



JUDGES MATTER

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Gauteng Division of the High Court

Interview of Adv. T A N Makhubele

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CJ M. Mogoeng: Good afternoon Advocate Makhubele.

Ms T.A.N. Makhubele: Good afternoon Chief Justice and all Commissioners.

CJ M. Mogoeng: Are you well?

Ms T.A.N. Makhubele: Yes, I am.

CJ M. Mogoeng: You look like a person who's a bit uncomfortable?

Ms T.A.N. Makhubele: Well, I am comfortable, Chief Justice.

CJ M. Mogoeng: You are?

Ms T.A.N. Makhubele: I am. I was just rushed in, I was expecting the last candidate to -

CJ M. Mogoeng: - take longer.

Ms T.A.N. Makhubele: Yes so, then she came back within what looks like a split second, so I was a bit ruffled by that, but otherwise I am comfortable.

CJ M. Mogoeng: Okay, yes. For how many years have you practiced law?

Ms T.A.N. Makhubele: Starting as a prosecutor -

CJ M. Mogoeng: How many as a prosecutor? How many at the next level?

Ms T.A.N. Makhubele: I started as a prosecutor in 1992, then I went to the Master of the High Court in 1996, I joined the Pretoria Bar in 1999 to date. So that should make it, 20 -

CJ M. Mogoeng: All right, we'll work it out.

Ms T.A.N. Makhubele: Twenty-five.

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

Ms T.A.N. Makhubele: I was recommended during 2012. The Letters Patent were actually issued in 2014, because the delay was caused by that challenge by Mansingh, on the powers of the President to confer senior status.

CJ M. Mogoeng: Yes.

Ms T.A.N. Makhubele: - So we only had our Letters Patent issued after that, after the Court confirmed that the President does have powers to confer senior status.

CJ M. Mogoeng: Yes, and for how long have you acted as a Judge? Putting everything, taking everything together?

Ms T.A.N. Makhubele: I've counted the information I gave the Judge President and I think that he is going to confirm it's 58 weeks from 2013 to 2017.

CJ M. Mogoeng: Yes. Was it a challenge to produce judgements? Or was it not much of a challenge?

Ms T.A.N. Makhubele: Chief Justice, it wasn't much of a challenge, because of the experience that I've had. From the time I started to practise I have been in a position where I've chaired this or other tribunal committee. Where I wrote decisions or judgements, if one wants to call them that. So writing judgments was not a challenge to me – is not a challenge to me. And with regard to the time for producing judgements I have looked at the track record, I think I am, within a period that can be considered reasonable time. When I started I would actually – When I adjourn the matter I would actually adjourn it to a specific date or thereafter, I would issue Notice to the parties that I would hand out judgement on the following date. So I would work within some timeframes that I would have set for myself.

CJ M. Mogoeng: And has it ever taken you embarrassing long to deliver a reserve judgement?

Ms T.A.N. Makhubele: No Chief Justice, it hasn't.

CJ M. Mogoeng: Yes, what was the longest?

Ms T.A.N. Makhubele: I can't recall one that goes beyond three months.

CJ M. Mogoeng: Yes, thank you. JP?

JP D. Mlambo: Thank you Chief Justice. Good afternoon Advocate Makhubele.

Ms T.A.N. Makhubele: Good afternoon Judge President.

JP D. Mlambo: Oh, today you call me Judge President?

Ms T.A.N. Makhubele: Uh.

JP D. Mlambo: I'll tell the Commissioner what you called me on other days. That's by the wayside. I just want to thank you, for the amount of time you've given the Division in terms of acting stints. I know that I had to twist your arm very hard to come and act.

Ms T.A.N. Makhubele: Yes, you actually did not give me an option. The first time you called me, which was a pleasant surprise.

JP D. Mlambo: Now, you've done your fair share of acting. I think I've put you in the Urgent Court three times, but is towards the end of your – this latter part of your acting stints. And I think I've explained to the Commission why I do that. And you've done a massive 13 weeks in Appeals. Have you sat in Full Court Appeals?

Ms T.A.N. Makhubele: I have. One civil and one criminal. And I've actually written judgements for the Full Court.

JP D. Mlambo: You were requested by the Judges to write the judgement.

Ms T.A.N. Makhubele: Yes.

JP D. Mlambo: Right, now you have 18 weeks in the Unopposed Motion Court, isn't that a difficult Court?

Ms T.A.N. Makhubele: When I started I thought it was an easy Court. Maybe because of the perception when we are there in practice we think Unopposed Court is for juniors, but when you are there you actually realise that's the most difficult Court. Particularly because there is just one party, and then all sorts of substantive law and procedures. And if you have not been in practice, I mean doing that kind of work, you will not cope. But I then settled in.

JP D. Mlambo: Right. The other capacities you hold are in adjudicatory mode, like you're the Chairperson of the Water Tribunal, if I am not mistaken.

Ms T.A.N. Makhubele: That's correct.

JP D. Mlambo: As we speak. And you've sat in other similar situations, where you had to adjudicate on disputes. Am I correct?

Ms T.A.N. Makhubele: That's correct JP.

JP D. Mlambo: Right and you view yourself is ready?

Ms T.A.N. Makhubele: I am ready.

JP D. Mlambo: In terms of applying for, to become a judge, we've had this discussion for the last three years? Am I correct?

Ms T.A.N. Makhubele: Yes JP. That's why I said when you first called me and I – over the time you encouraged me to apply but I kept on saying, I need to act, and gain the experience. And in the latter part I then said, I want to have maybe a full term, or rather more time for me to see if this is what I want to do, for the rest of my life. And I've made that decision.

JP D. Mlambo: Thank you, JP Hlophe is asking candidates about the racism issue. If you want, you can do that. No, I just want to refer to one particular incident that happened to you.

Ms T.A.N. Makhubele: Yes.

JP D. Mlambo: Which you came to report to me, in the Division, and you can summarise it. I don't want you to name anyone.

Ms T.A.N. Makhubele: Yes JP. I was in, I can't recall whether it was an urgent or, I think it was in Urgent Court. This particular judge, the way he spoke to me, I cried in Court. He dismissed me, I wanted to explain something. I think it was why the matter – why we didn't start at a particular time and then he, sort of in a dismissive manner, as if he was talking to some primary school kid, said, Just get on with what you are here for. And –

JP D. Mlambo: -I think that is the gist of what I wanted you to tell the Commission. I know that I criticised you, for crying in Court. Right. And you assured me that you were taken aback by that because you'd acted before, in the Division; and this is a person who regarded you as a colleague when you were acting. But when you came into the Court, then he treated you that way.

Ms T.A.N. Makhubele: That's what hurt me most. Because he is a person who knew me as a colleague, and then when I'm in Court – I'm not saying that should inform how anybody treats –

JP D. Mlambo: And he is white, isn't it?

Ms T.A.N. Makhubele: Yes.

JP D. Mlambo: And male?

Ms T.A.N. Makhubele: Yes.

JP D. Mlambo: Right, I just want you to also share, with the Commission, some other instance that happened, if I am not mistaken. That you and your deputy brought complaints to me as JP of the DJP of what had happened at roll call. In the hands of one white judge, who was calling roll call, at the time. I don't know if you recall that.

Ms T.A.N. Makhubele: I can't immediately JP. But I know there were –

JP D. Mlambo: Can I refresh your mind?

Ms T.A.N. Makhubele: There were complaints, by practitioners about the attitude of the then, the person that was calling the roll. And as we then took it upon ourselves, as leaders, to approach you to discuss the matter.

JP D. Mlambo: Right. But the fact of the matter are, this is the judge who wanted to ignore senior black silks and preferred to call junior whites, to call their matters before him. Even when the junior said to him, but I am junior. He said, I've called you. Call your matter. Do you remember that?

Ms T.A.N. Makhubele: Yes, I remember the incidence JP.

JP D. Mlambo: I just thought, let me just prompt you. I know you didn't come to talk about this. But racism is featuring in these interviews, and you had your fair share of this. As a leader of the Pretoria Bar and in that instance in the Court.

Ms T.A.N. Makhubele: Yes JP. If I may just add, also as a junior counsel there is a time when, not just me, but sometimes juniors will be forced to bring in senior white colleagues. Because if you appear as a junior, it doesn't matter how you – just the treatment that you get, but then most juniors will prefer to bring white senior colleagues because when he or she stands up the judge listens. But if you go there being a black junior you could see the attitude.

JP D. Mlambo: Chief Justice, I just, I know I digressed. I had to show the Commission what this candidate had done in acting, but I just had to deal with these aspects because she brought them to my attention. Otherwise I would have not known about them. But anyway, thank you CJ, I have no other questions.

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

MEC: Thanks CJ. Good afternoon Advocate Mogoeng.

Ms T.A.N. Makhubele: Good afternoon MEC, Commissioner.

MEC: M Langa: You have declared in your questionnaire and I quote, *“I resigned from the Masters Panel during 2011 to concentrate on my legal practice. However, I am obliged to finalise old matters that are taking time to finalise. The administration is done by the relevant core liquidators.”* Do you mind to expatiate on this?

Ms T.A.N. Makhubele: If I may understand the question. It is a fact, I have resigned. When I joined the Bar, I also enlisted my name in the panel. The Master has a panel of liquidators and trustees. So I would, now and again get appointments. Because then I was still trying to see whether I should, I would go that route of the insolvency practice or practising as an advocate. Then I made the decision, just before I took up silk. That was 2011. That as a senior counsel, and now having chosen to concentrate in my legal practice, This kind of, would not sit well. So I then resigned. But then there are matters, that I was appointed, 2006 up to 2011 that are taking long to finalise and the reason I’ve written a judgement on surrender of estates. There is part of the reasons why it would take maybe 20 years for one matter to be finalised in my – I can explain later on, if I have to deal with that judgement. So I am no longer involved there, and the Master stopped giving me work during 2011 and I have not done anything about it. Since then.

MEC: M Langa. Thanks.

CJ M. Mogoeng: Commissioner Mampuru?

COMM. Mampuru: Commissioner Malema, what is the problem? No thank you. Thank you CJ. Good afternoon mam.

Ms T.A.N. Makhubele: Good afternoon, Commissioner.

COMM. Mampuru: How are you?

Ms T.A.N. Makhubele: I’m doing well, thank you.

COMM. Mampuru: No I am fine. On a lighter note Chief Justice, by the look of things, it’s like you’re – you’re a Church goer? You look more like me.

Ms T.A.N. Makhubele: I think there is, the spirits is, we are connecting.

COMM. Mampuru: Let's hope so.

Ms T.A.N. Makhubele: I am.

COMM. Mampuru: Let's hope so. It is said that the candidate will be the first black female silk to be appointed. What would be your words of encouragement? I mean, if appointed, to other female silks. In particular black female silks. That is the first question. Number two, what is your greatest strength or your greatest weakness? How do this help, or hinder your work and what are you doing about them? Thank you CJ.

CJ M. Mogoeng: Thank you, Commissioner

Ms T.A.N. Makhubele: On the words of encouragement to other silk, black females, I remember when I was addressing the, a symposium at the invitation of the Minister of Justice. Because the Minister is also worried about this issue of lack of females who apply for silk. Even who come to the Bench. But then my view in having observed the trend or being there, its senior – ones a woman attains the status of silk there is pressure that you must go the Bench. And my view is that, that is a career decision, that one must take. And unfortunately, our profession was sort of, creating some barrier for women that for you to add you must be a silk. That is until recently. So a person would have to wait until you attain silk status, and by then maybe you don't even want to go to the Bench. But there are women who want to come to the Bench, but who were not able or not even encouraged. I am talking about the Advocates profession because of the perception that you must first attain silk status which in itself was, in my view, unfair. So I think women must be encouraged because by the time you are 10 years into your practice, you are qualified in my view to start to act if the JP invites you. But often you hear people ridiculing some of us who choose to act. And they call it, it's as a, what – act of insolvency. Because of the stipend that we get from the judiciary when we act as compared to what they would make when they remain practising. I think –

CJ M. Mogoeng: Just to interrupt you. It is also said to be an act of insolvency to leave that lucrative practice and become a judge. We are floating in the land of insolvency, as you see us.

Ms T.A.N. Makhubele: That is so, Chief Justice. So I think woman know what they want. And individual people know what keeps them where they are. But also if the JP invite people they must take the opportunity. Because until you act you won't know whether you be a judge or not. So it's only when you act. And as I've already explained, I've told the JP that let me first see if this is what I want to do for the rest of my life. And on this, your second question, was my strength. I think it is in, I have demonstrated the part about being a social worker, a trained one. Those skills analytical, reasoning and also writing and I believe that with those kinds of skills I can make a contribution because I often hear juniors who sit in my Court; that when I am presiding they also learn. Because with time permitting you don't just, even in the Unopposed Court you do explain, and in that way people are learning.

COMM. Mampuru: Your greatest weakness?

Ms T.A.N. Makhubele: I haven't identified any. No one has, but maybe my humble disposition. Some people would take advantage, but I have proven that, that is my nature and when circumstances permit I do assert myself. And some would be shocked when they see me, they think I am this quiet, maybe meek until I open my mouth.

COMM. Mampuru: Thank you CJ.

CJ M. Mogoeng: Thank you Commissioner Mampuru. Judge president Hlophe.

JP J. Hlophe: Thank you Chief Justice. My learned brother, Just President Mlanga has already asked the question I was going to ask you. And I thank you for your answers in that regard. I have one more question for you. It is this. It is based on case flow management. We are given the limited resources, that the Country has, we are expected to do more and more with less and less. The question is this, where

you to be recommended for appointment, today, do you have any views that you would like to share with us, as to how we can address the challenge of less and less resources, but more and more work. In other words, how can we now, as judges, work in a very smart manner. Because litigation, as well has changed in its nature. Any views in that regard?

Ms T.A.N. Makhubele: Thank JP. I know as acting judges we are denied, I am saying this in a respectful manner, we are denied access to more than resources that would make our job easy. I am talking about access to internet and all those other facilities. But I know, or I seem to believe that judges have access to that. The other resource would be the researchers. I know at the Pretoria High Court, I'm speaking under correction, I think there are only two researchers or so. And you can imagine if they have to do research for so many judges, the quality of research that one would expect them to do. So if it's often it's – you look at the judgements that were written by 100 years or 50 years ago. But then you again, you have to think. This judge was doing there were fewer cases, and he or she had a researcher, one or two, and the had ample time to deal with this. So I think that is one other resource that should be increased. That's a human resource. And then, I can't think of any other thing JP, except the, yes, the financial. I don't know if I have to talk about that. But, it is an incentive. Because when you are comfortable and stable, although you can never have enough financial resources, but it eases the worry, the burden. And you can concentrate on the work that you are supposed to do.

CJ M. Mogoeng: Thank you Judge President. Commissioner Montsume?

COMM. Montsume: Thanks CJ, I'm covered by Commissioner Mampuru. Thank you so much.

CJ M. Mogoeng: Thank you Commissioner Montsume. Commissioner Nyambi?

COMM. A.J Nyambi: Well covered CJ.

CJ M. Mogoeng: Thank you very much. Commissioner Cane?

COMM. Cane: Thank you Chief Justice. Good afternoon.

Ms T.A.N. Makhubele: Good afternoon.

COMM. Cane: You inspired me, because just ahead of my tenure, you were the first black at the Pretoria Bar. And when I read your annual report closely, one of the things that really stuck out, which may not come across adequately in this interview was your strength of character. And I say, may not, because today you have actually demonstrated a soft side to your personality. Which is quiet obviously hurtful in many ways, and I am sorry that you've experienced that kind of hurt. But when you wrote your annual report, you spoke about the tremendous support you got from most people at the Bar, but obviously there always those, you wrote, you will unashamedly show their leader the middle finger. And you said you chose to ignore them. And I admire that strength in you. And if you were to take a position as a judge; I presume that, that strength of character is what people will see. They won't see the tears in Court. They will see you stand up tall and be proud of who you are.

Ms T.A.N. Makhubele: Definitely Commissioner.

COMM. Cane: Thank you Chief Justice.

[crosstalk]

COMM. Cane: It's me, Commissioner Cane. Thank you. Commissioner Norman?

COMM. Norman: Thank you President. Good afternoon Counsel.

Ms T.A.N. Makhubele: Good afternoon Commissioner.

COMM. Norman: I just want to state and inform the Commission that it was very pleasant appearing before you. I am just disappointed that you did not attach that judgment that dealt with complicated mining and water matters, and I thought it would be great to have it as part of what you have supplied to the Commission. But I

just want to record, that you might view your humble disposition as a weakness, but it is actually your biggest strength. Thank you.

Ms T.A.N. Makhubele: Thank you Commissioner. Actually, I was thinking, because the judgements or decisions of the Water Tribunal were published, publishable, and I think the last one was in 2011 and getting the administrative part of the department to publish them again, it's a mountain to climb. But we are working on it. And it was also brought to our attention by a judge, in the Western Cape, recently. Where there was an issue involving water law. And in that judgement, the judge said, she wanted to refer the matter to the Water Tribunal. She knows it's functioning, but she is not certain because the decisions, she cannot see the decisions any longer. But we do give judgments. I have written many judgements for the Water Tribunal, and so has my colleagues. I have also written many judgements, as I have said, for in the Department of Health, the medicines. And it is unfortunate my bundle is already full and if I were to bring everything it would, but I have. I thank you Commissioner for bringing that up.

Female Voice: Thank you Commissioner Norman. Commissioner Motshekga. Is he here?

COMM Motshekga: I went to rub shoulders.

Female Voice: It is your turn sir. Commissioner Didiza.

[cross talk]

COMM T. Didiza: Thank you very much President. Afternoon Mam.

Ms T.A.N. Makhubele: Good afternoon Commissioner.

COMM T. Didiza: One thing that I noted in your CV is that you started as a social worker.

Ms T.A.N. Makhubele: Yes, that is correct.

COMM T. Didiza: And I wanted to just to ask from you, it's just one question. In your view how has that training as a social worker, you know, influence your work as a legal practitioner. Both as an SC but also in instances where you've been an acting judge?

Ms T.A.N. Makhubele: Thank you Commissioner. As I have already explained, that training you are taught to, - well maybe the first one would be, it goes to what ultimately one would regard as the temperament of what is required of the judge. Social worker as a profession, to start with one it requires someone who has that empathy for people. Whom always wants to conscientise people about their rights and not just that, but also working toward doing that. And also, the skill of writing, of analysing it now comes handy. One may not get credit, they don't credit us for non-law courses, but as a, at the end when you look at what you have become you then realise the foundation was laid there. Thank you, Commissioner.

CJ M. Mogoeng: Thank you, Commissioner. Didiza, Commissioner Magadzi?

COMM Magadzi: Thank you Commissioner. [foreign language – 33:36]

Ms T.A.N. Makhubele: [foreign language – 33:40]

COMM Magadzi: You started being gainfully employed at age 12? What are the lessons that you would teach us and teach others that having been employed at age 12, these are the things that shaped your social attributes and your humble beginnings as you have indicated? That is the first question. The second question is in 1995 there was the Fourth Conference of Beijing, a platform of action, which spoke to a number of things particularly in terms of transformation. And since then, as South Africa in 1997 we promulgated legislation toward gender main streaming. Are we living up to this ideal? Because I know that you are dealing with transformation, particularly in the judiciary. Would we say that the legislations that we have churned [inaudible 34:43] we are living up to them? What are the deficiencies in this regard? Thanks CJ.

CJ M. Mogoeng: Thank you, Commissioner. Yes mam.

Ms T.A.N. Makhubele: Commissioner my background, having to, the twelve years when I – apparently, I was intelligent. And I was made to skip certain grades. In one year I would do three grades. And as a result, I finished primary school very early. And unfortunately for my parents, it became a headache. I caught up with my elder brother. There was no money to take any one of us to secondary school and I stayed home. The local principal just had a baby, and I went there to look after the baby and work in the house as a maid. You know when I, for a long time I was angry about that situation I -

CJ M. Mogoeng: - You are free to take a moment. Oh, okay -

Ms T.A.N. Makhubele: I could not understand. I was angry. But in retrospect I think it, it is part of the positive foundations that I shared, who I am. Because if at that age you accept your circumstances, you do not try to – nowadays children run away, and they become something. I also see that as an environment that protected me from the harsh world out there. Because unlike me, at least I was in somebody's house. I had food and everything. Although I was a child worker. My brother had to go to work in the farms. And that year actually determined our respective fate. My brother passed on, some five years ago. He never recovered from that year. But that's why I am saying, why I say for me now in retrospect, when I reflect I see it in a positive way. Because things could have been worse. If that did not happen, I would have also ended up somewhere. Maybe due to some cultural practices I would have been married at that age, and not proceed with school. So it is, something good came out of that for me now when I look back. The second part of your question, on the gender, whether we are doing well or not. It is sort of disappointing when you have all the legislation. You have, at government level, you also have; I'm talking about in the judiciary, not generally. You also have a ministry dedicated to women. And I believe it will also, one of the competencies' will be gender equality. That these kinds of discussions only appear to gain momentum at times like this. For me it would do us good if there could be ongoing discussions. And not just discussions I know, a lot of time is wasted in conferences. But positive steps that should be taken to ensure

that women do get the opportunities to – not when they think they are ready to become judges, but there should have been steps taken to assist them to become judges that are appointed on merit. Not just to fill the numbers of, or rather the statistics. That's for me it is where we are lacking. Because you would only hear voices talking about this issue when there are decisions like the ones you have to make at the end of this meeting. And I would expect women's groupings to know who are the women in the profession and how we are doing. And not to be concerned after the JSE has issued notices. I can, I don't know how to – sorry for the long answer.

CJ M. Mogoeng: No, no, no thanks. Commissioner Masaga?

COMM Masaga: I understood you to mean that your knowledge of social work enhanced your sense of justice. Do you not think that social sciences should be made compulsory courses for law students? So that all lawyers are grounded in those sciences?

Ms T.A.N. Makhubele: I agree with you Commissioner. It should be part of the training, because when try to assume -

COMM Masaga: Covered. Done it.

Ms T.A.N. Makhubele: Thank you.

CJ M. Mogoeng: I think your mike is off prof.

Dr Motshekga: You think it is right, that Magistrates Courts presided over by people who have not studied indigenous law of a particular community and don't know the language of the community concerned, should hear appeals from the Traditional Courts of those communities?

Ms T.A.N. Makhubele: Commissioner I think for any indigenous cases, although it would be sort of prescriptive, but it does not sit well. Because when you read about it and when you live it; there is a difference. So I believe that it creates that vacuum. It

is the same as having, for instance, let me use the word, someone who doesn't, I am Tsonga speaking. Someone who doesn't speak Tsonga teach Tsonga. It is the same for me.

Dr Motshekga: Lastly CJ, would you agree that maybe Indigenous African Law, and at least one Indigenous language should be compulsory courses for all law students?

Ms T.A.N. Makhubele: I would even go earlier than being a law student. Because by the time you go to university you have acquired all the - your vocabulary is almost. I would go to primary school level, because there are certain terms that even though concepts rather, even legal concepts. Even though I am Tsonga speaking. If I were to be asked now to start, even answering your questions, in my language, that would be a problem. So I believe at foundation phase. It used to be like that. I remember we were taught in Tsonga at my primary school, and what happened to that I don't know. And then only when you went to high school, then English was introduced. But it is necessary, even at foundation stage because that's when vocabulary; and even standardisation of the language itself. Because although I'm Tsonga, there could be somebody who is Tsonga, from for instance, the Eastern parts of South Africa. We do not speak the same. There are certain concepts which are not the same.

CJ M. Mogoeng: On a lighter note then, as we conclude, it is actually a pity, because even at home, many parents don't speak the language with their children. It is all English, with a particular accent. It that not so. And we are the people who are supposed to develop the language to that extend, as lawyers and judges. So who is going to develop it? No book, or maybe one by Nikahnama in African customary law. Written by an African. Who is going to develop all these concepts? Who is going to give expression to these language rights that we are pushing for? Do you know of any?

Ms T.A.N. Makhubele: Chief Justice I wish the MEC was sitting here when I give this response. Because I believe our children they are even worse –

CJ M. Mogoeng: Because of us.

Ms T.A.N. Makhubele: Because I will give an example, where I stay my grandson his father is a, speaks Shona, his mother Tsonga. At school he is forced to learn in English and Afrikaans. In the community where he is playing with his mates, one is Venda, one is, speaks Sotho, one. At the end of the day this child must learn all these languages. When is he going to learn and master sciences? So I think, we, something needs to be done.

CJ M. Mogoeng: No thank you very much Advocate Makhubele. You are excused.

Ms T.A.N. Makhubele: Thank you Chief Justice and the Commissioners for giving me this opportunity.