



# JUDGES MATTER

## Judicial Service Commission interviews

05 October 2017

### Free State Division of the High Court

#### Interview of Adv. P J Loubser

**DISCLAIMER: These detailed unofficial transcripts were compiled to the best of the abilities of the monitor. However due to capacity constraints they have not been fully edited. We have therefore made the video recordings available that were taken during the interviews available. Those wishing to cite or quote from the transcript are encouraged to check accuracy with reference to the video file.**

CJ M. Mogoeng: Good morning, Advocate Loubser.

Adv. P. Loubser: Good morning, Mr Chief Justice.

CM J. Mogoeng: Are you well?

Adv. P. Loubser: I'm well. Thank you, Mr Chief Justice.

CM J. Mogoeng: Thank you. Thank you. Are you relaxed?

Adv. P. Loubser: Yes, I am. Thank you.

CM J. Mogoeng: Okay, all right.

Adv. P. Loubser: Thank you.

CM J. Mogoeng: Tell us why you believe it is your turn? It's – you are ready and this is the right time to appoint you? In your own words, based on your experience, your acting stint and any other thing that you consider relevant, briefly but pointedly?

Adv. P. Loubser: Yes, Mr Chief Justice, and honourable members of the Commission, every time I came to the occasion rather late in my life. I think the reason for that is that I never had ambition in the sense that I wanted to push myself into high positions. I firmly believe that when the time comes, one will be aware of it

and when I did my time as an Acting Judge, during the first term of this year, I felt comfortable in the job. I wasn't doubtful and I felt that I had the experience to be a judge. And on the insistence of other people, colleagues of mine and so on, I came to the point where I made myself available. And as I said, Mr Chief Justice, in the last paragraph of my application papers, I said that I'm not making this application because I'm obsessed with the idea of becoming a judge. I'm making this application because I think it is the proper thing to do for any responsible citizen of this country who feels and is comfortable with the idea that he's got the experience and the little skills that are necessary to be a judge. That is why I decided to make myself available.

CM J. Mogoeng: And for how many years have you been senior counsel?

Adv. P. Loubser: Not for long, Mr Chief Justice, only for almost a year.

CM J. Mogoeng: And before then you were practising for how many years?

Adv. P. Loubser: For 26 years, Mr Chief Justice.

CM J. Mogoeng: What took you so long to become silk? What explains the delay in taking up silk?

Adv. P. Loubser: I was comfortable in my position of not being a silk. But eventually I felt, I got the idea and maybe I was totally wrong. I got the idea that maybe a judge would listen more attentively to a senior counsel. I found myself in the position for almost ten years I would say, where on – almost on a daily basis I appeared against KC's in Lesotho, SC's in Lesotho and in South Africa. But eventually I thought maybe the time has come now for me to also apply to become a silk, to get that extra weight in court that is why I then made the application.

CM J. Mogoeng: Were you not concerned that taking as long as you have taken to become silk could give rise to the unfortunate impression that you didn't have what it takes to attract the quality work that a silk ought to attract if you do become a silk? Were you not worried about those inferences or that cynicism, if cynicism it would be?

Adv. P. Loubser: Not at all, Mr Chief Justice, that awareness never came up in my mind.

CM J. Mogoeng: Yes. Thank you, JP?

Ms. Maya: Thanks, CJ. Good morning.

Adv. P. Loubser: Good morning, Madam Judge President.

Ms. Maya: How are you?

Adv. P. Loubser: I'm well thank you and yourself, ma'am?

Judge President Maya: I'm fine, thank you. How long have you acted in the – not only in our division or just indicate the periods during which you have been appointed as an Acting Judge, whether in our division or in any other division?

Adv. P. Loubser: No, I only acted in the Free State Division for about a month.

Ms. Maya: For one month?

Adv. P. Loubser: That was from the end of February until the end of March.

Ms. Maya: One of the comments from one of the professional bodies is that you do not, you have not acted sufficiently. What is your comment about that?

Adv. P. Loubser: Madam, Judge President, yes that can be said because it's a reality. I only acted for one month but on the other hand, I think that people, who are qualified to become judges and to have the necessary experience and the skills to become judges, don't need that qualification of having acted necessarily. And I think in my specific case, as I have said before, from the moment that I sat on the Bench at the beginning of the year, I felt comfortable. I did not feel uneasy and I could feel that my experience through all these years is assisting me.

Ms. Maya: Yes, in that period of a month, how many criminal trials were you able to finalise? And I'm not talking about where there was a plea of guilty?

Adv. P. Loubser: Yes.

Ms. Maya: A full blown criminal trial; how many did you do?

Adv. P. Loubser: I haven't been allocated any criminal trials during that period. I sat in two criminal appeals with Judge Reyners [inaudible 06:36].

Ms. Maya: But in your practice, please, correct me if I'm wrong, you specialise in civil work, not in criminal work, don't you?

Adv. P. Loubser: Yes, I actually do much more civil work than criminal work although the criminal work does come up now and then. But only in exceptional cases.

Ms. Maya: You don't have to agree with me. Don't you think that you would need another acting stint; if not two or so just to have the necessary exposure to criminal work seeing that it's not your speciality in your practice?

Adv. P. Loubser: Yes. I think one must just be mindful that my background is a background of criminal practice in the sense that I was in the prosecuting authority for a number of years at the beginning of my profession and I have that background of criminal work. And thereafter, I appeared in many criminal cases. For instance, in

the so-called Barbie case in the Pretoria High Court, I was briefed there to appear on behalf of the two accused. Advocate Dirk Prinsloo and Advocate Visser and –

Ms. Maya: But you have, oh sorry.

Adv. P. Loubser: Yes.

Ms. Maya: But you have not presided over a criminal trial, have you?

Adv. P. Loubser: No, no. No, I haven't presided during my stint as an Acting Judge.

Ms. Maya: Thank you. Thank you, CJ.

CM J. Mogoeng: Thank you, JP. Just a quick one on the experience you already have. Part of the challenge is this and an acting stint helps us to satisfy ourselves. We have people who have been senior counsel before others with a lot of experience who just can't finalise judgements on time. Some of them are before the Judicial Conduct Committee now. But when you act, a JP, and we, when we interview you will be able to say, "Oh, this one was able to produce judgements on time." Don't you think with that perspective, it might be a bit of an impediment or a challenge rather to be recommended for appointment without knowing in advance whether you'll produce judgements over a protracted period of acting, on time?

Adv. P. Loubser: That may be so, Mr Chief Justice, I concede that but may I respectfully point to the judgements that I have attached to my application?

CM J. Mogoeng: Yes.

Adv. P. Loubser: And I respectfully that those judgements will show my background and my experience to deal with even very complicated matters.

CM J. Mogoeng: Yes. Thank you. MEC?

MEC Mashinini: Thank you, CJ. Just – morning, Mr Loubser.

Adv. P. Loubser: Good morning, Mr Commissioner –

MEC Mashinini: How is the morning to you?

Adv. P. Loubser: I'm well thank you, Mr Commissioner.

MEC Mashinini: Good, good. Just one or two questions. The first one. Why did you wait for 26 years before you can think of applying to become a judge? You said you had 26 years' experience? Why did you [inaudible 10:12] time because I thought that you must have gained a lot of experience to become a judge, to apply for a judge?

Adv. P. Loubser: Yes.

MEC Mashinini: Why now? Why not four years or five years or ten years late, earlier?

Adv. P. Loubser: Yes, Mr Commissioner, that is a good question. But I want to motivate my response as follows. I've said before that never in my life I have tried to push myself into important positions. That is not my personality. That is not my style. But when other people came to me and said to me, "We think that you have the qualities to go there." Then I decided to take the step and to make the application. One of our previous Prime Ministers in this country has said that a leader is not somebody who makes himself a leader or who tries to be a leader. He is pushed upwards by his compatriots and I think that was my attitude.

MEC Mashinini: You acted for, is it one month?

Adv. P. Loubser: Yes, Mr Commissioner.

MEC Mashinini: Do you think with acting with that one month, you have necessarily acquired the skills of being a judge?

Adv. P. Loubser: I think so, Mr Commissioner?

MEC Mashinini: Within that period of one month?

Adv. P. Loubser: Yes, Mr Commissioner, I have no doubts about that. As I say, I've been in private practice for more or less 26 years. I know the procedures in the High Court. I know the procedures in the application proceedings, in civil proceedings, in the criminal proceedings and as I said, when I took up the position of an Acting Judge, I never felt doubtful in any way. I never felt uneasy. I was satisfied that I could do the job.

MEC Mashinini: I didn't want to pursue this point but I want to mention it to you. I want to put it to you to say you indicated that until other people came to you and said that, could you consider, I want to believe, to apply for a judge. Why do you have to be told by other people and not look at the interest of the country?

Adv. P. Loubser: Well, Mr Commissioner, I think I am looking at the interest of the country because I think I've reached the stage with my experience and on the insistence of other people, I've reached the point where it would be a responsible step from my side to offer my services and my experience to my country. I think that is the proper thing for any responsible citizen to do.

MEC Mashinini: Thank you, CJ.

CM J. Mogoeng: Thank you, MEC.

COMM. J. Malema: CJ, I want to make a quick follow up.

CM J. Mogoeng: Okay.

COMM. J. Malema: You quoted a Prime Minister. I want to read that Prime Minister. So if you can just refer me to – give me a name, the date of the speech and all that so I can go and read further what you said about that Prime Minister.

Adv. P. Loubser: I cannot say, Mr Commissioner, when it was said and where it was said. But the Prime Minister was Mr Joh Vorster.

COMM. J. Malema: Thank you very much, I knew that.

CM J. Mogoeng: Judge President Hlophe.

JP J. Hlophe: Thank you, Chief Justice. You have enormous experience as a practitioner. Share with this Commission, what steps have you taken to transfer your skills, particularly to African women in the profession.

Adv. P. Loubser: Yes, Mr Judge President, as you will notice from my application papers, I appear in the Lesotho Courts in a more than regular basis. The system is somewhat different in Lesotho because there is no distinguish – there is no difference between attorneys and the advocates.

JP J. Hlophe: I'm sorry, Chief Justice, we are talking about South Africa. You want to be a judge in this country.

Adv. P. Loubser: Yes.

JP J. Hlophe: Let's talk about South Africa.

Adv. P. Loubser: Yes, Mr Judge President, I did not have the opportunity for women but black, black people, I did, black men.

JP J. Hlophe: Can you elaborate perhaps for the record?

Adv. P. Loubser: Yes. Mr Judge President, some years ago about five years ago I was approached by the Bar Council to take on a black pupil to be in his mentor in the Bar. And I took him on and we worked hard and he didn't make it the first time but the second time. I insisted that he stay with me because I knew that this man had to become an advocate because I was serious about transformation. And as far as I'm concerned, transformation starts with numbers. You cannot speak of transformation in the Bar Council and in other instances where a legal life is concerned. You first have to get the numbers and the second time around, this man did make it and he is now flourishing as an advocate in the Free State Bar. I think of another man, who wasn't a youngster when he came to the Bar. In fact, he was a member of the Council of Traditional Leaders here in Pretoria. He came to the Bar. He was allocated to another senior member in the Bar to be his mentor and so it went on. But then only one month before his final exams, the Bar Council approached me and

said to me, “There is a problem between this pupil and his mentor at this very late stage. They don’t see eye to eye and this pupil is very much concerned about the fact the he did not get sufficient practice, exercising and sufficient teaching to pass the exams.” And they requested me to take him on board, to take him over. And I jumped at the opportunity and as I say, it was only one month before the exams and we sat after hours, me and this man. We sat after hours and I quickly realised that his skills in legal writing were lacking. And in the end, we sent him into the examinations and he passed and it gave me a great feeling of satisfaction that I could make a contribution in that sense. Today, he’s a respected member of the – a practising member of the Free State Bar and I am very proud of him.

JP J. Hlophe: Justice, my second question is this. Let me put the following to you. There is racism in the country. There is racism in the profession and there is racism on the Bench. Do you agree with me?

Adv. P. Loubser: Absolutely, Mr Judge President.

JP J. Hlophe: Were this Commission to appoint you for a permanent appointment to the Bench, what steps would you personally take to assist the leadership of the Bench to address the issue of racism in the profession and on the Bench in particular? Thank you, Chief Justice.

Adv. P. Loubser: Mr Judge President, I will certainly take all steps that are available to me. Any steps that I identify as steps where I can make the contribution to get rid of this thing of racism. Can I mention that I regard my whole life and especially my professional career as a journey in trying to understand? Trying to understand people of other culture, people of other tradition because where I grew up in the apartheid era, I grew up in a white box and other cultures found themselves in black boxes. There was no interaction between the two of us. And I remember that in trying to understand, even as a school boy, if I can go into that for a second or two. I started that journey of understanding. My father was a Minister in the Dutch Reformed Church and they had a practice there that whenever black people want to attend a funeral service of their white employer, they had to approach my father in order to get his permission to enter the church building. And on every occasion, he would grant that permission but then with a condition. They must sit at the back of the church or they must sit up there in the gallery and I couldn’t understand it because according to my understanding, the blessings and the love of the Lord is for all people, regardless of colour or race. And Heaven is for all people regardless of

colour and race and I took up that point with my father when I was at high school and I said to him, "I don't understand this, please explain to me this system that you have in your church?" And his explanation, I remember that very vividly. His explanation to me was, "Yes, but what I say is the truth." But if he throws open the doors of the church and all the black people come in, it would scare off the white members of the congregation. And I said to my father, "But wouldn't you then rather say, Praise the Lord because the church is full? Or even if there is not one single white face in the church left. Won't that be your attitude?" And I say this today in honour of my late father that he had the courage to listen to a school boy. He had the openness of mind to take notice of what I was saying and not long after I left school, in fact, he extended an open invitation to all colours, to all races to attend his church. That is where my journey started and it continued when I went to the Transkei in later years and when I went to Lesotho in later years.

JP J. Hlophe: Thank you [inaudible 21:17].

CM J. Mogoeng: Thank you, Commissioner Mpofo?

COMM. D. Mpofo: Thank you, CJ. Mine is very short; two questions. One is a follow up on the – good morning. Sorry, good morning, Mr Loubser.

Adv. P. Loubser: Good morning, Mr Commissioner.

COMM. D. Mpofo: Yes, a follow up on this issue of – you said you tried to understand other cultures and I see that like me, you were born in East London?

Adv. P. Loubser: Yes.

COMM. D. Mpofo: And practiced some in Umtata and you're the King's Counsel in Lesotho and so on. Can you speak any Xhosa or Sesotho?

Adv. P. Loubser: I can say, temela tati legai [language]. Yes, but I can't take it much further than that. Mr Commissioner, I read the scriptures and saying that all of us receive certain gifts from the good Lord and certainly, I haven't received the gift of languages. But I think that I've compensated for that to the extent that I say in all honesty today, as I sit here, I have many more friends in the black community in Lesotho than I have in my own white community. And I am honoured by the fact that the President of the Court of Appeal of Lesotho, Dr Mosito, whenever he comes across me outside the court, he hugs me and he says, he calls me, "My brother" and I take great satisfaction in that. It is a –

COMM. D. Mpfu: Okay, thank you. So you also take great satisfaction that all your friends and brothers that you hug, for you to interact, they have to speak your language but you can't speak their language?

Adv. P. Loubser: Yes, but, Mr Commissioner, you know, I've learnt through my professional career that my black brothers in this country are in fact, very kind, very understanding and full of assistance. And I have never encountered one single moment where it was held against me by my black friends in the black communities, where it was held against me that I could not speak their language. And I must say I've tried to speak the language but I never succeeded in doing that.

COMM. D. Mpfu: All right. Sorry, no – okay. Let's leave that and now, can you tell us under what circumstances did you leave the Eastern Cape? Can you give us the story there?

Adv. P. Loubser: Yes. I regard that as a sad story, Mr Commissioner. I was a State Advocate in Umtata and one day, I was allocated a case where I had to prosecute one of the leaders of Umkhonto weSizwe in the Transkei on charges of high treason and sabotage. And all I had against this gentleman was a confession; a written confession that he had made to a magistrate and he disputed that confession in court saying that he was forced by the Transkei police at that time to make this confession. And he said he was held in a cell where the flushing system of the toilet operated by means of a chain. And he said every day that chain was put round his neck and he was suffocated until he agreed to go and make the confession. And in rebuttal of those allegations, I, as the State Prosecutor called several high-ranking officials of the Transkei police to testify that this man is not telling the truth because the flushing system is operated by pushing a button. There is no chain in that cell. And when the judge eventually adjourned the court after two or three weeks of having a trial within a trial, to determine the admissibility of the confession, he adjourned the trial for about a week to prepare his judgement and on the day before his judgement, I became very, very concerned about this whole issue. Because, Mr Commissioner, I've learnt in my years in the Transkei that all people who commit crimes are not necessarily common criminals. Many of them commit crimes because of an idea, because they are fighting for the rights of their people. And I thought by myself, isn't this perhaps an instance where this man had done something wrong, fighting for his people and I thought but of course, that is what happened because he's a leader in Umkhonto weSizwe. And what I did, when I

became concerned like that is I took my car and I drove up into the mountains to that remote place where he was detained and where that toilet was. And I walked into that toilet and, Mr Commissioner, I was shocked and I was amazed to see that in fact, there was a chain hanging from the flushing bell of the toilet. In other words, the truth was not spoken by my police witnesses and the following morning, when the judge entered the court with a bundle of papers containing his handwritten judgement on the admissibility of the confession, I stood up before he could speak a word. And I said to him, "My Lord, I have something to disclose to this court. I drove to that police station and there is in fact, a chain." And he immediately adjourned the court for ten minutes. He came back and he said in the circumstances because of my disclosure, he's not going to allow the confession. Since I had no other evidence, I closed my case and the man was summarily dismissed and outside there were great celebrations going on because of his acquittal. And then some three to four weeks later I had to appear before a Commission of two Attorney Generals, in an interview for a promotion. And when I entered the interview room, I saw that there were records of proceedings on the table before these two Commissioners and as I sat down the first thing that was said to me was, "We have taken a look at the record of the case in so and so and we want an explanation from you, why you had stabbed the state case in the back by making that disclosure to the court? Why did you not keep quiet because the man didn't do well in cross-examination? Your police witness testified well. That confession would have been allowed had you not stood up and made that disclosure." And I said to him, "Sir, I'm very sorry, my explanation is that I'm an officer of this court. I have to go and sleep at night with my conscience." The death sentence at that period of time was still in full force in effect. And the charges being high treason and sabotage, this man was heading straight for the gallows, had that confession been allowed. And I told him that, "Sir, should anything of the kind happen again, I will do the very same again." And he remarked to me that I – his words were and I will never forget it. "I take a dim view of your attitude." And then I decided that I could not work for an employer who expects from me to be – to display dishonesty in court, as an officer of the court and that especially where peoples' lives are on the line. I have to be very specific and I have to tread very carefully and then I immediately resigned from the public service. And I remember that evening, I was sitting with my wife and three small kids in our house there in Umtata and we thought, "What now, I'm without a job, where to now?" And

that is where I decided to make an application to the Bar in Bloemfontein to be allowed as a pupil.

COMM. D. Mpfu: Thank you. Do you remember the name of that MK operative?

Adv. P. Loubser: Mr Commissioner, I don't remember his name. I remember his nickname but in the circumstances I am not willing to disclose his name.

COMM. D. Mpfu: His MK name? That's fine. No, it's fine. All right, thank you very much.

Adv. P. Loubser: I was told – can I just mention that and I'm speaking under correction. I don't know if it's the truth but I was told afterwards that that man later became a Cabinet Minister.

COMM. D. Mpfu: Thank you. Thank you, Chief Justice.

CM J. Mogoeng: Thank you, Commissioner Mpfu. Commissioner Norman?

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

Adv. P. Loubser: Good morning, Madam Commissioner.

COMM. T. Norman: I just want to – when you were acting for the month, in which court were you deployed? Was it just the Appeals Court or did you do any Motion Court?

Adv. P. Loubser: No, no, I did a full unopposed Motion Court. I also was involved in opposed applications. I was involved in three or four civil trials and then I also had to deal with appeals.

COMM. T. Norman: Thank you. Do you have any reserve judgements from the opposed motions?

Adv. P. Loubser: No, not at all.

COMM. T. Norman: Thank you.

Adv. P. Loubser: No, not at all. I issued, I handed down my judgements very, very quickly I think. The one which is attached to my application papers was handed down three weeks or four weeks after the hearing. But that was because my colleague Judge went on holiday during that time and I had to wait for him to come back so that he could check the judgement and sign with me.

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

CM J. Mogoeng: Thank you very much. Thank you, Advocate Loubser, you are excused.

Adv. P. Loubser: Thank you, Mr Chief Justice.

