: Yes. President Maya.

PRES M Maya: Thank you, Chief Justice. Good afternoon Judge Mbatha.

Judge Y.T. Mbatha: Good afternoon.

PRES M Maya: I do not have any questions for you really. Chief Justice has asked everything I would have elicited from you. Just one thing though, did you find that in your year at the SCA you were exposed to the widest possible range of legal questions?

Judge Y.T. Mbatha: Yes. Thank you, Justice. Yes, I was exposed to the widest legal work. For instance we – I recall in a panel where the President was presiding it was a case where four female Judges were there and only one male. It was a Patent Law Judgement. I really enjoyed that one. Though I do not get that much kind of work from my Division and when Justice Zondo came for his interview here, he had said he still yet to see a judgement on Patent Law written by a female. Without knowing that on the 31st of March Justice Dambuza had penned a judgement where there were four female sitting judges, with one male, in a judgement which we all enjoyed and contributed to. So at the SCA, I found quite a lot also Administrative Law work a lot of the applications of Constitutional Principles, quite more a diverse kind of work than from the Provincial Division.

PRES M Maya: Was there anyone occasion where you felt out of your depth in the hearing of those Appeals? Where you able to cope? That was the simple answer I want to ask you?

Judge Y.T. Mbatha: Not at all. Not at all, because I do not recall where there was a matter where I felt out of depth. If I had missed a point, I would openly say I could see where I had made a mistake when we discussed in conference that that is where I missed the point. But I felt I could cope with the work.

PRES M Maya: And where you able to participate fully during Court Proceedings and during the Judges private deliberations in Chambers after the hearings?

Judge Y.T. Mbatha: Yes, I was able to even to pose questions though as an Acting Judge you are scared. You don't know whether to pose questions or not, but I was able to do so. Also at conferences because at times the Presiding Judge would start with me being the Junior Judge to first give the views on the matter. Then I would go ahead and give the views. Also at times, when I would scribe in the matter I would be the first person to be asked to give – of how I see the matter and give my views on the matter.

PRES M Maya: You even able to produce a dissent in one matter? A class action matter that raised new questions of law for our judicial system? In Mahaeane I think we sat together in that case?

Judge Y.T. Mbatha: Yes, I wrote a dissenting judgement in Mahaeane versus Mahaeane. It was about a silicosis matter where the DJP from Gauteng Justice Mahape Law, had granted a Certification Application in that matter and this related to an application in terms of PAIA. So we decented that decent that I wrote I really enjoyed it because I also got the support from the President. We dissenting against the President of the SCA and other two Judges. We did not feel any hostility. We felt that to be very much empowering as Judge Molemala also wrote her own dissenting judgement in that matter.

CJ M. Mogoeng: Thank you, President Maya. Commissioner Fourie?

COMM Fourie: Thank you, Chief Justice.

CJ M. Mogoeng: Your mic is off.

COMM Fourie: Good afternoon Judge Mbatha.

Judge Y.T. Mbatha: Good afternoon.

COMM Fourie: Judge Mbatha there is one matter that I am concerned about and which I feel duty bound to raise with you.

Judge Y.T. Mbatha: Yes.

COMM Fourie: And that is a matter where you convicted and sentenced nine accused in October of 2016 and they were sort of a syndicate with a common purpose to target automatic teller machines of Banks in KZN etcetera. Do you recall the matter?

Judge Y.T. Mbatha: The state versus Makazi and others?

COMM Fourie: That is right.

Judge Y.T. Mbatha: Yes.

COMM Fourie: Now you are - I understand you are aware all nine the accused then appealed and in respect of all of nine on the 2nd of March of this year, and I understand you are aware of that judgement the full Bench set aside the convictions and sentences in respect of all nine. You are aware of the full Bench Judgement, aren't you? And what is concerning to me is in the conclusion of that judgement the following is stated by the full Bench. And I need to have your view and insight into what is stated there because if not addressed it is very concerning. I must immediately say I have not read your judgement in the court a quo, but it says: "In conclusion, there was no reliable evidence before the Court a Quo to sustain a conviction on any of the counts and the Appellants ought to have been acquitted". If I may just pause there. The convictions included murder, attempted murder etcetera. And then the following paragraphs: "Counsel for the State has confirmed that in the Court a Quo he did not seek a conviction against the Appellants in respect of the counts set out in paragraph 4 supra. Notwithstanding this, the Learned Judge convicted the Appellants on those counts. No reasons were given why she disagreed with the submissions and concessions made by the State. In fact, the judgement did not record the concessions made by the State at all. They were ignored. In our view,

a Court declining to Act in accordance with such concessions made by the State is duty bound to explain where the State erred. In this case, this was not done. As a consequence, the first, third, fourth and fifth appellants were sentenced to three life terms of imprisonment in circumstances where the State had conceded that there was insufficient evidence against them. It is indeed so that the evidence presented in the Court a Quo raises strong suspicions against the appellants however it is trite that suspicions do not amount to proof beyond reasonable doubt". And then the order that the Appeal is upheld, and all the convictions and sentences are set aside. Could you enlighten us as to exactly what happened here, and can you deal with what I have read to you was stated by the full Bench on the 2nd of March this year?

Judge Y.T. Mbatha: Yes. Thank you, Mr Fourie. I thought we were referring first to the first to the ATM judgement which I had included that is State versus Makazi and others where there were also eight or nine, the accused the one that was confirmed. This one was also an ATM bombing it is a trial that lasted for almost a whole year, which I did at the KZN High Court. It was based mainly on circumstantial evidence. We had a cellphone evidence. We had the finding of the cartridges. Spend cartridges, ballistic evidence, informer evidence, all those kinds of evidence. There were lots of grey areas, I admit, in that judgement. It was not a clear-cut case where you would simply say I acquit or I do not acquit. What I recall in that matter is that I acquitted only accused number ten. Then when I had given judgement and conviction there were about thirty-eight counts from various scenes, various places all over the country. They made an application for Leave to Appeal. When the State tried to oppose it I personally, it is in there, judgement for Leave to Appeal that I said I want this judgement to go on Appeal because there are lots of grey areas. I would like to send this judgement to my peers so that they can look at it because I am also not certain on certain issues. On the issue that the State Advocate had conceded to certain counts not having been proofed, I justified it on the basis of the finding of the cartridges because those cartridges were linked to the same firearms that were found in the certain, or in their possession. I was alert to what the State Advocate had suggested but I applied my mind that if I include certain scenes and link them to these cartridges why should I exclude those? But it is a judgement that I was also expecting that rather than saying I am refusing Leave to Appeal as the State

Advocate was saying, that let me grant Leave to Appeal so that it can be reviewed by a bigger group, or by the three judges in a full court.

COMM Fourie: Judge Mbatha the main criticism by the full Bench is that no reasons were given why you disagreed with the submission and concessions made by the State. In fact, the judgement did not record the concessions made by the State at all and they were ignored. And that in the full Benches view declining to act in accordance with such concessions made by the State the Judges is duty bound to explain where the State erred, and this was not done. Is this fair criticism?

Judge Y.T. Mbatha: Well it could be fair criticism, but the Judgement says also why I convicted on the basis where the State was saying I should not convict.

COMM Fourie: Did you – just as a follow-up on my last question -

Judge Y.T. Mbatha: Maybe it was an oversight not to say that well as the State has suggested this is why, but my judgement encumbers that I convict in all those counts because of the findings of the spent cartridges, because of their matching with the firearms used, because of the cellphone evidence. That is how I had couched my judgement.

COMM Fourie: Just follow up and final –

CJ M. Mogoeng: A follow up – I think you are over stretching it now –

COMM Fourie: Just an issue of clarity.

CJ M. Mogoeng: No, no just to say you are over stretching it, let it be the last now.

COMM Fourie: Yes, I just want to get a clear answer from you. Did you record the State concessions and did you in your judgement deal with why you do not agree with what the State conceded?

Judge Y.T. Mbatha: No, I did not record the State concession.

COMM Fourie: Thank you, Chief Justice.

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

COMM Nkosi-Thomas: I wanted to make a follow-up question, to direct a follow-up question but on reflection, I would rather not.

CJ M. Mogoeng: Thank you. Now if anybody wanted to understand what your views are vis a vie the concession made by the State. Even if you do not deal with them directly, would it be possible for a person to understand why notwithstanding the concession, you concluded in the manner that you did?

Judge Y.T. Mbatha: Yes. Yes, Chief Justice. I did so.

CJ M. Mogoeng: Is there a principle that you can remind us of. A legal principle? That says of necessity? The concession by the State carry the kind of value that requires of a Judge to deal expressly with those – the rejection of the concessions?

Judge Y.T. Mbatha: Yes, I am not aware. But what I am aware of, Chief Justice is that any concession that has been made by counsel does not necessarily mean that the Court is bound by that concession.

CJ M. Mogoeng: Yes.

Judge Y.T. Mbatha: The Court should be independent, exercise its discretion if it needs to exercise its discretion or its mind and see how it should apply the Law to the facts.

CJ M. Mogoeng: Yes. Thank you very much Judge Mbatha, you are excused.

Judge Y.T. Mbatha: Thank you very much, Chief Justice.

CJ M. Mogoeng: Thank you.

