



JUDGES MATTER

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Competition Appeal Court

Interview of Judge M Victor

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CJ M. Mogoeng: Good afternoon, Judge Victor.

Ms M. Victor: Good afternoon, Chief Justice.

CJ M. Mogoeng: Are you well?

Ms M. Victor: I'm well, thank you.

CJ M. Mogoeng: Are you relaxed?

Ms M. Victor: Ooh, I can't say that.

CJ M. Mogoeng: Okay, now tell me, when were you appointed a High Court Judge?

Ms M. Victor: In 2008, in May and I'd acted for about a term before that, in 2007.

CJ M. Mogoeng: And did you in your practice or in your role as a Judge come across some competition related issues – competition – law related issues?

Ms M. Victor: I must be quite frank, Chief Justice. No, I haven't. Not at the bar, when I was an Advocate and also not in the – on the bench, where I sit.

CJ M. Mogoeng: And then you went to act?

Ms M. Victor: Yes, in the competition Appeal Court. I was invited by Judge President Davis.

CJ M. Mogoeng: And did you find it particularly complex or were you – did you find it easy to grasp the concept?

Ms M. Victor: I must say that Judge President Davis did assist. It would've been good to have a background in Economics, but not essential. It is a statute that must be interpreted, like any other statute, but there are some complex issues, but not insurmountable.

CJ M. Mogoeng: Yes.

Ms M. Victor: Judge President Davis gave us – gave me and others that acted for the first time – he gave us judgments to write. We cut our teeth on the Act and those judgments. So, it was not insurmountable.

CJ M. Mogoeng: Inspired by the German Judicial Academy, one of the things that are suggested, which hasn't been done, is that all Judges, without exception should get some orientation in Economics, some orientation in Communication, some orientation in Political Science and other spheres, so that when they come here or before you – whether you are a Constitutional Court or whoever, you've got a fair

appreciation of what is involved, rather than a stereotypical approach to issues, saying the law says therefore...

Ms M. Victor: Yes.

CJ M. Mogoeng: ...regardless of consequences – this will be the outcome.

Ms M. Victor: Yes.

CJ M. Mogoeng: Did that induction give you a sense that it would benefit all Judges or only those of the Competition Court, who have that exposure?

Ms M. Victor: Well, I think it would benefit all Judges, because there are times when there would be an intensely complex commercial matter, valuation of shares, et cetera, where that input from SAJA, because I must say, the input that we've had from SAJA has been very beneficial, for example cyber-crime. Not heard of cyber-crime before, but after that course, it was an excellent introduction. The same would be for Economics, for Communications. I think SAJA has a vital role to play to expand our education.

CJ M. Mogoeng: Yes.

Ms M. Victor: And every Judge can benefit from that.

CJ M. Mogoeng: And if appointed with the benefit of your experience, would you be available to help in the process – in the training programs of SAJA?

Ms M. Victor: Certainly, Chief Justice. Training has been something very close to my heart over the years and I must say, I've never stopped training. When I was at the Bar, I did advocacy training. When I went to the bench, I've mentored so many Attorneys, students – even students from overseas and training has been certainly something very close to my heart and hopefully a forte for me.

CJ M. Mogoeng: Yes. JP?

Mr Davis: Let me start there. We've had – I mean, how long has it now...? I've forgotten, sorry. Pardon my familiarity. How long is it that you've actually acted now?

Ms M. Victor: Four years.

Mr Davis: For – on the Competition Appeal Court?

Ms M. Victor: Yes.

Mr Davis: And you've been very gracious about not applying, until now?

Ms M. Victor: Yes.

Mr Davis: I accept that. And during your four years, it seems to me, I think three or four times we've had fairly intensive ourselves? Is that...?

Ms M. Victor: Yes., we've had workshops.

Mr Davis: Won't you just describe what that is, because it's not unimportant.

Ms M. Victor: We've had several workshops discussing not only the basic principles, but dealing with cases, assessing judgments. We've also had input on the amendments to the Act. So, it hasn't been solely a sitting process as a Judge in the Competition Appeal Court. We've had a lot of input. We've had two sessions with one of the world's famous lecturers, Eleanor Fox and it's been very helpful. It was interactive. She could relate to where we were in our competition jurisprudence and we could expand from that point, from her input.

Mr Davis: And I just want to ask you. In relation to – if I can get to the amendments, perhaps let me start there. We're going to be faced with a whole lot of – the Competition Appeal Court's going to be faced with a whole lot of challenges. Of course, we're moving to a substantially different idea and I'm particularly interested

because South African Economy – it's common cause, is so skewed racially, and because of levels of inequality, I'm just interested, if you've looked at the amendments and you think that they might well make some contribution, to these particular problems and if so, how?

Ms M. Victor: Well, I think the amendments do introduce a lot of beneficial factors, for example the enquiry. It's a wide range in enquiry from now onwards and the bestowed racial ownership problem, as I put it, can be investigated, interrogated and the solution found. The other aspect, which is valuable is that one can follow up after a judgment has been made to assess what path or what weight that particular judgment has created.

Mr Davis: And can I just ask you about what do you – I mean, the argument I suppose is this, that in many countries in the world they've been worried about structural issues, as opposed to conduct and no one's really pulled off solutions in that regard. I mean, so how do you think the Court's going to have to – and the tribunal for that matter is going to face those challenges?

Ms M. Victor: Well, they will be challenges. They'll be input from experts, whether the expertise is challenged or not, but I'm thinking in particular where you have high levels of concentration, an order of divestiture can even be made, and I think if it's done in a considered way, it won't result in a chessboard effect of affecting so many structural changes that it becomes – introduces an element of business.

Mr Davis: You're talking about large corporations?

Ms M. Victor: Yes.

Mr Davis: That might find themselves so – at such levels of concentration that we order that they divest of certain assets?

Ms M. Victor: Yes. And that won't be done likely, as I read the Act (indistinct).

Mr Davis: Now, one of the concerns that can be expressed and rightly so, is of course this question of cartel behaviour, which I suppose ranges from what is corruption, as the Chief Justice has described it quite rightly to other forms of collusive activity, which is probably less than that. Franchise agreements themselves could be cartel activity.

Ms M. Victor: Yes.

Mr Davis: What is your attitude to the issue of the criminalisation of cartel activity?

Ms M. Victor: Well, I think it should be criminalised. It's good that it has been criminalised and those persons who collude deserve to go to prison. It's as simple as that.

Mr Davis: That would be the best deterrent, or should we just jack up the fines radically? As you know the Bill proposes that the cap go from 10 percent to 12 percent?

Ms M. Victor: Yes.

Mr Davis: I'm interested, one, in your view, about whether you think criminalisation is a better deterrent and secondly what you think about the 12 percent?

Ms M. Victor: You see, if it's a huge company with the ability to pay these fines, you know, what deterrent is that? Maybe just fewer dividends paid at the end of the year, but the criminalisation will introduce the true deterrent in my view and it's long overdue.

Mr Davis: (Indistinct)?

Ms M. Victor: Yes, sending to prison (indistinct).

Mr Davis: I'm hesitant to ask this question. It got me into trouble last time with somebody else, so let me put it to you this way. I'm just interested in your attitude

with the notion that this is the collegiality of an Appellate Court, how we work and your sense of that?

Ms M. Victor: Well certainly, Judge President Davis, in your Court there is so much collegiality, so much engagement on the issues. When a draft judgment is produced, there's further intensive engagement on what has been produced by say a new judgment in the Competition Appeal Court and that to me is very valuable. Collegiality is all. We have that collegiality in the Gauteng Local Division and I was very happy that there was that collegiality when I first sat in your Court.

Mr Davis: Thank you, Chief Justice.

CJ M. Mogoeng: Thank you very much, JP. Do you think that 12 percent is enough?

Ms M. Victor: You see, Chief Justice, if that percentage becomes...

CJ M. Mogoeng: Considering the objectives sought to be achieved and that those driving companies ought to be alive to the reality that what they are doing contaminates society so much, it needs to be uprooted. So, they ought to be incentivised to desist, rather than continue, encouraged by the punitive costs, for want of a better expression to be paid.

Ms M. Victor: Yes, you see sitting as a Judge of Appeals, one stands back and considers what the impact of a large fine would be and if it means that a large fine is going to put that company out of business, then obviously that would be a negative result. But where there is careful consideration, sufficient facts put before the tribunal initially and then the Appellate Court, maybe there should be a discretion to go higher.

CJ M. Mogoeng: Let me tell you where I'm coming from. The company comes, it does something terrible. You'll say, ah, this is bad, 12 percent. It does the same thing or similar things again, and again and again. But you can only go up to 12 percent. What level of seriousness to uproot this unacceptable conduct is it? You

encourage the existence of corrupt practises within the corporate sector. Is it not what it boils down to – under the guys that oh, people will lose jobs.

Ms M. Victor: Yes.

CJ M. Mogoeng: ...from crookedness.

Ms M. Victor: Well, maybe the 12 percent cap is already high.

CJ M. Mogoeng: Oh.

Ms M. Victor: But it just seems to me that on the correct facts there's no reason why it shouldn't go higher and if that is coupled with a prison sentence for those who are in charge, the Directors, the CEO's, then I think that the South African Competition jurisprudence will achieve a very good result.

CJ M. Mogoeng: Yes.

Ms M. Victor: But I do understand that maybe a cap is limiting.

CJ M. Mogoeng: Yes. Commissioner Mpofu?

Mr Mpofu: Thank you very much. Good afternoon.

Ms M. Victor: Good afternoon.

Mr Mpofu: Yes, I'm just going to ask you one question, but it's got many legs. It's about demystification. We had a discussion earlier about how this area or how important this area of law is and how it has somehow been mystified by Economics and Economic formulae and all sorts of things and I agree with you that ultimately even, as you say, for a person who doesn't have a background in Economics, ultimately, it's a law – it's a law, it's a statute.

Ms M. Victor: It's doable.

Mr Mpofu: Yes, and it's doable. And the first part of the question is for example what can be done to demystify it, for lawyers obviously, so that you encourage access, which is the one issue. But more importantly, for the public and I'll give an example. Jenny and I, who are familiar with this, we're talking about horizontality and versatility and that's basically meaningless, whereas actually what this means is a horizontal relationship is a relationship between competitors and we could use a term like that and everyone around the room would know what we are talking about. And a vertical relationship is a relationship between firms and customers and suppliers. You see what I mean?

Ms M. Victor: Yes.

Mr Mpofu: So, that kind of breaking it down, so that any – everybody, particularly the consumers should be able to use the tool, limited as it is, in order to protect themselves.

Ms M. Victor: Well, I think one place to just demystify the concepts would be to have judgments that are understandable and easy to read – easy to understand. That's one point of demystification, vis-à-vis the public. There can also be programs – television programs and newspaper articles. In fact, there should be an effort to publicise the work of the Competition Appeal Court, the Tribunal and the Commission itself. I mean, many people don't know about the work of the Commission. So, it is capable of demystification.

Mr Mpofu: Thank you. Yes and in the same vein, maybe it's more of a comment, the objectives of this are not different from all the – what other Courts or specialist Courts do – the Constitutional Courts, the Labour Courts and so on and for the record, the Act says that its objective is to: "promote economic efficiency, adaptability and development, competitive prices and product choices for consumers, creation of employment opportunities and advancement of social and economic welfare for all South Africans. International competitiveness, market access for small and medium enterprises and diversification of ownership, particularly in favour of historically

disadvantaged persons.” Anybody can understand that. I’m sure. So, one doesn’t need an economic degree to be able to pursue those objectives, applying the Act.

Ms M. Victor: And you see, the heading there would be, Economic Transformation. It’s so critical to an entire society and of course, as you say, in every part of the law transformation is important and in competition law, economic transformation, even more so.

Mr Mpofu: Thank you, CJ.

CJ M. Mogoeng: Thank you very much. Advocate Cane FC?

Ms Cane: Good afternoon, Judge Victor.

Ms M. Victor: Good afternoon, Commissioner Cane.

Ms Cane: Judge Victor, in an effort to ensure that we have each of the candidates respond to just some problems that I understand arise in the competition forum and how you would deal with them, and I put more or less the same questions to you that I put to the other two candidates, the first pertains to the role of experts in this Competition Appeal Court and the recent criticism that the experts give evidence pertaining to legal issues, where in a context where it’s very difficult perhaps to isolate what is a legal issue from an economic issue, have you perhaps come across this and do you have any views on how this should be dealt with?

Ms M. Victor: Well, in the Cecil case there was the criticism of one of the experts, because clearly, they were trying to tell the Court what the law was, starting with the tribunal and then the Court. I think that experts have to steer very far away from telling the tribunal or the Court what the law is. They must place the facts before the Court and then the Court will use the facts and apply the law to the facts.

Ms Cane: Thank you. Then going back to what Commissioner Mpofu has just said about horizontal and vertical agreements and relationships and your obvious knowledge of Section 4 will render certain relationships or horizontal agreements

between competitors as a violation of the Act. What do you say about the fact that you can find aspects of horizontal relationships in supplier customer relationships, which is ordinarily called a vertical agreement? Do you just mechanically apply Section 4 or what do you do about that?

Ms M. Victor: Well, I think it's very important to not simply apply it mechanically. You have to have a clear understanding of the facts and then see whether there is a horizontal contravention.

Ms Cane: Thank you. And then lastly, if you could give us your views on predatory pricing and the way that that issue is dealt with in Section 8(d) of the Act. How would you, as a Judge approach, from a legal perspective issues about cost standards and whether intention has a role to play in that enquiry.

Ms M. Victor: Well, intention would have a role to play, you know. Why is the price as it is and the – what I can understand from the amendment, is that there is a shift in onus and and that is an important amendment.

Ms Cane: Thank you very much.

Ms M. Victor: ...where a dominant firm cannot simply carry on business as it did before, once the fact of dominance has been placed there.

Ms Cane: Thank you very much. Thank you, CJ.

CJ M. Mogoeng: Thank you, Commissioner. Commissioner Mpfu?

Mr Mpfu: Just a quick one. You know, we all talk about collusive pricing, which is bad enough, but there's another animal called predatory pricing, which is probably the more dangerous. That is where a person under prices a product, so as to kill the competition. There's a new – there's a case that has come out recently – Media 24 (indistinct) from the Competitions Commission, but my real question is this and I stand corrected by the JP. As far as I understand it that your Court has never found

predatory pricing to be – A, to be found to exist and/or punished. Would – what kind of message would that send to society, if it's true, if that status would be true?

Ms M. Victor: I'm not sure that there has been no case found on predatory pricing, but with the amendment the enquiry is much wider, and I mean, the whole function of that enquiry is to really look at things more carefully and closely.

Mr Mpofo: Thank you, CJ.

CJ M. Mogoeng: Minister?

Mr Masutha: Good afternoon, Justice. Good afternoon, Justice.

Ms M. Victor: Good afternoon, Minister.

Mr Masutha: The Constitution places the honourous task of exercising final responsibility on the prosecuting authority – for prosecuting authority on the cabinet member responsible for the administration of justice, whoever that minister may be – I mean that cabinet member may be. I'm particularly concerned about the statistic of there being policy of prosecutorial action against conduct of a criminal nature, committed under this statutory arrangement or dispensation.

Ms M. Victor: Yes, Minister, I think one of the reasons contributing to that perception is that there has not been sufficient cases put before the tribunal or the – and then following back to the Competition Appeal Court, where those facts are clear and provable. It seems to me that there must be a more concerted effort to place sufficient material to the prosecutor or the prosecutorial authority to take those matters forward and not just in some instances rely on newspaper reports. I think with the introduction of the enquiry till now one will see more prosecutions and the prosecutorial authority being able to bring those cases to Court.

Mr Masutha: I think that's not enough. It appears that for the very same reasons that you have just articulated, even the severity of civil penalties, if that is what the Competition Commission issues – civil recourse remedy, that a negotiated – that

they are usually the product of some kind of negotiation, which takes into account precisely the fact that it is difficult to prove a fault or to adduce efficient facts to make a negative finding, that that results in the actual quantum being so watered down that in some instances it does not have the desired sting that it should have ideally. Is that the objective reality, generally speaking of what really transpired in this environment?

Ms M. Victor: Well, the tool of the Plea Bargain has been with us for a long time. I'm not talking only about the Competition Appeal Court jurisdiction, but it has been a valuable tool, but it must be used correctly, and I think with the introduction of what I term the yellow card, where there can be a high penalty for the first contravention. That will bring a lot more focus on the importance of proper penalties and you know, question of penalty has got so many variables in that if it's going to – in the light of the company – that means a loss of work, et cetera, but it's not something that should be approached as a superficial level. Where there is this plea bargain, the facts too have to be presented carefully. And then, sorry, if I could just add, now, having regard to the amendment, where we can revisit the penalties that we impose, I think that will also bring a different dimension to this question of an appropriate penalty.

Mr Masutha: And finally, have you been able to or conversely is it really practicable that you can ensure that the penalty is not somehow partially or fully recouped through restructuring pricing from the very same consumers who in the first place were the victims of collusion and anti-competition behaviour?

Ms M. Victor: I think that's such an excellent – if I may use the word excellent. It's just so important that that issue be addressed and that is why the importance of subsequent investigation after an order has been made is so important and I think it will go a long way to addressing that conduct.

Mr Masutha: Thank you, Chief Justice.

CJ M. Mogoeng: Thank you, Minister. Judge Victor, thank you very much. You're excused.

Ms M. Victor: Thank you.