



# JUDGES MATTER

**Judicial Service Commission interviews**

**10 April 2018.**

**Competition Appeal Court**

**Interview of Judge BJ Mnguni**

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Mr B.J Mnguni: I'm confident that I can make a contribution, Chief Justice.

CJ M. Mogoeng: Yes.

Mr B.J Mnguni: Actually, in my first sitting, which was somewhere in October, it was the first sitting and I was able to produce a judgment albeit with Judge Victor.

CJ M. Mogoeng: Yes.

Mr B.J Mnguni: Yes and recently I've also produced another judgment on my own.  
Yes.

CJ M. Mogoeng: How, in comparison to other areas of the law is this one in terms of complexity?

Mr B.J Mnguni: It's complicated in the sense that...

CJ M. Mogoeng: How does it compare to other areas of the law in terms of complexity?

Mr B.J Mnguni: It is a specialised area of law.

CJ M. Mogoeng: Yes.

Mr B.J Mnguni: Because you don't look at the law only. You look at the other aspects, for instance Economics with the other aspects, which may – because it's dealing with the – the issues that we deal with are spread over. You're looking at the issue of whether the judgment that you're likely to hand down is going to affect the issue of employment, the contemplation and other aspects – the issue of ownership as well, which is very important.

CJ M. Mogoeng: I'm not sure I understand. I mean, some people think Road Accident Fund matters are fairly straight forward, but you deal with somewhat complex medical issues there.

Mr B.J Mnguni: Yes.

CJ M. Mogoeng: And all sorts of projections that you must come to grips with before you can do justice to those matters. So, what is it about competition law that caused it to occupy a particularly special space?

Mr B.J Mnguni: Because you have to factor in the issues of ownership.

CJ M. Mogoeng: Yes.

Mr B.J Mnguni: One of the key issues that you have to look at is the issue of ownership. The other aspect, which is very crucial is the issue of whether what you're trying to achieve is not going to (indistinct) employment and competition as well.

J M. Mogoeng: Now, my experience, hearing these cases in the Constitutional Court is that there are very few women, very few black Counsel that appear there and those black Counsel that do appear have struck me as being particularly competent in that area.

Mr B.J Mnguni: Yes.

CJ M. Mogoeng: Why is it, if you know, why is it that very few of them appear in the Constitutional Court or is it a reflection of their appearances, even in the Competition Appeal Court?

Mr B.J Mnguni: I think so, Chief Justice, but the other issue, which I think is very important is the issue of exposure. I don't think they're exposed enough to the competition law. It seems to be centered around Gauteng and Cape Town. So, I think if we can spread over, that can also be of great assistance, ja.

CJ M. Mogoeng: But there are many women and black Counsel in Cape Town and Gauteng? Why is it that those who practise in those areas do not appear to appear in numbers that ought to give one comfort that we're making progress in terms of transformation in that area?

Mr B.J Mnguni: I don't know, except that it's perhaps the exposure, but having said that, in my matter – in my matter that we – I've dealt with, where I've sat and dealt with, it was comforting to see that there were black Advocates. Commissioner in fact appeared himself and argued the matter.

CJ M. Mogoeng: Yes. Any suggestions as to how to facilitate the introduction of women and black practitioners in that area?

Mr B.J Mnguni: I would perhaps argue that we need to do it through the organised profession and see whether we can be able to reach them, because I think if we do that, we'll be able to.

CJ M. Mogoeng: Yes. Anyway, tell us why should you be recommended for appointment? Just boast a little bit. Well, I've been a Judge, as I stated earlier on, for nine years. I have sat on a number of appeals with my colleagues and I'm comfortable with it. I'm also a person who's open to persuasion and I'm also likewise, if I hold a certain view, I also try to persuade whoever I'm sitting with, but according that respect that whoever I'm sitting with deserves and I've been – as I've said earlier on, I said in my first sitting I managed to produce a judgment. In my second sitting I managed to produce a judgment as well. So, I think I'm comfortable with the law. I understand it and I hope to make a difference, given the opportunity.

CJ M. Mogoeng: How long ought it to take for those practitioners who were not previously exposed to that area of the law, to understand it so that they can practise it? What will it take? How much exposure?

Mr B.J Mnguni: I think – it's a difficult question, Chief Justice, to answer, but I think with some training and some exposure on the practical side, I probably think a period of six months would be too much.

CJ M. Mogoeng: Six months?

Mr B.J Mnguni: Yes.

CJ M. Mogoeng: Wow...

Mr B.J Mnguni: Provided of course that the person is willing to learn. Yes.

CJ M. Mogoeng: I thought it takes lesser to expose a Lawyer to any area of the law, however complex it might be before they can have a fair understanding of it.

Mr B.J Mnguni: I think it also depends on the individual.

CJ M. Mogoeng: No, no, I'm talking about individuals who are willing to learn and are not lazy. Six months? Isn't it too much?

Mr B.J Mnguni: That's why I said it won't be six months.

CJ M. Mogoeng: Yes.

Mr B.J Mnguni: Yes.

CJ M. Mogoeng: Very well. Judge President Davis?

Mr Davis: I should just add, Chief Justice, we're having a Competition Seminar for Judges in July. We also want to welcome the Constitutional Court to that seminar, first of all, because what I wanted to ask you, Judge, just explain to the Committee – the Commission if you may. You mentioned Professor Fox?

Mr B.J Mnguni: Yes.

Mr Davis: Your training that you were exposed to in her Court?

Mr B.J Mnguni: She's actually part of the people who helped with the drafting of the legislation and the exposure and the training that I received from her was amazing and it took us through for the whole week and I was able to understanding the implications of the Competition law.

Mr Davis: Can I ask you as well, if I may, your experience being on a collegial Court and then there was the Court, an Appeal Court.

Mr B.J Mnguni: Yes.

Mr Davis: And the question of collegiality.

Mr B.J Mnguni: Yes, I was really humbled to see the way the bench and the defence and the Counsel conduct themselves in the Court. There's so much mutual respect. I know that we – the questions that – we always put questions, but we always try to be fair and firm to counsel.

Mr Davis: Could I ask you as well, I think we can debate the issue if Chief Justice of course is correct about the transformation question.

Mr B.J Mnguni: Yes.

Mr Davis: But then you've only been on the two cases there?

Mr B.J Mnguni: Yes. Yes, I have.

Mr Davis: The second case, you wrote the judgment on your own?

Mr B.J Mnguni: Yes, I offered to write the judgment.

Mr Davis: It's a very good judgment too, I see.

Mr B.J Mnguni: Yes.

Mr Davis: Could I ask you, we're facing a major challenge in our area, because the Minister of Economic Development, Minister Patel has tabled some very far reaching amendments to the Act.

Mr B.J Mnguni: Yes.

Mr Davis: Have you had an opportunity of looking at them before?

Mr B.J Mnguni: I've had a look at them. I think they're quite progressive, the amendments that the Minister is suggesting, because I say this, because if you look at them, they deal with the issue, concentration of ownership. They're hoping to address the imbalances of the past and also of what is refreshing in the amendments

is that he has introduced a market enquiry, which was not in existence before, which will help in going beyond the two – the parties that are before you – beyond the conduct of the two parties that are before you. You actually go beyond. You look at the entire – the market as a general – in general, sorry.

Mr Davis: Okay, could I ask you on that, do you think it's going to be a challenge for the Court, because the Court's obviously going to have to develop a jurisprudence around these far-reaching amendments, that we're going to have to deal not just with conduct of large corporations, but structure.

Mr B.J Mnguni: Yes. Yes, you'll deal with the structure. You look at...

Mr Davis: But do you think that's going to be difficult for us to do?

Mr B.J Mnguni: It is going to be difficult, but I always say where there's a will, there's a way.

Mr Davis: But I mean, just in terms of Judicial Competition laws only dealt with conduct. That's why I'm asking.

Mr B.J Mnguni: Yes. It's going to be a challenge, but with the assistance of the experts, I think it's going to be possible.

Mr Davis: And can I – just one final question, I know you say you didn't do Competition Law as it were beforehand, but before you became a Judge, you had a – as I understand, quite a distinguished commercial background?

Mr B.J Mnguni: Yes, we dealt commercially – with commercial matters. Even currently, I do preside over commercial matters on appeal and in trials. Ja.

Mr Davis: Thank you, Chief Justice.

CJ M. Mogoeng: No, thank you, Judge President. You know, I must apologise, a question that I really wanted to ask, or questions escaped me, and I must come back

to them. Tell me if I'm wrong, much of what has been exposed by the Competition Commission as having been done by business is what in the public sector has properly been characterised as corruption?

Mr B.J Mnguni: Yes.

CJ M. Mogoeng: Why is it that when punishment is visited upon these companies, which at times take what as you say could correctly be characterised as corrupt conduct?

Mr B.J Mnguni: Yes.

CJ M. Mogoeng: When punishment has to be visited upon them, there is so much leniency? I'll tell you what I'm talking about. Recently we had to grapple with a case. I won't mention the case. Happily I've forgotten even the citation. From the Competition Appeal Court, the – is it the tribunal that comes before it? The tribunal had given a somewhat harsher sanction, but when it came to the Competition Appeal Court, it said no, no, this thing is close to the margin and it is not a worst-case scenario and it was reduced, suggesting that there is some sympathy for the corrupt in the private sector, but harshness when it comes to the corrupt in the public sector. How should an ideal Judge of the Competition Appeal Court deal with these matters?

Mr B.J Mnguni: Obviously you've got to deal with it in the context of the facts presented before you, but even more so, I should note – you should note the norm that when you're dealing with the companies, the punishment that you mete out, it should be too lenient, as when you're dealing with for instance the corruption arising from government employees. I think as a Judge you should try to be as objective as possible and judge the cases presented before you in a firm manner.

CJ M. Mogoeng: Yes. As a general principle I agree with you, but let me put it differently, reflecting on the judgments of that Court, did you get a sense that generally speaking incidents that border on corruption are visited with appropriately

harsh sanctions by the Court, as a matter of Court. That's the impression that you got.

Mr B.J Mnguni: Yes, definitively.

CJ M. Mogoeng: Now, what is the maximum that can be visited upon a big company that makes even billions per financial year? What is it?

Mr B.J Mnguni: We're generally looking at 10 percent of the turnover.

CJ M. Mogoeng: Is it a fixed amount or is it a percentage?

Mr B.J Mnguni: It's a percentage. It's 10 percent, if I remember correctly.

CJ M. Mogoeng: And generally, what percentage are judgments where punishments have to be visited upon a company fixed at? More or less? On average.

Mr B.J Mnguni: I haven't looked at the history, unfortunately, but I know that, and I haven't been faced with that situation. I must be honest.

CJ M. Mogoeng: Are you satisfied that that percentage is appropriate, considering that South Africa is a country where we're grappling with corruption in both the private and the public sectors? Do those companies get punished with the necessarily harshness to demonstrate that whether you are in the public sector or in the private sector, when you embark upon activities that you know to be ethically unacceptable that either constitute corruption or border on corruption, you will not be allowed to emerge dignified from your act.

Mr B.J Mnguni: Well, I am certainly not satisfied, because my view is this, if there are – the elements of an offence are there, I also think there should be criminal prosecution, because to stem corruption out, because unless you start being serious about that, you never go anywhere.

CJ M. Mogoeng: What percentage would be most appropriate? Is it 10 percent or should it be taken higher than that, in your view? I know that you'll answer as a Judge, not just somebody who says, hey, the wind is blowing in this way, I need to be (indistinct) you are objective. What – is it appropriate or should it be increased, that percentage?

Mr B.J Mnguni: It's difficult for me to – because I'm not presented with certain facts.

CJ M. Mogoeng: No, no, on average, on the assumption that there would be in every situation worst case scenarios. Are you saying in a worst-case scenario, say collusion that results in the poor suffering? I would be giving an example, but I don't want to give an example that would point to particular companies.

Mr B.J Mnguni: Yes.

CJ M. Mogoeng: Companies that deal with products, for instance, without which the poorest of the poor cannot survive and they get involved in these collusions that would make life even more difficult for the poorest of the poor, are you satisfied that 10 percent, as the highest punishment is appropriate?

Mr B.J Mnguni: No, Chief Justice, I will make an example for you with the bread issue, because it effects the poor.

CJ M. Mogoeng: I was deliberately avoiding that, so that I don't point to any company. It's best left to the level of principle.

Mr B.J Mnguni: Yes, it (indistinct). I'm sorry about that. You balance the facts and if for instance it's going to – it's affecting the poor, then you obviously have to look at a higher percentage, because they have to dig deep to make sure that they cover what they need on a daily basis to put on the table and yet there is collusion going behind, where of course, if it did not happen, they were going to be able to get whatever they wanted to buy cheaper than what they're paying currently.

CJ M. Mogoeng: Yes. Minister?

Mr Masutha: Just following on the questioning line that the Chief Justice has adopted. I know for a fact that when certain incidents that had happened notably around your 2010 period certain prominent people felt that you can't deal too harshly with certain industries, because it would implode the economy, given their size and I felt I took exception to that, because I thought that all are equal before the law. Is that the principle that guides the Competition Tribunal or Appeal Court decides on matters or are questions of economic impact given the size of certain corporations taken into consideration and deciding whether or not and what kinds of penalties should be imposed?

Mr B.J Mnguni: It's difficult, Minister, to say, because currently we're faced with a situation where the law says 10 percent, but you know, ordinarily you would want to have evidence to explain the extent of the collusion that we're talking about and who gets affected, who was affected by it and in that sense, I would think you'll have to judge the case based on the evidence that has been presented before you. It is difficult, because we're now dealing with a situation where in law we're tied up to 10 percent.

Mr Masutha: If I may, Justice. I'm raising a question of principle. The constitution in the equality clause says that all are equal before the law.

Mr B.J Mnguni: Yes.

Mr Masutha: So, that is an injunction from the constitution itself. Now, I'm asking, in a situation where if that principle were to be applied, that would risk as others would have urged whether they're correct or not, the economy as a whole being significantly impacted?

Mr B.J Mnguni: Yes.

Mr Masutha: Would it be a serious consideration in determining the extent to which the penalty would be meted out against the perpetrators?

Mr B.J Mnguni: It should be, because it has far reaching consequences.

Mr Masutha: So, indeed it is possible that in a given situation the very fact of economic impact would be?

Mr B.J Mnguni: Yes.

Mr Masutha: And finally, in relation to prosecution, which you alluded to, again there has been a perception put forward that perhaps even though there was clear criminality, as a compromise a fine as opposed to outright prosecution would be a better route then to go, because then you're likely to get cooperation and concession and that would make the job of the state easier in ensuring that justice is carried out. What is your view on those considerations?

Mr B.J Mnguni: I sit and think it's a good thing, because in a way, if you have a situation where a person knows, or a firm knows that if he ... if it engages itself in a particular conduct, it would not only be a question of paying an administration fine. It would also go to an extent of prosecuting them, because it's only – it's unfair to prosecute public, when you can't prosecute private. In a way it's unfair.

Mr Masutha: So, I'm trying to understand your answer. So, you are saying that in all instances work criminality has been established and certain individuals should be followed by prosecution regardless of the impact that it would have...?

Mr B.J Mnguni: Yes.

Mr Masutha: ... on the economy. Thank you. Thank you very much.

CJ M. Mogoeng: I'm sorry. And tell me, does prosecution follow in these cases?

Mr B.J Mnguni: It's very difficult at this stage, because of the way the Act is structured, but it will probably – this new amendment has tried to help in this instance. If I remember correctly, Section 2 of the proposed amendment, you know, it's trying to give you the issue of the burden of truth.

CJ M. Mogoeng: Yes. And these plea bargaining possibilities with the possibility of some minimum fine, do they help root out corruption within the private sector? Just to give you a perspective, you know, I'm moving from this perspective, if we are serious about rooting out corruption, in this country and corrupt practices, the tendency to be soft on corrupt business executives and companies should end. Corruption in both the public sector and the private should enjoy maximum publicity, but if you restrain yourself and say no, no, it's not appropriate to be hard on corruption in the private sector, you are actually incentivising corruption in the private sector without realising it.

Mr B.J Mnguni: It's more so, because they know that they're able to pay – they'll be able to pay fines and get away with it. That's why I say, if there is that deterrent. Ja.

CJ M. Mogoeng: Yes. Is there a follow-up, Judge President Davis?

Mr Davis: Clarify something, so we can be on a... The criminal cartel behaviour, you would agree, I suspect that there's a difference between what we would call really corrupt practices, such as – I think you've mentioned it, the bread cartel and the complexity of Section 4(1)(b) where they may be a collusion, but it's a slightly different matter. Now, the criminal procedure is, we haven't yet got there yet, because they haven't been instituted. The Act hasn't been triggered.

Mr B.J Mnguni: Ja.

Mr Davis: I just wanted to ask you. That's going to be done by the prosecuting authority, not by the Competition Appeal Court?

Mr B.J Mnguni: Not by the Courts, ja.

Mr Davis: People will go to jail for that?

Mr B.J Mnguni: Yes.

Mr Davis: Do you think there's a distinction between, on the one hand, correctly putting directors in jail for criminal – for what are criminal – what Chief Justice correctly regards as corruption, which just is, when you're talking about bread.

Mr B.J Mnguni: Yes.

Mr Davis: ...on the one hand and rather and putting a lot of emphasis on that, whereas if we simply fine we may put the company out of business and these jobs get lost and alternatively the cost of the fine get eventually redistributed to the consumer, so would you think that it should be imperative to get the criminal law up and running, which it isn't at the moment?

Mr B.J Mnguni: Yes, that's why I said if there is a lack of wisdom on the part of the criminal side.

Mr Davis: Because it hasn't been implemented yet.

Mr B.J Mnguni: It hasn't been implemented yet.

CJ M. Mogoeng: And I wasn't sure whether you say it's proper to keep the percentage at 10 or to raise it. Your mic is off. Should it stay at 10 percent or should it go higher, in your view?

Mr B.J Mnguni: Well, depending on the case that has been presented before you, it should be fair.

CJ M. Mogoeng: Not to accommodate the extreme possibilities?

Mr B.J Mnguni: Yes, it should go high, because if you make for instance billions, for you to pay 10 million, it doesn't really pinch.

CJ M. Mogoeng: Yes. Advocate Mpofu S.C.?

Mr Mpofu: Thank you very much, Chief Justice. I've partly been covered. Would you agree that...? Okay, maybe let me rephrase this by saying, I practised in this area of the law and I'm a relative newcomer, two or three years and I find it very significant, a significant area of law for the reason that, as the CJ said, I call it the – I call the Competition Commission the public protector of capital.

Mr B.J Mnguni: Yes.

Mr Mpofu: Because in other words, that is exactly the same issue that you are dealing with there, obviously the nuance differences. One of the paradoxes that we have to deal with is that we have what we call a capitalist system or a free market system, which is based on the assumption of competition. Competition is one of the big things that gets extolled as part of that system and yet it's clear that left to their own devices big companies will do everything against the public interest and the Act in a detrimental fashion.

Mr B.J Mnguni: Yes.

Mr Mpofu: Now, I think one of the or the issue that I really want to deal with you firstly is the demystification of this area of law, because there's a whole lot of history that is built around it. I found that when I did Economics, not as a major, at university level, but I was able to understand the concept very easily and yet it presented as if you have to be – to have a PhD in Economics to understand it, which is not true, because I think this area of the law is more about the public interest, protecting the public against the vagaries in the market and those issues, the constitutional issues are actually much more prominent than economic formulas and all sorts of flowery things. So, what do you think can be done to demystify this area, A, for Lawyers, because it's like any other area of law. CJ is right. If you do your first case, your second case and then you get the hang of it and if you apply yourself, basically you'll be able to practise. At that level, but more importantly at the level of the public, so that the public can understand that actually the public is not just simply vulnerable of being abused by people simply because they have economic power. That these instruments are available and sorry to compound the question even more, the issue is not even so much that what the CJ is saying, that over the 10 percent cap. The

issue is that these courts have never even approximated something to the 10 percent, so the fines really, CJ, but 1 to 3 percent. I think this is an unscientific thing – number 1. Number 2, the next thing you get told, that if there are multiple offences, it's fine, don't worry, because you're going to kill the golden goose, you're still going to give one fine. And those kinds of niceties don't apply. If I commit 10 counts of corruption, I'll probably be fined or sentenced in respect of each, but somehow there's this nice buddy system. Would you agree that there's at least a perception of that overall leniency and not treating this thing as if it is about protecting the public in the same way as corruption?

Mr B.J Mnguni: Yes, and also just to add on that. You know, I find that it is very difficult for someone, for instance, who stays in the rural area to understand what this kind of Court does, and I personally think the public needs to be educated on the importance of the Court, because in the same way that they have been educated about the importance of the public protector. So, insofar as the issue of making sure that we see more black Lawyers, African Lawyers coming up on the fold, I've said earlier on that I personally think through organised profession we can also make a difference if we go out there and assist and make them understand the importance of this aspect of law.

CJ M. Mogoeng: Commissioner Mpofu, are you done?

Mr Mpofu: No. Practically, what do you think should be done, except that we need to do training and all that? But what needs to be done to ensure that the public out there is aware and is able to use the instruments to protect itself against abuse by Capital?

Mr B.J Mnguni: I think one has to...

Mr Mpofu: Obviously I'm talking specifically in relation to the Court? There might be many things that the public might do.

Mr B.J Mnguni: Even though we as Judges are limited in terms of what we can offer, but I suppose if we educate legal profession about the importance of this aspect of

law and in turn and really on them to go out and entice the public. That could also be a solution, because we are limited. We can only assist up to a certain point.

Mr Mpofo: Okay, last question, just to do with the Court itself, again another answer in statistics that I picked up in the streets of the Competition law's fraternity is that in the Courts more than 60 percent of the judgments are written by the JP. Is that a desirable thing or should we try and diversify the view point, so that the area is not, for the lack of a better word, captured by the same view point. What you say?

Mr B.J Mnguni: I do understand what the Commissioner is saying. I was not aware of that position, but as I said earlier on when I sat on those two instances I offered to write, and I was given an opportunity to write, so there were no hindrances on the part of the Presiding Judge.

Mr Mpofo: Maybe just skills (indistinct).

Mr B.J Mnguni: Yes.

Mr Mpofo: All right. I won't ask you about that judgment you wrote, because I'm taking it to the Constitutional Court. I'll be bias here. Thank you, Chief Justice.

CJ M. Mogoeng: Thank you. Commissioner Masuku?

Mr Masuku: Thank you, Chief Justice. Good afternoon, Judge Mnguni.

Mr B.J Mnguni: Thank you.

Mr Masuku: The significance of the Court that you wish to join in my view has not properly been set out. If you look at the preamble of the Act, it says that "apartheid and other discriminative laws and practises in the past resulted in excessive concentration of ownership control within the national economy, inadequate restraints against anti-competitive trade practises and unjust restrictions on full and free participation in the economy by all South Africans." So, this Court is created in order to create a legal framework in terms of which the economy can be freed in

order to advance the economic interest – the regulatory interest or rather it's really the regulation of how the economy should run.

Mr B.J Mnguni: Yes.

Mr Masuku: But looking at South Africa, recently there was a report about South Africa being the most unequal party.

Mr B.J Mnguni: Yes.

Mr Masuku: Would you say that the Court has done enough in order to use the power it has in order to create an environment in terms of which the South African economy and particularly the players in the economy are able to work in such a way that they close these gaps that are created by discriminatory practises and by anti-competitive and unjust restrictions? Do you think that the Court has in fact done enough in order to do that? That's the first question. The second question, before you answer the question, the second question, is it not a great concern that this Court operates only in one province and not in all provinces? And I mean, the judgments that it makes, its far-reaching consequences in the whole country, probably affects as an international thread. And the fact that it's concentrated only here, means that only practitioners within the province have access to that Court. Practitioners outside the province don't. Actually they don't. The only time you get an opportunity to get – to do a Competition Appeal Court matter is when it comes to the Appeal in Cape Town, but then (indistinct) advocates are already involved in the matter, so you don't get involved in the Cape. So, I'm concerned that this Court's potential has never really been utilised in order to achieve what Commissioner Malema is fighting for in this country, economic freedom. It will not, because of the way in which it functions, so I would like your comment on that.

Mr B.J Mnguni: Well, just to deal with the second question, the second question, relating to the Court's sitting, I think it will help to deal with that aspect with legislation. That's the first point. The second point about the issue of dealing with – the issue of ownership, because what it boils down to – what the question that you've asked me, that's precisely what I've said the Minister has made a proposal

which in my view is progressive, because those proposals – the amendments to the Act seek to deal specifically with those issues, the issue of the concentration of economy to a particular group of people and they also speak to the aspect of dealing with the structure itself, which was not there in the past, because in the present act you can only deal with the collusion. The Act deals with the collusion of market appeals. It doesn't touch on the concentration of ownership, which the minister has – is proposing now that this Court has to deal with that aspect, which I – that's the reason why I said earlier on it I personally think it's a very good move, because if we don't do that, we'll never be able to address the imbalances of the past.

Mr Masuku: Well, thank you, Chief Justice.

CJ M. Mogoeng: Thank you, Commissioner Masuku. Commissioner Nkosi Thomas? And Maybe Commissioner Cane, you could signify whether you still want to come in, in light of the earlier discussion or not.

Ms Cane: (Indistinct).

CJ M. Mogoeng: Okay, then you come in after Commissioner Nkosi Thomas.

Ms Thomas: Thank you, Chief Justice. Good afternoon, Judge Mnguni.

Mr B.J Mnguni: Good afternoon.

Ms Thomas: In the questionnaires that you submitted to the commission there's a question there, question 16, which asks of you, if you have written any judgments and whether of any significance and it invites you to tell us why those judgments are deemed to be significant by yourself. So you listed 11 judgments there?

Mr B.J Mnguni: Yes.

Ms Thomas: One of them being a matter of Hoskin Consolidated. It appears to be the one that pertains – that is relevant...?

Mr B.J Mnguni: Yes.

Ms Thomas: ...to this application.

Mr B.J Mnguni: Yes.

Ms Thomas: But what you have not told us in this questionnaire is why you regard this particular judgment to be important or significant. Are you able to enlighten us as to why you would see that as – to be of some significance?

Mr B.J Mnguni: I'm sorry about that. Yes.

Ms Thomas: I'm raising the question, because it is relevant to this application.

Mr B.J Mnguni: I'm sorry about that. And it is significant in a sense that if you consider the new amendment, especially Section 12(b), that section deals specifically with the lacuna, which the proposed amendment is seeking to address, and that judgment is relevant, because after that judgment their lacuna was exposed, and the legislation has – it's now supposed to deal with that aspect. I'm sorry that I didn't mention it here, but if you look at Section 12(b) of the proposed amendments, it deals specifically with that case. Ja.

Ms Thomas: Very well, thank you. And I think it's the GCB that commented at length about the judgment and you co-rolled with AJA Victor. Am I right?

Mr B.J Mnguni: Yes.

Ms Thomas: And it appears as though you did a very good job there.

Mr B.J Mnguni: Yes, thank you very much.

Ms Thomas: Well, is it on appeal? Well, you're not being criticized, that's what. The GCB is not criticising your judgment, that's all I'm saying. Thank you. Thanks, Chief Justice.

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

Ms Cane: Thank you, Chief Justice. Good afternoon, Judge.

Mr B.J Mnguni: Good afternoon.

Ms Cane: I'd like to pick up on the discussion that was being held with you just prior to Commissioner Nkosi Thomas proposing her question and it pertained to something the Judge President raised and that my fellow commissioners on both sides of me took further with you, which was the structural issue in the amendment – proposed amendment to the Competition Act.

Mr B.J Mnguni: Yes.

Ms Cane: Now, as I understand your answer, you said that you considered that you would be in a position to deal with those issues, if you were appointed to this Court with the assistance of experts.

Mr B.J Mnguni: Yes.

Ms Cane: Could you take that a bit further and just explain to the commission how experts' evidence will be considered and I've just referred to the recent criticism of the Competition Appeal Court in which the role of experts in a pinning on legal trust issues was taken up and I do understand that the line between expert evidence on law and economics is a very blurred one in the competition arena, but I'd like to just understand how you would approach these difficult questions if you called upon as a Court to deal with structural issues.

Mr B.J Mnguni: You see, with structural issues it involves investigation. That's the first thing, which is to be done by the authorities, the competition authorities, so in other words, it's evidence based. You have to have evidence and when you make a decision, you make a decision measured on the evidence that's being presented before you, so in essence you can't on your own come up with your own ideas

without – especially those ideas don't speak to the evidence that's been presented before you. It is in that context that I say we'll be helped by the experts. I know of course the role of the expert in the civil proceedings.

Ms Cane: Yes, thank you very much for that answer. May I take up one other issue with you, just to understand your approach in these kinds of difficult questions? My understanding is that Section 4 of the Competition Act makes certain conduct or agreements between competitors of violation of the Act and I think that will remain so under the new amendment. When you have a vertical agreement that has a horizontal dimension, if you were to be confronted with such an issue, would there be any room for holding that it doesn't contravene the absolute proposition in Section 4? How would you deal with that issue?

Mr B.J Mnguni: It's a very difficult question to answer, I must say, because as I've said, it should be evidence based. I mean, it's – I can't really make a pronouncement in abstract or I have to have evidence before me before I make that pronouncement.

Ms Cane: Well, may I ask you this? Is there room for any kind of horizontal dimension or agreements between competitors when you have an overlap between vertical and horizontal relationships?

Mr B.J Mnguni: I thought that was prohibited in terms of the Act.

Ms Cane: And when there's a blurring in the relationship, because you could have a situation where there's a vertical relationship that has a horizontal dimension.

Mr B.J Mnguni: I don't understand what the Commissioner is trying to ask of me. I honestly don't understand the question.

Ms Cane: All right, perhaps I'm not clear enough and it's not my area of expertise, so the fault may lie with me and I leave it to others who know more about the field to take it further then.

Mr Mpofu: Maybe I can assist. This is a question...

CJ M. Mogoeng: If you could switch off the other mic, Advocate. Thank you.

Mr Mpofu: Thank you. I was saying it's an issue over which the Judge President and I had a small debate last week in Court.

Mr Davis: We had a big debate, but we haven't decided the case.

Mr Mpofu: Yes.

Mr Davis: You or I aren't going to say any more about it.

Mr Mpofu: Yes, I do. No, I think what Commissioner Cane is talking about is the situation where it so happens that the horizontality or verticality of the relationship is an issue and that was dealt with, for example, I think in the case – in the SAB case, whether in those kinds of cases and this is what we were debating in Court last week, is there room for what is called the characterisation test, in other words to use it, to even determine whether the relationship is predominantly horizontal or vertical.

Mr B.J Mnguni: In the present context?

Mr Mpofu: Yes, in the...

Mr B.J Mnguni: Not in the present, but in the proposed amendment there's definitely.

Mr Mpofu: Yes, but the bigger question is this, remember that Section 41(b) of the Act is meant to bring what I call strict liability?

Mr B.J Mnguni: Yes.

Mr Mpofu: In other words there should be no defence, no justification and the issue that we were debating is whether using the characterisation issue isn't introducing a

defence to something, which is supposed to have no defence through the back door so to speak. Can you comment on that?

Mr B.J Mnguni: It's difficult for me to comment, because as far as I know, if you're trying to introduce something, you know, in terms of the new Act or the Act as currently, I don't think there is, as I said there is, but in terms of the proposed amendment, there's definitely room to deal with that aspect. Ja.

Mr Mpofo: Thank you.

CJ M. Mogoeng: You want to re-join, Advocate Cane?

Ms Cane: Thank you, Chief Justice. If I may canvas one more area with you, Judge, it pertains to predatory pricing and Section 8(d) of the Competition Act and I'd like you to explain to the Commission how you would approach the issue of cost standards and whether intention would have any role to play in deciding a case pertaining to cost standards.

Mr B.J Mnguni: You mean the cost in relation to the outcome of the case or what cost are you talking about?

Ms Cane: I'm talking about the issues of marginal costs and average variable costs as described in Section 8 and the issue of a dominant firm charging prices below...

Mr B.J Mnguni: At a reduced price, yes.

Ms Cane: ...cost.

Mr B.J Mnguni: Yes, you mean how do you approach that?

Ms Cane: Yes, what is the guidance that or how would you approach such a case?

Mr B.J Mnguni: But obviously the first step is to have facts before you and those facts will lead you to a certain conclusion. It's difficult to say this is the approach,

which I'm going to adopt without being presented with the facts, ,the evidence – hard evidence. That's the only way you can deal with it, because for you to be able to determine whether there was an unreasonable reduction of the price, you'd have to look at the evidence presented.

Ms Cane: Yes, I was really just asking you as a Judge of the Competition Appeal Court what legal principles you would bring to bear.

Mr B.J Mnguni: I can't pass judgment on something that is not yet before me, unfortunately.

Ms Cane: Very well. Thank you, you Chief Justice.

CJ M. Mogoeng: If you could switch off the mic, Advocate Cane. Thank you. Judge Mnguni, I'm sorry to have to come back. I'm worried about this, because it's a very important Court this one. You see, anything that is made difficult to understand to use the words of Advocate Mpofo S.C, mystified, tends to leave a lot of room for manipulation and even corrupt activities to be perpetuated without and I'm one of those who believe that if there is anything that has the possibility to demystify any concept, it is the law and I was gratified to learn from the vast Counsel of the University of Johannesburg and I think one of the genius scientists who died recently said actually even science can be explained to the point that anybody, educated or uneducated can understand it. Now, one of the challenges with this competition law area and tell me if my understanding is wrong or not – from the Competition Commission, the Tribunal, all the way through to the Court, the regulatory framework is structured in such a way as to make it unnecessarily complex, unnecessarily difficult for people to grasp it and therefore creating the possibility for corrupt activities to elude the system with effective and effective arrests of these undesirable and yet economically toxic tendencies, as far as the poorest of the poor are concerned to continue. What is it that needs to be done? I'm coming back to Advocate Mpofo S.C's question, to demystify this area of the law and its practise. To facilitate detection of wrongdoing, to facilitate the attainment of the objectives set out in the preamble. What is it that needs to be done, because for as long as it shows a highly intellectual – people get away with murder in cahoots.

Mr B.J Mnguni: No, I agree with you, Chief Justice, but as I've said earlier on, I don't think we have done enough to educate the people, the legal professionals about this aspect of the law.

CJ M. Mogoeng: But educating them or is it about doing something about even the law as it stands? I mean sometimes you come across strange formulas. It's a struggle to – what are they saying now and before you know it, there is some conclusion, which doesn't quite register as sensible that is being arrived at, because there is – I don't know whether it's a question of just taking what others are doing elsewhere and applying it to South Africa, even if it doesn't quite help or why is it that it's made so intricate, so difficult. Shouldn't something be done about the – this complexity in cahoots?

Mr B.J Mnguni: Well, I personally think there should be. I even offer myself to help in that regard, if there's any need to. I personally think there is a need to educate the public about it.

CJ M. Mogoeng: Yes. So, you think about – it's more about education than the regulatory framework itself?

Mr B.J Mnguni: Because as far as I can see it, the public is not even aware of...

CJ M. Mogoeng: No, no, but I'm not talking about the public.

Mr B.J Mnguni: Yes.

CJ M. Mogoeng: I'm saying for the Competition Commission to be effective and all the structures created to arrest this sugar-coated corruption, because sometimes it is, you need to do something about the regulations and the Act before you can even teach people.

Mr B.J Mnguni: Yes.

CJ M. Mogoeng: They could use a friendly. Is that not the problem then what...?

Mr B.J Mnguni: That's the problem and the transparency as well. Ja.

CJ M. Mogoeng: Yes.

Mr B.J Mnguni: Ja.

CJ M. Mogoeng: Anyway, thank you very much, Judge, you're excused. Thank you very much.