



JUDGES MATTER

Judicial Service Commission interviews

04 October 2017.

Gauteng High Court Division

Interview of Adv. N Davis

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CJ M. Mogoeng: Good morning, Advocate Davis.

Adv. N. Davis: Good morning Chief Justice.

CJ M. Mogoeng: Are you well?

Adv. N. Davis: I am, thank you.

CJ M. Mogoeng: For how many years have you been a practising lawyer?

Adv. N. Davis: This will be the 28th year as counsel and I had another two years as an attorney.

CJ M. Mogoeng: And for how many years have you been senior counsel?

Adv. N. Davis: I took silk in the beginning of 2006, Chief Justice.

CJ M. Mogoeng: Wow. And how did you ready yourself for the Bench? I understand that you may be a silk but not quite Bench material. That's where I'm coming from, asking you to demonstrate to us how fit and proper you are for judicial appointment.

Adv. N. Davis: Chief Justice, I have, since taking silk acted on numerous occasions. Initially, in 2006 I was part of the initiative of our Bar as well on assisting the Bench in working down a backlog then particularly in criminal appeals. So I sat in recess times *pro bono* and I've done so some time since. In the past couple of years however, I have sat in various parts of the duty roster and since 2014, 15, 16 and this year regularly been asked by our JP to act in our courts in our division both in Pretoria and in Johannesburg.

CJ M. Mogoeng: Did you find it difficult to produce judgements or was it as relatively easy as it is to write Heads of Argument or legal advice?

Adv. N. Davis: Chief Justice, I did not find it difficult. If there were difficulties it would have been in the subject matter. If the subject matter is difficult then a judge should of course, utilise all the tools to his availability including that of the counsel appearing for the parties. And you should rely on their assistance, you should ask for their assistance. And he has the benefit of the Heads of Argument and he should insist on that or even request more Heads and then to assist him in doing his own research. But after that the writing of judgements, I did not find it difficult. The prime distinction between the practice and a judgement is of course, a practitioner only has one view and as a judge you have to balance both or multiple views of the parties.

CJ M. Mogoeng: The hunger to be noticed for, and to make an impact has caused many a High Court Judge to keep judgements reserved for a long time. Want their judgements to be reportable and so on, with the result that a number of them take six, eight or even longer months to have judgements produced. Where are you there? What is the longest period you've kept yours reserved for?

Adv. N. Davis: Well firstly, Chief Justice, on the issue of reportable I was always very sceptical about some of the judgements marked reportable. It seemed as if it was only done to be noticed as you mention and as a mark of judicial humility I think one should guard against that. A judgement should only be reportable if it can contribute to the development of law or a specific point. The longest I've ever reserved a judgement I think was between five or six weeks. I've never even come close to the three-month period mentioned in the norms and standards. I tend to either give extemporary judgement or a judgement within a day or two, if I have time to reflect, so that I have time to reflect. Or, if I give a reserve judgement I will bind myself and give certainty to the parties and reserve judgement until a specific date say, for example, the next week or the week thereafter.

CJ M. Mogoeng: In both civil and criminal trials?

Adv. N. Davis: In both civil and criminal matters.

CJ M. Mogoeng: Yes.

Adv. N. Davis: I have not yet sat in a criminal trial in the High Court. I've sat in many criminal appeals, bail applications, bail review applications and the like. But in all of those, the only instance that my judgement has been delayed was when it was agreed between the three judges, if I sit in the full bench, that I write the judgement and then the other two judges might then take some time to review it or then agree or not.

CJ M. Mogoeng: Yes. JP?

JP Mlambo: Thank you CJ. Advocate Davis, this is your, is it your third time?

Adv. N. Davis: It is my third time, JP.

JP Mlambo: Yes. And thanks for availing yourself once more. I see that in your judgement spreadsheets you've acted for a total of some 47 weeks from 2008.

Adv. N. Davis: That is so.

JP Mlambo: 2006, sorry.

Adv. N. Davis: 2006, yes.

JP Mlambo: Now in that period I see that you've chalked up five weeks in the Urgent Court. How did you manage that?

Adv. N. Davis: Well firstly, JP, that's where you put me. But to say how did I manage that, I acted in the Urgent Court both in Pretoria and in Johannesburg. And how I managed it was to liaise with the senior judge. In the past, the second week before term ended, I acted again in the Johannesburg local division together with Judge Keightley. Our offices were coincidentally opposite each other and we frequently liaised and dealt with the matters as they came in. I had no difficulty in handling the Urgent Court and managing my court. I, as a practitioner, have been in Urgent Court numerous times and had the benefit of seeing how many different judges handle the Urgent Court and I took my cue accordingly and I always finalised the Urgent Court in time. If there are matters which are lengthy and which require judgements, the latest I have held over a judgement of a matter in Urgent Court was until the next week.

JP Mlambo: I see you've also done two weeks in the Third Court.

Adv. N. Davis: That is so.

JP Mlambo: What is the Third Court?

Adv. N. Davis: The Third Court in our division is where matters exceed or opposed applications exceed a length of paperwork or the estimate is that it might exceed a length of time arguing for a day or longer and then they are allocated by the Deputy Judge President to the Third Court and they are then lengthy opposed matters. The week in the third term where I sat in the Third Court in Johannesburg there – in Pretoria, there were two matters set down. The one was for the Monday which I

heard and finished on that day and the second one which was 26 lever arch files, which I had prepared on was settled on the morning and then the remainder of the week I assisted the then Acting Deputy Judge President in doing civil trials of which I recall ,I think there were two days in which I did two trials in a single day.

JP Mlambo: High Court work, you've acted and in terms of you as a senior advocate is not a problem to you, is it?

Adv. N. Davis: No, it isn't.

JP Mlambo: Have you appeared in the Constitutional Court?

Adv. N. Davis: Yes, I have.

JP Mlambo In the Supreme Court of Appeal?

Adv. N. Davis: Yes, I have.

JP Mlambo: Right.

Adv. N. Davis: My last appearance in the Supreme Court of Appeal, I think was two months ago.

JP Mlambo: Okay. Thank you, Chief Justice.

CJ M. Mogoeng: Thank you, Judge President. MEC?

Mr Nyambi: Thank you so much, Chief Justice. This is the third time that I pose question to the, to SC and I don't really want to go back to all the issues that I've raised before. I just want to know one thing. You are cited in the nomination form as the only white person that is serving in the Advocates for Transformation. I just want you to share your experiences and why you feel that other people, your counterpart are not participating in this structure.

Adv. N. Davis: I was Chairperson of the Pretoria Society of Advocates until March of this year. During that period I, as previously explained and as in the application, pushed the agenda, the transformation agenda and kept that transformation as I previously mentioned, which is not just a juncture but a train in motion, in motion. When my term ended I wanted to continue participating in transformation. At that stage Advocates for Transformation in Pretoria suggested perhaps an honorary membership to the AFT which I felt was wrong. I did not want to be a token AFT member or an honorary member. I wanted to be a real and participating member and that's why I became a member once my term ended. There are some constitutional issues as to our chairpersonship which alternate every year on the principle of co-governance between AFT and non-AFT members. So once my term ended I then joined the AFT. The fortunate thing for me in the AFT is when we have a general meeting, as we recently had regarding membership of the GCB is that although I am relatively junior in Advocates for Transformation, I am one of the senior members. And our chairperson after, well during the course of debate would then ask me to express my views as well and in that sense I can participate in continuing the transformation. On your question as to why others don't do so, I'm not sure whether I'm the only white AFT member nationwide. I know I'm the only one in Pretoria. Why the others don't do so, I do not know because to my mind all advocates should be Advocates for Transformation. That's what the name itself says. I hope I answered your question.

Mr Nyambi: Yes, thank you so much. The last brief is the point that we had last time when we interviewed you - that's a person with a legal brain that you have that in 1988, 89 you decided to serve and join the air force. That you knew it was an air force that was not representative. It was an air force that was brutal, dealing with matters of national interest. When we interviewed you last time, you didn't see anything wrong with that participation. Do you still hold that view?

Adv. N. Davis: No. I think perhaps that my answer was misunderstood. I said previously that the laws forming part of the apartheid mechanism of which the Defence Force was part of were unjust, were laws which should never have been implemented and perpetrated. What I did then as a national serviceman, as a young national serviceman always with a dream of flying – I don't think I mentioned that

previously. Then joining an air force with the perception of protecting the sovereignty of the country and the injustness of the laws did not at that stage, in that capacity as an air force member come to the fore. But I agree and reiterate that those laws and the implementation thereof and the way in which they were executed are not only constitutionally abhorrent and unjust but such an unjust situation should never again take place in our country.

Mr Nyambi: I have no further questions, Chief Justice. Thank you so much for that.

CJ M. Mogoeng: Thank you MEC. Judge President Hlophe?

JP J. Hlophe: Thank you, Chief Justice. Mr Davis, I'm going to ask you a question relating to racism in the country and the judiciary in particular. The question is as follows. Is there racism in the judiciary and if so, why in your opinion after 23 years of democracy in this country? Secondly, it's an allied question. It's related to the first. How will you, if appointed, contribute to the process of eliminating racism on the Bench? Thank you.

Adv. N. Davis: JP, I'm not sure exactly what the question is. Is there racism in the judiciary and why I am uncertain about that is in our division both in Pretoria and Johannesburg I have never experienced any racism or seen any racism. I've never seen that the colleagues or the judges act in any racist manner towards each other. I have never in the instances where I sat together with other sitting judges in a full bench or just an ordinary appeal experienced or witnessed first hand, any such conduct by any judge towards any member of the public or any practitioner. If it should happen, it should immediately be eradicated. If parties are even afraid to say so they should be encouraged or there must be then some mechanism that they can do so without fear of reprisal and it should be stamped out. On the question of contribution, the further education, if one can call it that of judges, which would include cultural awareness programmes, should be encouraged and should be increased. The contribution or increase of understanding of each other and cultures should increase and that I think, would assist in avoiding any possibility of racism. The more one has understanding of each other, the more and easier the respect and

accessibility and acceptance can be. But I have not seen, to answer your question, first question directly, racism in the judiciary; not in our division.

JP J. Hlophe: Was Mabel [inaudible 00:15:37] Jansen not a judge who was widely reported in the press as having uttered some racist statements not a judge in your division?

Adv. N. Davis: She was, I -

JP J. Hlophe: Thank you, thank you. No further -

Female: Thank you, JP Hlophe. Counsel?

Ms. T. Modise: Thank you, thank you, President, and good morning to you, Mr Davis.

Adv. N. Davis: Good morning Commissioner.

Ms. T. Modise: Have you seen the spreadsheet that the - JP has so kindly circulated to us that reflects the number of occasions you've acted in the High Court? Do you have that spreadsheet before you?

Adv. N. Davis: Yes, I have.

Ms. T. Modise: I'll tell you quickly what it says. In terms of the spreadsheet, you've acted for a total of 47 weeks. But then during that entire period not once did you appear or did you run a criminal trial. So is there any reason why you did not make sure that you get given such an opportunity knowing that you were going to make yourself available in this sort of manner?

Adv. N. Davis: Initially, when I started acting in the earlier years there was no method of thinking that I will act in order to prepare later for judicial appointment. Then it was primarily to assist the Bench as and when needs required. Later, when I was nominated and I acted with the prospect of being nominated and appointed I was, I performed the duties as allocated. On the issue of criminal matters, there was also a

question regarding my criminal capacity at a previous interview and I mentioned that I had experience in criminal matters both as an attorney and as counsel. And in fact, the first of my reported judgments was a criminal appeal and initially, when I started practice when the death sentence still had to be reconsidered in South Africa, I appeared in the SCA in criminal appeals -

Ms. T. Modise: I beg your pardon.

Adv. N. Davis: ...13 times.

Ms. T. Modise: Please, sir, really I beg your pardon. May you please focus on criminal trials because it's a [inaudible 00:18:00] critical skill for a sitting judge?

Adv. N. Davis: I have not sat as a judge in criminal trials. I believe however, with the criminal practice experience I am competent to do so.

Ms. T. Modise: Thank you.

Female: Commissioner Mpofu.

COMM. D. Mpofu: Thank you very much. Good morning.

Adv. N. Davis: Good morning, Commissioner.

COMM. D. Mpofu: Thank you. Yes, now I just wanted to ask you some, one little aspect. I've known you for a long time as somebody who's quite active in the affairs of the GCB, which I represent here and AFT as well. And I just want, you know, and maybe some people don't understand the level of sacrifice that that involves and the amount of time it takes sitting away from your practice while other people – like sitting here for a week while other people are making money. Speaking for myself. But you know, what strives you to be an activist in that sense and can you just touch on really what it entails for a busy practitioner to make those sacrifices for the sake of the profession?

Adv. N. Davis: Well, as you know, Commissioner, the profession, the advocates' profession, the referral [inaudible 19:32] profession is a voluntary association so it runs and manages itself. So that means that there are Bar Councils of the constituent Bars all over the country and they are under a chairperson and deputy chairperson as leaders. They deal on a weekly basis with all aspects of their members. We have, I think, 640 and your Bar, I think, will be double that and all those members are accommodated in chambers. And in various aspects of life in chambers and practice have to be dealt with, which ranges from accommodation, rental, collection of levies, termination if it comes to that. To discipline, to administrative functions and then also, the transformation issues, which deal with the entry to the Bar. The assistance in our instance of bursaries and mentorship in Limpopo and Venda, at the universities there. The engendering of or a garnishing of pupils, the training of pupils, the enhancements of the participation of particularly black and female pupils in that to make the entry to the Bar, transformative and to progressively reflect the demographics of the country. That means that a member of a Bar Council gives up two, three, four, five, six depending on hours per meeting per week. Sometimes assist other work during the course of the week and the same goes on with Advocates for Transformation, which is not a parallel structure but also as a parallel function for particularly its members. I recall Commissioner Cane, last year and the year before her Bar Council had to deal, your Bar Council had to deal with numerous disciplinary matters pertaining to RAF trials in which there were Bar Council meetings I think once a week and disciplinary meetings once a week. So that's twice per week that council gives up own time to serve the profession and the profession is then also serving the administration of justice. The time is actually the biggest one. Both myself, yourself and Commissioner Cane having been chairs of a Bar one finds that once that term ends you almost get a third of your time back for your own practice.

COMM. D. Mpofu: Yes, thank you. Now related to that if you don't mind me asking you this because you might have a special vantage point as a white person, if you don't mind me saying so, or a white practitioner. Having been active in efforts to transform the profession as you have been, you know the level of resistance that one finds both among practitioners themselves, attorneys, clients and so on, why do you think that or what are we doing wrong? Why is it not registering on people that, for

example, if you transform the profession you are transforming the future Bench and enriching the country and therefore, where in your experience does the resistance come from?

Adv. N. Davis: Commissioner Mpofo, I don't exactly know. I'm constantly amazed by resistance. I was amazed when I came to the Bar Council that one has to push for transformation, to use the word push. One would have expected it to have been natural. To me, it comes natural it must follow. It, as you say, enhances the whole of South Africa. If there is resistance then of course, the way to overcome the resistance is to show that it is wrong and then to embark on activism as you say. If a push is to transform the bar to start with entry, to start with the increase of the number of females to apply for senior counsel, for example then one has to actively do so. I have done so when I was a chair and that is what I am still doing, as a member of the AFT. I encourage, for example, black females to apply for silk. Their own reasons as to why they don't is personal pertaining to their practice. But if it comes to a point where the transformation is not acting fast enough or with sufficient enthusiasm then one has to take positive steps such as the AFT now considering leaving the GCB. Not actually considering, they took the decision to leave the GCB because of the resistance to transformation.

COMM. D. Mpofo: Thank you, President. Thank you CJ,

CJ M. Mogoeng: Thank you, Commissioner Mpofo. Minister?

JM M. Masutha: Advocate Davis, good morning.

Adv. N. Davis: Morning Minister.

JM M. Masutha: I must be frank and say that I am genuinely concerned about especially your emphatic response to questions relating to the existence or otherwise of elements of racism within your division. But perhaps let me start with this question. Are you confining your emphatic statement that you are not aware of any such tendencies to the Bench or would you even go so far as to venture into saying

that even at the Bar in the years that you have practiced you have not observed such?

Adv. N. Davis: Minister, yes, I had forgotten about Justice Jansen. She had never however, in my presence conducted her - as she did later expressed in any of the [inaudible 25:42] sentiments. What I mentioned was I have never personally amongst any of the judges –

JM M. Masutha: Wait just a minute and just dealing with that specific matter. Does it have to be displayed in your presence for you to observe its existence?

Adv. N. Davis: No. But –

JM M. Masutha: Or is it adequate?

Adv. N. Davis: No. I haven't heard her express or having heard anyone tell me before it was made public that she had such sentiments or expressed it. Of course it need not be in one's presence. I haven't heard any such comments about any other member of the Judiciary of our Bench.

JM M. Masutha: You see what concerns me is that that matter is recent, very recent. Widely publicised and you were very quick actually to relate to it when prompted specifically. And I'm not sure whether you, it could be that you did not take time to reflect on your experiences but you were a bit too quick to respond without taking a step back and reflecting, you know on your memory properly. But we want to just clarify that – I'm a bit lost...

Adv. N. Davis: Sorry, Minister [inaudible 00:27:04].

JM M. Masutha: ...given the recent nature of the matter.

Adv. N. Davis: Yes. Perhaps I put her conduct and her out my mind and that's why I did not remember that. If I were to reflect, I have more actually heard reports to me as chair at the Bar without people mentioning names and as AFT member about

practitioners resisting transformation. I'm not sure whether they meant resisting change or whether it is transformation. I was concerned about recent events, if you talk about reflecting on recent events of the almost recalcitrant manner in which the AFT's decision to leave the GCB because of the slow pace of transformation was dealt with by some senior colleagues in memoranda without taking cognisance of the position of the AFT. Without taking cognisance of perhaps dissatisfaction by black counsel of changes in the way the GCB ran matters. If I might take another moment to reflect on the Judiciary except for Judge Jansen, I cannot now recall any other accusation even conveyed to me about any other member of the Gauteng Bench.

JM M. Masutha: And this perception of the absence of this phenomenon within the Gauteng Bench struts [inaudible 29:07] throughout your career or are you referring to more recent experience? I'm just trying to get a sense of whether you're saying that...

Adv. N. Davis: No, that will be...

JM M. Masutha: ...there has been transformation to the extent that this tendency has been uprooted or are you actually saying that for the balance of your career as a lawyer in Gauteng you have not experienced it?

Adv. N. Davis: No Minister, I was talking about the current situation.

JM M. Masutha: And this finally, Chair, a second question from me relates to an utterance which was made by a prominent person when prompted to clarify on the issue of the history of apartheid and colonialism where she, in attempting to clarify her thoughts indicated that it is, that apartheid and colonialism were evil. But that not everything in their legacy, the legacy that they left behind was bad. If a similar question was put to you what your views are about whether everything about apartheid and colonial legacy was bad. Would you agreed with that or would you hold a view that not everything was necessarily bad?

Adv. N. Davis: I don't think I'll agree with her statement. I think if there were benefits it would have been coincidental or incidental but if one were to treat what she

referred to as benefits it's almost as if saying these fruits from the tainted tree don't taste as bad. If it is a tainted tree then one should rather say if there had not been any tainting, if there had not been the abhorrence of apartheid, if people had not been disenfranchised, what would the position then be? For example, I have clients who - in the taxi industry and if one goes through that history one sees that that is an industry where entrepreneurship and making money if one can call it so bluntly survived, despite the apartheid system, which placed even the transport industry in a certain category or manner. So I think I'll stick to my answer to say, I don't think, I'll say well the fruits aren't that bad. The tree is tainted, the tree is tainted the fruits are equally.

JM M. Masutha: Thank you, Chief Justice.

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

COMM. T. Norman: Thank you, Chief Justice. Good morning, counsel.

Adv. N. Davis: Good morning, Commissioner.

COMM. T. Norman: I just want to read to you the recommendation from the GCB. In its recommendation, it appears in book 1 of 2. Oh, you'll have it loose there. It's a loose document. They say in paragraph 8, the candidate is white. Are you looking for it? Okay. Sorry, just -

Adv. N. Davis: Sorry, Commissioner.

COMM. T. Norman: Yes, it will be on page...

Adv. N. Davis: Which page?

COMM. T. Norman: Page 7, paragraph 18, 1-8.

Adv. N. Davis: Yes.

COMM. T. Norman: And they say, “the message that the candidate’s appointment would send to the community at large, the candidate is white. The public may view his appointment as a failure to transform the Judiciary. However to members of the profession the candidate’s appointment would send a message that white males who contribute to transformation and have a thorough knowledge of the law are not ignored.” Do you share that view?

Adv. N. Davis: I share that view except I would wish to add to that that apart from the GCB apparently that’s also a view shared by my black colleagues who have nominated me now again and previously and there’s a letter of support. But also by the BLA and you will find their support under BLA on the last page of their recommendation.

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

Adv. N. Davis: Thank you, Commissioner.

CJ M. Mogoeng: Thank you, Commissioner Norman. Commissioner Cane?

COMM. J. Cane: [Inaudible 00:34:06]. We have all read the transcript of your previous interview before this Commission and also the various documents before us have indicated that it was during your tenure as the Chairman of the Pretoria Bar Council that the Bar Council established a policy of admitting 60% black pupils to the Pupillage Programme. So that is something of which we are aware. But that most people here would be not be aware that the person who preceded you as the first female Chair of the Pretoria Bar was Ms Makubela and she in her annual report which served as inspiration to me, complimented a number of her senior colleagues for the unexpected level of support, respect and confidence that they vested in her. And those seniors included [inaudible 00:35:13] Bala, [inaudible 00:35:16] and they included you. Can you describe to the Commission in what way you supported Ms Makubela in what was an unprecedented step for the Pretoria Bar of taking on not only its first female Chair but its first black female Chair.

Adv. N. Davis: Well, let me first just correct something. It was not that we said 60% should be black. In fact the, it started before that when it was 50% and then increased and increased. The position I pushed for was a progressive increase to say it should not be less than 60%. And in fact, there were other members of the AFTERNOON, which I agreed which even wanted it more to 70% or 75%. And Ms Makubela was my, I was her deputy and we served both on the Bar Council before that when I was a deputy. If you ask what level of support well, every position made by her or by the AFT which were transformative in nature I supported. In every instance where she wasn't available to perform a function or to chair a Bar Council then of course, I chaired and continued in the same way. We worked very well together. We had similar views, and I was proud to be her deputy. It was a laudable thing for our Bar to have a black Chair, a lady Chairperson. And she acquitted her well of her task and we worked well together.

COMM. J. Cane: Thank you. Thank you, Chief Justice.

CJ M. Mogoeng: Thank you Commissioner. Commissioner Msomi?

COMM. S. Msomi: Just one question from me, Advocate Davis. You have been practice for 30 years and you have seen the bad, the ugly when it comes to the development of our jurisprudence in this country. The Constitutional Court has in recent times handed down very, very interesting judgements. Which judgement stands out for you? Why? And how does that judgement that you really see as a significant one develop our jurisprudence as a constitutional democracy 23 years later? Thank you.

Adv. N. Davis: It's a difficult question. Last year at the farewell function of the previous Deputy Chief Justice, Justice Mosoneke I had the duty and honour to say a number of things introducing him and about him and what I did was I made a page of statements which read as if a speech regarding the rights of dignity of equality, various instances and rights contained in the Bill of Rights. And at the end of the page, I said, "These are not my words, these were the words of our Deputy Chief Justice" because I extracted them from his judgements. So it's difficult for me now to pick a specific one. In the matter dealing inter alia with customary law issue even

only peripherally of the Bakgatla [inaudible 38:49] Tribal Authority and their community association and dealing with the interpretation of Act, there is yet again another quotation by Deputy Chief Justice Moseneke regarding the interpretation of statutes. And if you talk about development of law as you asked your question, an important development of law is not only the Constitution itself. But what he said was, if we now interpret any other Act and before even getting to the Section 39 development of the common law and the customary law our point of departure even though we have the words of the Act and the language of the Act to read, even if it is unambiguous, the point of departure should be a purposive interpretation of that Act in terms of the values of the Constitution. And then he went further to say, and that purposive interpretation must of course then be in context. So the Act must be contextualised as your question also from what came before. The bad and where we are now and where we should be in interpreting any Section in any Act. And that to me is a direction given decision of recent times. I think it was a 2015 / 2016 decision.

COMM. S. Msomi: Thank you.

CJ M. Mogoeng: Thank you, Commissioner Msomi. Commissioner Schmidt.

COMM. H Schmidt: Thank you Chief Justice. For the purpose of my own clarity. Since March 2017 are you still a member of the Bar, Johannesburg Bar or is dual membership not acceptable?

Adv. N. Davis: No. Dual membership is of course acceptable. I'm a member of the Pretoria Bar since March 2017. I'm no longer the chairperson of the Pretoria Bar and I am an ordinary member of the Pretoria Bar and then the Advocates for Transformation.

COMM. H Schmidt: Then a second issue. It is a bit concerning that you do indicate that there's a resistance to transformation.

Adv. N. Davis: That is – yes.

COMM. H Schmidt: Now from your position where you would have experienced it first hand, your knowledge or your reasons perceived or otherwise as to why that resistance - is there a vested interest for resistance to change, resistance to transformation? What are the reasons? Thank you.

Adv. N. Davis: I think they're both. I think the resistance to change and to some extent the resistance to transformation. For example, if I take the pupillage issue, entry to the Bar. Of course if one wants to transform the bar you can remove members, existing members to change the composition of the Bar. What you can do though is from now onwards you change the entry to the bar and the future composition of the Bar. And if we then – Ms Makubela previously before me and me and our Bar Council then decide on the number or percentages of for example, black or female pupils then we enforce that and we make a decision and we say, this is the decision of the Bar Council. So transformation is then imposed. Those who oppose that wanted to say, well, as I perceived it, say that it should be a pure [inaudible 00:42:10]. It should be whatever the criteria is whether it's in a written exam or other exam pure [inaudible 00:42:17] and whatever ends up for the best will be the best advocates and the best for the Bar. But that loses sight of the fact that there are pupils or members or practitioners even having been attorneys wanting to come to the Bar from different backgrounds and a pure [inaudible 00:42:33] will not assist transformation. So the answer to your question, yes, I believe that the resistance was perhaps changed but also transformation- wise and I believe it was wrong and the solution then is if it doesn't happen voluntarily is to impose it.

CJ M. Mogoeng: Thank you, Commissioner Schmidt. Dr. Motshekga?

Dr. Motshekga: Would you agree with me that the injustices facing our people relates to both human which are individual and peoples' rights? And that in this country we seem to attach more importance to human or individual rights than people's rights?

Adv. N. Davis: I think it's not a simple answer to say yes or no. Let me take the position of the Bakgatla case again. Yes, there are individuals. Yes, there were individuals which were previously under certain instances of customary law prejudiced when say a tribal authority who could [Inaudible 00:43:55] or could

impose measures in customary law against females. Yes, that's individual. But that case again, illustrated the other side as well. It was about a community exercising their rights. A community asserting even land and rights to minerals and income and how to function as a community. It was a community then who registered a voluntary association to address those rights and it was that community's rights which were dealt with by the court. So I don't think it's a simple answer Commissioner, to say, yes, only individuals and not communities or larger society. I think depending on the circumstances, both.

Dr. Motshekga: If we, you agree that communities would fall under the definition of people, how would you explain the fact that each and every criminal is entitled to legal representation? And communities that have lodged land claims in 1998 have no representation even today And land dispossession being a root cause of injustice in the country. Would you say a constitution that creates such a situation delivers justice to the people rather than individuals?

Adv. N. Davis: It should never be that any party where there is an individual or as a part of a group whether he represents a community or whether he's even an arm of government should if he chooses to be or chooses to do so, not be represented in any court in the country.

CJ M. Mogoeng: Thank you, Prof. You are excused, Advocate Davis.

Adv. N Davis: Thank you, Chief Justice.