



JUDGES MATTER

Judicial Service Commission interviews

12 April 2018.

KwaZulu-Natal Division of the High Court

Interview of Mr M E Nkosi

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

Mr M E Nkosi: -- I studied at the University of Ongoye -

CJ M. Mogoeng: Yes

Mr M E Nkosi: -- It was Zululand at the time.

CJ M. Mogoeng: When was that?

Mr M E Nkosi: I started in 1984.

CJ M. Mogoeng: '84.

Mr M E Nkosi: Then I completed in 1988.

CJ M. Mogoeng: Yes.

Mr M E Nkosi: And I went on to the University of KZN in Durban where I did my LLB.

CJ M. Mogoeng: Yes. What then did you do thereafter?

Mr M E Nkosi: After that, I actually worked for an NGO called the “Community Law Centre” where we were training paralegals. I did that while I was doing my LLB. And when I finished my LLB I was asked to stay on for a time. Then I stayed for a year and decided that I wanted to do my articles after that.

CJ M. Mogoeng: Yes.

Mr M E Nkosi: Then I got my articles with my current firm Shepstone and Wylie and left the Community Law Centre to do articles with Shepstone and Wylie. But I had an arrangement with the Community Law Centre that when I qualify as an attorney I would come back and work for at least a year. So after qualifying as an attorney with Shepstone and Wylie I went back to the Community Law Centre and worked for there for a year until June 1985 as a case coordinator.

CJ M. Mogoeng: Yes. Very briefly what did that centre actually do for the community?

Mr M E Nkosi: We would -

CJ M. Mogoeng: I ask because my eyes were only opened to the role of paralegals last year. So very briefly what are the essentials of the role of a paralegal?

Mr M E Nkosi: The paralegals were actually getting elementary legal knowledge. So we would train them on the basic legal knowledge so that they could go out and advise members of the community and at that time they were pertinent issues which affected people in the rural areas particularly because that is where we concentrated. Issues of people not getting their pensions on time, not having

anywhere where they could go to actually lay complaints or they came in very handy because they advised them with regard to that.

CJ M. Mogoeng: What else? What other sensitive issues that often frustrate people did that centre or do centres of that nature help the community with?

Mr M E Nkosi: Well our focus was in the rural areas particularly. So issues of family we also have a problem. You know people who have problems within the family; breadwinners not being there, not being able to have enough resources to put food on the table or there will be disputes affecting members of the same family. So that came in as a very useful resource in trying to resolve those problems and where we could we could actually mediate amongst, you know, members of the same community. And we were relying quite a lot on the cooperation of the Chiefs, or the Traditional Authorities at the time, because before you could go there and do anything you had to get their go-ahead.

CJ M. Mogoeng: Yes. I know the answer to my next question might appear to be obvious, but I think it is necessary, where you being paid anything? Even a token for fulfilling that role, in other words, being paid by those you assist?

Mr M E Nkosi: No, we rely on donations actually, so it was a free service for the members of the community. Then because we needed, you know, funds to go around, vehicles to travel 'cause those were far out areas in KZN and some of us we are from Gauteng. I am originally from the East Rand.

CJ M. Mogoeng: Yes.

Mr M E Nkosi: So it was a foreign territory for me. So we had to get acquainted with the area. The resources were, there were actually quite a lot of donors at the time, who were funding the type of activity that we doing.

CJ M. Mogoeng: Is it fair to assume that the centre paid you fairly well?

Mr M E Nkosi: Not fairly well, but there were not many jobs going around at the time. And we were actually looking at the bigger picture of making a difference -

CJ M. Mogoeng: Okay.

Mr M E Nkosi: -- So it did not bother as much.

CJ M. Mogoeng: So in a nutshell, what is it that drove you to work for the centre notwithstanding the fact that you were not particularly well paid?

Mr M E Nkosi: I think we were driven, at the time, to make a difference in whatever way we could. It was a small contribution, but it was a contribution none the less. So as a student we were actually helping people anyway because people were having a whole lot of political problems, you know, being harassed by the police and all sorts of things. So in this case, at least, we were getting some form of income and at the same time, we felt like we were being lawyers which gave us some satisfaction. -

CJ M. Mogoeng: Yes.

Mr M E Nkosi: -- Because once you have assisted people and you can actually see that they have actually benefited from what you did it gives you some level of satisfaction.

CJ M. Mogoeng: You have been practising law for some time?

Mr M E Nkosi: Yes, I have.

CJ M. Mogoeng: As what and for how long?

Mr M E Nkosi: After I finished my stint at the Community Law Centre I returned to Shepstone and Wylie, 'cause I then had an arrangement with Shepstone and Wylie that when I finished my stint at the Community Law Centre I should come back and work as a lawyer. So I did that and went back to Shepstone and Wylie in 1995, in June. I worked as a, they used to call us, Professional Assistants at the time -

CJ M. Mogoeng: Sure.

Mr M E Nkosi: -- Which means you have just qualified. In 1998 I was admitted as a partner of the firm and I have been a partner ever since. So I have been there for about twenty-four years now.

CJ M. Mogoeng: Just a quick question in passing, why is it that it appears to be impossible for black lawyers, black in a generic sense to form big firms? Why does it look like they all just get absorbed by big white firms or it will be at best a three partner firm or a three-director company? What is the problem? Very briefly.

Mr M E Nkosi: I think it is -

CJ M. Mogoeng: To have fast-track transformation, that is what I am gearing at. What is the problem?

Mr M E Nkosi: -- I think the problem is we want the rewards too quickly, as black people. I think it is something that we still need to work on. Because in a bigger picture if you work in a firm you need to realise that you actually work for a collective and maybe it does not mean that you have a kill-what-scenario where you say I actually bring this much so I need to get the same much, which would be commensurate with what I am bringing in. What I have realised is that if you accept that you actually work as a collective for the general good and there may be times when you bring in more and not expect to get out more, that is the realisation that is going to make us, as black professionals, stick together if we decide to form a partnership.

CJ M. Mogoeng: Yes.

Mr M E Nkosi: Over the years I have been at Shepstone and Wylie, I mean there have been quite a lot of guys that were at varsity with who have actually shown an interest of forming firms, which was a good gesture. In most instances it would actually take off and those of us who are in big firms would actually assist in

facilitating the process but a few months or years down the line you find that squabbles start showing and mainly they are based on no I bring in too much and people are actually taking off more than what they are bringing in, and it is not fair, so I can do better on my own.

CJ M. Mogoeng: Yes.

Mr M E Nkosi: I think that maybe if we move away from that thinking -

CJ M. Mogoeng: Yes.

Mr M E Nkosi: -- Black firms are going to thrive.

CJ M. Mogoeng: That is a side issue, unnecessary side issue just so that you relax a bit. Let me wrap it up with this question. Why is it that you are absorbable, you are able to work, in these big firms and they give you whatever they think is appropriate for you – know how much you bring – and yet when you are alone you cannot do it? Why is it you did not march out of that big firm, join up with those struggling partners, form something formidable with the benefit of your experience in that firm. Grow it and grow it, encourage others around the country to do likewise. What is the problem?

Mr M E Nkosi: Are you saying why am I not personally doing that?

CJ M. Mogoeng: Yes, why did you not step out of the partnership just as an example, for instance, to go join them and strengthen this thing?

Mr M E Nkosi: Yes, you see -

CJ M. Mogoeng: Or have you not seen the need?

Mr M E Nkosi: No, I have seen the need, you need to find people who the same type of thinking -

CJ M. Mogoeng: Likeminded people?

Mr M E Nkosi: Yes.

CJ M. Mogoeng: Yes.

Mr M E Nkosi: Now if you find people who are actually not thinking the same way and you leave what has become your familiar place –

CJ M. Mogoeng: Sure, sure.

Mr M E Nkosi: -- And you get to a point where you are on your own or you are actually doing things the way you think you should but nobody else is actually pulling in the same direction -

CJ M. Mogoeng: Yes.

Mr M E Nkosi: -- It ends up actually disadvantages us as black professionals.

CJ M. Mogoeng: Yes.

Mr M E Nkosi: 'Cause as I say I had people who had very best intentions –

CJ M. Mogoeng: Yes.

Mr M E Nkosi: -- Who did exactly this and I have always been very supportive.

CJ M. Mogoeng: Yes.

Mr M E Nkosi: And then a few months down the line the phone you to say it is not working well because so and so is actually, you know, being selfish or wants to take out too much.

CJ M. Mogoeng: Yes.

Mr M E Nkosi: I think we need to change as black professionals.

CJ M. Mogoeng: Yes. For what it is worth, I find it strange that we can form political parties, they can form also sorts of thing, they work regardless of how much anybody contributes and yet when it comes to money making ventures there seems to be a problem. But anyway, I think you have answered. Now how did you equip yourself for the position you have applied for now?

Mr M E Nkosi: Position of?

CJ M. Mogoeng: That you have applied for, just boast a bit. Give us your credentials, emphasise as much as you want to so that we really understand that Mr Nkosi is up to it.

Mr M E Nkosi: Okay, since I went back to Shepstone and Wylie back in 1995 I have litigated in the High Court. I am responsible for my own matters and I happen to specialise in what I do and in order to place myself in a position to -

CJ M. Mogoeng: And what is that?

Mr M E Nkosi: Local Government and Administrative Law. So in order to equip myself in doing that effectively, I had to read as much as I can, get to know people as much as I can, get to meet clients and find out what their problems are as much as I could. And through the litigation that I have done over the years I have rubbed shoulders with counsel, senior and junior, and in most instances, because most of them are not too familiar with what I do I would actually have to assist them in preparing for the cases that we were doing and throughout the process I do not rely on counsel to actually come up with answers in my cases. If it is my case I need to know it more than counsel will do. We can exchange ideas in terms of how the case is how to be handled but I want to be hands-on in all my cases. So all counsel that I have briefed will know that I know as much as they do when it comes to my cases. Then in 2011, I was approached by the then Judge President to request that I make myself available to act. For me, it was jumping into the deep end because I had not

done it before. But because I litigated in the High Court throughout it was no problem at all. I actually hit the ground running and I was prepared to go to the other Judges who were there at the time, if I am not familiar or if I was not sure of anything to ask them. And I must say they were very helpful in guiding me through the process. I have been doing it almost annually for about last seven years now and I have learned a lot from the Judges who have worked with me. I think they have actually found out that I am a team player, always prepared to learn. So I am very well equipped, and questions were asked as to having acted all these years why did I not make myself available. I personally felt that I was not ready yet. I feel that I am ready now.

CJ M. Mogoeng: Have you had any problem delivering judgement within a reasonable time? Reserve judgements?

Mr M E Nkosi: No the least I have waited for a judgement if I am not mistaken, was a month.

CJ M. Mogoeng: Yes. Just to clear something -

Mr M E Nkosi: The most, I beg your pardon Justice.

CJ M. Mogoeng: I beg your pardon?

Mr M E Nkosi: The most I have. I said the least, the most or the –

CJ M. Mogoeng: Yes.

Mr M E Nkosi: -- The longest period I have waited I think was a month.

CJ M. Mogoeng: Yes. Just to take something out of the way. Your directorship; you seem to express doubt whether you ought to resign the directorship or not in the event of your appointment. Have you reflected further on it?

Mr M E Nkosi: Yes, I have no doubt that I will be prepared to resign, if –

CJ M. Mogoeng: Is it prepared or is it something else?

Mr M E Nkosi: No, I would, I would –

CJ M. Mogoeng: Are you uncertain?

Mr M E Nkosi: No, I would resign unless I am allowed to stay. I will resign from my directorships if I am appointed.

CJ M. Mogoeng: Yes. Thank you DJP?

DJP M.I. Madondo: Thank you, CJ. Mr Nkosi, good afternoon.

Mr M E Nkosi: Good afternoon DJP.

DJP M.I. Madondo: How are you?

Mr M E Nkosi: I am very well, thank you. And, how are you?

DJP M.I. Madondo: Yes. How many times have you taken crime?

Mr M E Nkosi: Actually, I acted in Durban once and then I did now - 'cause I was given civil throughout but when I was acting now in January I also did both crime and civil.

DJP M.I. Madondo: So how long did you do crime in the previous session?

Mr M E Nkosi: Well in the previous session I did it, I think it was for a period of two weeks and before then I did it for the whole session in Durban. That was the first time I acted.

DJP M.I. Madondo: So with such an experience and exposure in criminal prosecuting can you safely say that you are now a well-balanced judicial officer?

Mr M E Nkosi: Yes, I can. I mean when I did crime the first time I actually had an assessor with me and we were allocated if I am not mistaken, five criminal matters to do within a week. And for our luck, all our matters ran, by the time I finished my stint I delivered all our judgements and I had no difficulty whatsoever in dealing with all the matters that we allocated to me.

DJP M.I. Madondo: Okay, maybe you can give me some clarity on this; in the answer to your questionnaire, you indicated you appear in court occasionally, mostly to note judgements and to argue urgent applications.

Mr M E Nkosi: Yes.

DJP M.I. Madondo: So have you been involved in any trial proceedings?

Mr M E Nkosi: Like I said I am always involved in trial proceedings. When it comes to preparation I am as one, I prepare all my cases and I am actually there. And if there issues to be found out I make sure that I do.

DJP M.I. Madondo: I mean on your own?

Mr M E Nkosi: On my own. Run a matter on my own?

DJP M.I. Madondo: Yes.

Mr M E Nkosi: No, I do not think it is actually advisable for any attorney to do that. If you actually are a litigator, I think it is in the interest of your client that if you have a chance to brief counsel you give your client benefit of having two minds looking at the same thing. Because if you act for a client, as both attorney and counsel you tend to develop blind spots. There are issues which you overlook which counsel if you had one, would have actually pointed out. Because what tends to happen is that as an attorney I tend to become too emotionally involved with the issues of my client. I see the whole case through the lenses of my client, then I tend to concentrate on what is before me in favour of my client. Only to find that there are issues or cases

that I had not actually dug deep enough to find out. So that I can look at the matter from both ends. So having counsel helps in doing that. There are instances when I thought our case is waterproof only to find that when I sit down with counsel the shortcomings that are pointed out gives me the indication that I need and dig deeper and my clients have always benefited from that.

DJP M.I. Madondo: Okay. During your acting stint have you come across a situation where you had to develop Customary Law so for it to be in line with Constitutional values?

Mr M E Nkosi: Yes, I have quite a few cases involving Customary Law and I have dealt with them quite well.

DJP M.I. Madondo: As practising attorney or as a presiding officer?

Mr M E Nkosi: As both. No, not as a practising attorney I specialise in Local Government and Administrative Law. My clients are, you know, institutions. But as a judge, I heard Customary cases that I have dealt with and I have dealt with them very well. I never had any complaints.

DJP M.I. Madondo: Okay, thank you, Chief Justice.

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

MEC W Thusi: Thank you, Chief Justice. Looking at the racial and gender demographics of the KZN High Court Bench you realise that transformation is necessary?

Mr M E Nkosi: Certainly, yes, I do.

MEC W Thusi: Please tell us what contribution have you made to empower the previously disadvantaged colleagues in your profession especially women in particular, over your long period of service in the legal profession.

Mr M E Nkosi: Okay, when I went back to Shepstone and Wylie as a lawyer, back in 1995 as I said, I had this department that was there, but I had to refine it; it was Local Government and Administrative Law Department. It is a small department because of the specialising of our work. So I have an associate attorney or professional assistant, as we use to call them, I had a paralegal and I have a candidate attorney who also helps with the running around. Since that time I have always had black professionals in my department to assist or to be part of the department. So as a big partnership we have a policy in terms of how we recruit people to come into the firm. But as a black senior partner, I made sure that I lead by example. So I have always had black professionals working in my department and I have trained them very well. And those who left went out to join parastatals or to practice on their own account and the reason they left is because they actually had to be head-hunted because of the training that they got from me. So I have done quite a lot to actually make sure that I develop other black professionals to be in a position to do what they have been trained for.

MEC W Thusi: Thank you, Chief Justice.

CJ M. Mogoeng: Thank you, MEC. Commissioner Mpofu?

COMM J. Mpofu: Good afternoon Mr Nkosi.

Mr M E Nkosi: Good afternoon, Commissioner Mpofu.

COMM J. Mpofu: Yes, thank you. I would like to maybe further develop a point that the CJ alluded to. But from a different angle. Historically white firms, like the one you work for, are notorious for not briefing black counsel or black women counsel. There is an expectation, legitimate or otherwise, that people like yourself who are highly placed in those firms would either back the trend and do something different or influence the mentality – we know where the mentality comes from we do not have to go there - And you said you tried to lead by example, so transformation for me has got, we spoke this morning about empathy, there is this other phenomenon which is what I am asking about called “kicking the ladder”. In other words, you climb, and you make it there in the big white firm and you are a partner and so on, but you kick

the ladder down and nobody else is supposed to go up it. From the point of view of your subordinates, you have answered the questions. So I would like to know whether you have done anything remarkable in relation to briefing black counsel?

Mr M E Nkosi: Yes, I have actually, the first counsellor I look for if it is a matter that I have to litigate on at the High Court is a black lawyer. I have briefed black lawyers who actually did a very good job for me to the extent that I can, the next day go to my client and say we use this lawyer again. Most of the time you find that people get, as I said I specialise in ending which is not familiar to most lawyers. So once I have developed that database of lawyers the difficulty is getting them be available. The senior lawyers that I have used, and who actually did a very good job for me to the extent that I had my clients them to use them again. You find that you go back to them they are no longer available. And you check around and you just cannot find lawyers. So I think black senior counsel who are black also need to make sure that they make themselves available so that people like us, who are in this white firms should actually be able to utilise them Because what happens is that I end up having to go to the very same white advocates I used previously because the ones I was hoping to get are just not available. Last year I waited until the end of the year for counsel who had done a very good job for me, he was black, and he was too busy, and my client was prepared to wait until early this year. Which is the time we finally actually got to have a consultation? So I think we need to do some introspection as black advocates as well that we don't stretch ourselves to wide in terms of our availability. We are also available to take work from those big white law firms because it gives that substance or quality of the work that will make you thrive as an advocate.

COMM J. Mpofu: Yes, the point taken. I am more concerned about not those people who have that good problem to have. I am concerned about the, what you call baby juniors in the professions, you know what that means, yes?

Mr M E Nkosi: Yes.

COMM J. Mpofu: Particularly black women who come to the Bar and have to leave, very competent people, who have to leave at alarming rates simply because they are

not given work. Not fancy work just work to survive and cut their teeth and, you know, even Magistrates Court you know this and that. That kind of effort, that is what we would expect. Particularly from the bigger firm because you have the pool of work. Other words outside of your department you would be able, just because of your cloud within the firm, to influence that kind of thing.

Mr M E Nkosi: Yes, as a firm we have a policy that in matters where we can have black female advocates available for matters which actually are not too complex, you know, we do not want to throw them into the deep end if it is a complex shipping matter for instance. But if it is a matter which a black male or female can run with, so our policy is that is where we should start. And personally, I have actually whenever I have a matter that is not complex where I start is to look for female black counsel to brief. And if I don't find them I go on to see if I can find black male counsel to brief and if not then I have to go back to the usual white counsel –

COMM J. Mpofo: Suspects.

CJ M Mogoeng: Commissioner Norman?

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

Mr M E Nkosi: Good morning, Commissioner.

COMM T. Norman: Sorry, I just need your comment on an article that you wrote. About a judgment that the Constitutional Court gave. I will read the paragraph -

Mr M E Nkosi: Yes.

COMM T. Norman: -- That concerns me, and I would like you to just explain it.

Mr M E Nkosi: Yes.

COMM T. Norman: You dealt in that matter, in the article of Abhlali BaseMjondolo it says, it dealt with Islams Act, am I right?

Mr M E Nkosi: Yes.

COMM T. Norman: And then you say in the paragraph: “In the circumstances” it is the last paragraph of your article, “one can only hope that the finding of the unconstitutionality against the provisions of Section 16 of the Act was not an attempt the Constitutional Court to split the “cake” in order to appease the Abhlali to ensure that it did not go back empty handed. If that was the case then such a gesture, noble as it is, would be based on reasoning which in my view is legally flawed”.

Mr M E Nkosi: Yes.

COMM T. Norman: What did you mean by that?

Mr M E Nkosi: I meant that we need to, as a judiciary in our country, we need to enrich our profession to make sure that the judgements which are delivered by our Highest Courts have substance. So we should guard against delivering or giving judgements which are just going to make people feel happy that we did not actually lose out completely. So if the reasoning was that there was an issue of legal – there was legal substance in what that judgement said; I am all for it. But when I look at the actual reason that was given by the Constitutional Court at the time it just did not make any sense to me.

COMM T. Norman: So in other words, you believe that the Constitutional Court is capable of just appeasing litigants?

Mr M E Nkosi: No, I am saying to guard against the risk of doing that.

COMM T. Norman: No, no you have said now, Mr Nkosi, in answer to my question that you felt that the judgement did not make sense. The reasoning did not make sense.

Mr M E Nkosi: Yes.

COMM T. Norman: So if then the reasoning did not make sense, is that the Highest Court in the land of this country, according to you is capable of giving judgements that do not make sense? First of all, and -

Mr M E Nkosi: Well in this –

COMM T. Norman: -- And secondly, please if I may, and secondly it is capable of appeasing litigants.

Mr M E Nkosi: Judges in the Constitutional Court are human. They are not infallible, so they can make mistakes like everyone. If as lawyers, we scrutinise those judgements and there is something that we think is missing I think we more than entitled to do that. Because we know it is not a destructive criticism it is constructive criticism which is aimed at the Court having self-introspection to guard against falling into the trap. I may be wrong, I am also an individual, I am not saying I am always right. It was just a view which I expressed to other colleagues. So if I am wrong, so be it, I can accept that, but I felt I was entitled to express a view.

COMM T. Norman: Yes, but one last question. Thank you for me, Chief Justice. You had drafted the Islams Act am I right?

Mr M E Nkosi: Yes, I did.

COMM T. Norman: So it was your own baby and then the Court had found that it was invalid and then you had to make these kinds of comments because it was your own baby according to you there was nothing wrong with that Act.

Mr M E Nkosi: No, whoever drafted the legislation if it actually had a flaw, if the judgement relating to it had a flaw I would be entitled to comment on it. I am not barred from commenting on it just because I drafted the legislation. If you think of what the Court said in that act it is that it actually ruled that one section is unconstitutional and that Section said the Premier could order a Municipality or a landowner to remove people if their occupation of the property is problematic as said by the Municipality. And the Court said for that reason it is not in compliance with PIE

. What did not make sense to me is because in the legislation it says whenever you remove people you do it in terms of PIE so how can it not be in line with PIE if when you have to do it you have to follow the route that is set out in PIE?

COMM T. Norman: Thank you, Chief Justice.

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

COMM A.J, Nyambi: Thank you, CJ. Afternoon, Mr Nkosi.

Mr M E Nkosi: Good afternoon, Commissioner.

COMM A.J, Nyambi: Understanding the hierarchy of the judiciary in South Africa taken it from the last question what will be the intention of criticising judgement of Constitutional Court?

Mr M E Nkosi: It is just to enrich our jurisprudence because as I say Judges in the Constitutional Court are not infallible, they are – I can be appointed to the Constitutional Court at any stage and it does not mean that by taking office in that Court I become infallible. I may make mistakes which other lawyers can bring to my attention and it could be justifiable criticism. It was just criticism, nothing – I knew the Court could not change its judgement just because of me. I am just a lawyer from Durban, but what I thought the Court would do is just to look at what I am saying, and decide if I am talking nonsense or not.

COMM A.J, Nyambi: What would you regard as your weakness?

Mr M E Nkosi: My weakness?

COMM A.J, Nyambi: Yes.

Mr M E Nkosi: Maybe I am too impatient at times when it comes to getting things done and I tend to worry if things are not done within the period I expect them to be

done. But other than that I think other people can answer that question better than I can.

COMM A.J, Nyambi: My last one is your worst experience as a legal practitioner in South Africa?

Mr M E Nkosi: My worst experience actually occurred when I was acting as a Judge and the case that I was presiding over; a criminal case was not investigated properly and there was evidence that I thought should have been gathered and was not gathered and the prima facie view was that the accused in the case had some case to answer but because of that missing evidence I just could not get them to answer the way I thought they should. I had to watch them go because I could not convict without evidence being put before me, to enable me to do that.

COMM A.J, Nyambi: Thank you, CJ.

CJ M. Mogoeng: Thank you Commisioner, Nayambi. Commissioner Notyesi.

COMM N. Notyesi: Thank you. CJ. I note that you have been nominated by an Advocate G.D. Goddard.

Mr M E Nkosi: Yes.

COMM N. Notyesi: Is one of the counsel that you brief in your office? Or what is your relationship?

Mr M E Nkosi: I have actually he has acquired expertise in the Law I specialise in. As I have said, I specialize in Local Government and Administrative Law and when I brief counsel, you know they end up acquiring experience in the Law that I practice. So over the years, when I have matters which are complex enough to require senior counsel I would use him as one of the advocates I would consider for those cases. So over the years, we have developed a friendship. Not the type of friendship that you invite me home to a braai sort of friendship but on a professional level where we actually respect each other as professionals and he respects me as an individual. He

has actually observed me active on the Bench as well and he is one the people who have to impress upon me that I should make myself available.

COMM N. Notyesi: Some of the questions that you have been asked relate mainly to transformation and our efforts as a profession ensuring that we accelerate transformation. I note in the questionnaire that you neither belong to BLA or to NADAL or any of these organisations that advance or champion the course of transformation. Is there any particular reason?

Mr M E Nkosi: No there is not. I think I can just as capable to make a contribution without belonging to any organisation. I actually have belonged in organisations throughout my life in, during the period prior to 1994 I belong in organisations and it got to a point where you belong to an organisation A or B and then it seemed as if you are not in A then you are against B. So to avoid the situation where I look at people who belong in a different organisation as them and me belonging in another organisation I think I decided to make my contribution from outside organisations. And so far, I have had a problem with that.

COMM N. Notyesi: Lastly, I am not assured yet. It is my last question. I understand your question I am sure Advocate Mpofu here is quite happy about attorneys, should you advise attorneys to brief counsel mainly for a second mind and all that. Bearing in mind the introduction of the right of Appearances Act where attorneys were allowed to appear in the High Court -

Mr M E Nkosi: Yes.

COMM N. Notyesi: -- And also taking into account the obligation to contribute in transformation and also develop their skills why would you regard the appearance by attorneys in court as something – lastly there is this issue of court categorisation from your part. Where you say on less complex matters you would brief black African counsel as it goes up. I am not too sure what is that measure of complexity on your part. If it is more complex you go for maybe for Grade 1 counsel. I do not know what were you saying?

Mr M E Nkosi: No, I am not saying there is anything wrong with it. It is like a GP saying that I am not going to use a specialist because I can as well do an operation. The fact of the matter is that the patient may not get the benefit of two people looking at the problem. What I am saying is if you feel the means that are available to a client warrant that you should actually have an attorney appearing as both counsel and advocate by all means you should do it. It is in the interest of your client. But if you have a client who is saying that I do not necessarily have a shortage of resources just win my case why should you deprive that client by me appearing as an advocate as well after having done work as an attorney and when I lost the case it actually transpires that there are things that I overlooked?

COMM N. Notyesi: There is this last portion which you have not answered. This is this categorisation of complex and less complex of your matter. You say you brief a black, you look for a black junior counsel, particularly female if the matter is less complex; it is just an easy matter, you look for that -

Mr M E Nkosi: No, I am -

COMM N. Notyesi: -- What is the basis, I mean what is the measure of this complexity that you are talking about?

Mr M E Nkosi: Maybe the way I put it came out wrong. I don't mean the sense that blacks should only be given less complex matters. If you deal in specialised – if you specialise in law there are actually, the maybe cases which are more complex than others. There may be another case which are just run of the mill cases. But other cases may require actually in-depth knowledge on the part of the person who is going to argue the case and it does necessarily have to be a white lawyer who is going to argue it. If I go to a black practitioner or advocate I would not go to an advocate who qualified last year and say to them I want them to go and argue a case that involves my client having to lose, let us say 50 million, if we lose the case because of these issues which could go either way and I actually want to promote transformation, so I think you are the right person to argue because if they lose it I am going to be the first one who is going to point a finger. So I will go to a person that I know is going in a position to better argue the case for me, black or white,

knowing that I am going to be in a position to go to my client and justify whatever result we get from the case after that. Because my clients also do ask when I brief counsel, I act for clients, they always ask but how experienced or how, you know, how conversant is this counsel in the case that we are facing. And the worst answer I can give is, no well they are black, but I think it is only fair that we give them work to do. I have to in a position to justify it.

COMM M. Mogoeng: Commissioner Didiza? Thank you very much, Commissioner Notyesi.

COMM T. Didiza: Thank you very much, CJ and good afternoon sir.

Mr M E Nkosi: Good afternoon, Commissioner.

COMM T. Didiza: I was maybe going back to the issue of PIE and your own reflections after the judgement of the Constitutional Court. Has it ever occurred to you may be looking at that judgement broadly that it might be necessary to look at an omnibus legislation that deals with land matters? Given that currently, you have got various pieces of legislation that deal with the issue of land and property development in particular that lie in a number of spheres of government. Some of them it is ordinances or by-laws and the other relates to the disposal of land which may have a concurrent function between National and Provincial Government and yet some of those, you know, occur in the local sphere. You also have got legislation that deals with farm dwellers, extension of Security of Tenure Act which in part also may touch issues of PIE, you know, I can go on and on. I am just trying to hear your views at whether or not is it something that you think is doable? Is necessary? In the US, for instance, you have the Farm Bill when it comes to Agriculture. Which is an omnibus that relates to all Agricultural Acts as a way of ensuring that you can actually have consistency in how those matters are dealt with whether at Federal or at a State level? Thank you.

Mr M E Nkosi: I think the legislation we have in place is more than adequate to deal with the problems that we facing. I do not see any problem with PIE being implemented to actually make sure that it serves the people it was supposed to

serve. And it actually puts in place the measures that are necessary to safeguard the rights of people to occupy land. If you devolve legislation too much then you end up running the risk of having got it too fragmented to the extent that you get area A applying it their own way. Area B having their own different application or interpretation. The move now is actually to centralise legislation. Like in the case of local authorities. We had ordinances been applicable in various provinces but since then we have legislation been centralised at national level, this [inaudible 45:19] particularly which actually means that in all the areas, or all Municipalities within the country the legislation that needs to be applied is uniform. So I am not sure if I have answered your question correctly but in my view, I do not think we have a shortage or a lacuna insofar as the legislation is concerned. It is just the application which may be a problem.

COMM T. Didiza: Thank you, CJ. Maybe just to clarify I was not saying devolution or that there is not enough legislation, but I am saying if you look at the plethora of legislation that relates to the land matter in our country there are a number of those. Some of which may be from where I sit maybe confliction. And that is why I used the issue of the extension of Security of Tenure Act which deals with the protection of farm workers.

Mr M E Nkosi: Yes.

COMM T. Didiza: And PIE which deals with the prevention of illegal eviction of unlawful occupation of land. So I was just saying that in your own, maybe it is something you have not looked at. If you look at all of these lands, pieces of land legislation do you not think it might be better for a country to revisit whether you do not need a consolidation of those pieces of legislation? Such that you can have one omnibus legislation? It may be okay, it may not be okay. It was more to hear what is your views about it.

Mr M E Nkosi: I do not think it will be a good idea. I think we should not adopt the same size fit all approach in terms of our legislation because the problems tend to be unique depending on areas. You might find that the problem which are faced in rural areas require a certain type of solution which may not necessarily be the case when

it comes to regulating land in urban areas which is occupied, you know, by people informally. So, in that case, I think it – I had not thought about it, to be honest with you. But I think it may be problematic if we try to centralise it.

CJ M. Mogoeng: Commissioner Singh?

COMM N. Singh: Thank you, Chief Justice. Just two questions. Good afternoon Mr Nkosi. I have not belonged to a law society, but I am trying to understand what it means to be a member of a law society. You know you are born in Springs, you got your degree in KZN, but I see you are a member of the Cape Law Society and KwaZulu Natal Law Society. What does that mean for a layman like me?

Mr M E Nkosi: Our firm has branches in various centres of the country. We have a branch here in Gauteng, we have a branch in Cape Town, we have a branch in Richardsbay, we have the main office in Durban and what we tend to do is make sure that our lawyers are versatile. So if I go to Cape Town and I need to do anything that needs to be done by a lawyer I will go to Court and appear because I will be a member of the Cape Law Society. I have not done the same with Gauteng, unfortunately, but that was basically the reason. It is not that I have had any reason to appear in Cape Town but just in case, so we as a firm took an approach that all our lawyers should be able to appear in any office of that where the firm has a presence.

COMM N. Singh: Just following on that one now, if you are appointed with your firm presence in all these provinces and you get one of your colleagues, you are a partner in this firm for many years – you are involved for twenty-five years - appearing in a matter for a plaintiff for a defendant what would you do?

Mr M E Nkosi: I will recuse myself.

COMM N. Singh: Thank you, Chief Justice

CJ M. Mogoeng: Thank you so much, Commissioner Singh. We took too long on you, but I just need to clarify one or two things with you and happily, I am satisfied

that as a senior partner you should be able to absorb the question and deal with it well. You see, I need to know what percentage of the work that you personally handle at the firm as it relates to briefing counsel goes to black counsel, including women, black women?

Mr M E Nkosi: The difficulty in giving like a definite answer to that is that actually varies. If -

CJ M. Mogoeng: Estimate?

Mr M E Nkosi: An estimate would be about 40% of the work I give out to counsel I give out to black professional counsel. As I said I need to qualify that, -

CJ M. Mogoeng: Sure.

Mr M E Nkosi: -- That is based on their availability.

CJ M. Mogoeng: No, no, no. I just want to know how much has actually been delivered to them? Obviously, they are not available they cannot have it.

Mr M E Nkosi: Yes.

CJ M. Mogoeng: You see.

Mr M E Nkosi: So –

CJ M. Mogoeng: That is what I want to hear.

Mr M E Nkosi: -- So I think the rough estimate would be about 40% of the work that I have, bearing in mind that my first port of call would be black advocates. I'd say I actually tend to give out about 40% of my work ends up in being the work given to black advocates.

CJ M. Mogoeng: And how much of that 40% goes to senior counsel? Black?

Mr M E Nkosi: I would say about 30%.

CJ M. Mogoeng: So 10% goes to the junior ones?

Mr M E Nkosi: Yes.

CJ M. Mogoeng: How much of the work that goes to senior white counsel? Particularly male? And do you make it a practice that you, where there are juniors involved that black women junior are roped in?

Mr M E Nkosi: Like I said I would actually brief seniors depending on the complexity or the magnitude of the matter.

CJ M. Mogoeng: Sure.

Mr M E Nkosi: Because of the fact that I have been working with counsel who have become familiar with the type of work that I do and in most of the time those are white advocates. I will say about 70% to 80% of the work at that level I end up giving to senior. Well, I am not certain - about 60% to 70% to senior black advocates.

CJ M. Mogoeng: You see I am asking these questions because you seem to be hesitant and to unsure to make one uncomfortable when Commissioner Mpofu was asking you about this issue; availability it looks like it is black counsel who have a problem about being available to get work from you, but white counsel are always available to take work from you and I was seeking to understand what this hesitance is all about.

Mr M E Nkosi: The hesitance is about there are too many of the white senior counsel going around as compared to black senior counsel.

CJ M. Mogoeng: All right.

Mr M E Nkosi: So when it comes to finding white senior it is actually you go through the Horters you find that 80% or 95% are white.

CJ M. Mogoeng: Do you, yes -

Mr M E Nkosi: Then I go through the 5% that I would have preferred to brief who are senior –

CJ M. Mogoeng: Sure.

Mr M E Nkosi: -- And all of them are occupied.

CJ M. Mogoeng: Okay. Is your briefing confined to KZN or is it nationwide?

Mr M E Nkosi: No in my case it is just KZN.

CJ M. Mogoeng: Is your client, or are your client's Municipalities or the private sector that deals with Local Government issues?

Mr M E Nkosi: It is a mix. I do not act for Municipalities, I do not act against Municipalities who are traditionally our clients. So if an instruction comes through anybody wanting to act against them I would refuse that instruction.

CJ M. Mogoeng: So traditionally you act for Municipalities?

Mr M E Nkosi: Traditionally, yes but –

CJ M. Mogoeng: And, yes.

Mr M E Nkosi: --But as I say if individuals have matters against Municipalities that I do not act for then, by all means, I do act for those individuals.

CJ M. Mogoeng: Sure. Now, have you prevailed on Municipalities to have you for the purpose of contributing to the transformation agenda. To allow you to source counsel throughout the country? Black counsel? Women?

Mr M E Nkosi: I –

CJ M. Mogoeng: Because they are part of the State that ought to make sure that transformation is realisable.

Mr M E Nkosi: I actually do it all the time. Now you see the thing is some cases you find that for officials because most of the time my point of contact are officials in the Municipality –

CJ M. Mogoeng: Yes.

Mr M E Nkosi: -- And when they come to you they think their heads are on the block because if they lose the case there is going to be ramifications from the councillors or people who are actually in charge. And when I impress upon them that we should actually take a chance and, you know, maybe brief someone who does not necessarily have the type of experience they expect you find that there is some resistance.

CJ M. Mogoeng: Well -

Mr M E Nkosi: So I have to try and persuade them.

CJ M. Mogoeng: Yes. Why is briefing senior black counsel thought to be equivalent to chance taking?

Mr M E Nkosi: No, I am not saying in the case of black, I am just saying the level of seniority or the experience for instance.

CJ M. Mogoeng: Okay. All right.

Mr M E Nkosi: So it may be black or white. If I say this counsel was admitted two years ago –

CJ M. Mogoeng: Yes.

Mr M E Nkosi: And the claim involves 200 million and they say well –

CJ M. Mogoeng: No, I was talking senior counsel -

Mr M E Nkosi: Oh, no I –

CJ M. Mogoeng: -- They are all over the country.

Mr M E Nkosi: --Okay.

CJ M. Mogoeng: Now one last question and I need to rephrase this one. I am all for judges being criticised because none of us should ever be given a reason that they have it open to them to criticise others, but they should not be criticised. But here is my point in relation to your article; because I believe that even as you do so you should be careful. You cannot be for want of a better expression – reckless. You cannot just be free-flowing.

Mr M E Nkosi: Yes.

CJ M. Mogoeng: Was the possibility to appease what came strongly through as the possible basis for what they did or was the possibility for seeing issues differently? Understanding the law differently by the Judges just as strong or even stronger? I am raising it, let me explain myself. Because I do not think it should be an easy thing to do, particularly by an officer of the court to say to the, read in public; that you know these people, do not count much on their integrity, they can just do things to appease. Because that just to explain is dangerous, seems to suggest that when judges feel pressurised by some entity – political party or something – there is a possibility of attacks or embarrassment they may just choose to appease. It is one of the readily available possibilities. So I just want to afford you the opportunity so that

you are not misunderstood. Why did it look more as a possibility of appeasing rather than just seeing the law differently or at worst an erroneous legal conclusion?

Mr M E Nkosi: I must admit, Chief Justice that my choice of language may not be the best choice of words I could have used. But at the same time, I could be wrong, I am not saying the views I express are actually the right views. I am just saying I expressed an opinion, I may have been more robust in the way I expressed a view and other lawyers may read what I am saying and say: Agh he is talking nonsense. Which I will accept. But what I am saying as I viewed it as constructive criticism–

CJ M. Mogoeng: Yes.

Mr M E Nkosi: -- In an effort to enrich our judiciary. That we should be actually be prepared to –

CJ M. Mogoeng: Sure.

Mr M E Nkosi: -- Listen to each other's criticism.

CJ M. Mogoeng: Absolutely. No, that I agree with. But your comment caused us some of kind of an aperture, it suggests the possibility of actually acting contrary to the oath of office. Because a Judge's oath of act without fear, favour or prejudice. So if a party deserves to succeed in a case for you to then disadvantage a party deserving to succeed by appeasing, that is not justice that is corruption justice. Your conclusion seems to point in that direction in some way. Judges, the Constitutional Court goes out of its way to appease, why would they want to appease? Why?

Mr M E Nkosi: Like I said it –

CJ M. Mogoeng: You don't just appease, there has got to be a good reason to depart from your Constitutional Mandate and appease interest groups, communities or entities?

Mr M E Nkosi: Like I say, Chief Justice, I think it was a wrong choice of words.

CJ M. Mogoeng: Okay.

Mr M E Nkosi: So for which I sincerely apologise to the Justices who sat in the matter and it was not intended to be destructive in any way it was just as lawyers expressing a view in an attempt to enrich our jurisprudence that we can also self-criticise.

CJ M. Mogoeng: Is it a jurisprudential issue to say people are appealing?

Mr M E Nkosi: No actually it is not. I may be, belated as it is, I should have not used that word in my article

CJ M. Mogoeng: All right. No to err is human, that is why I thought it was necessary that you be afforded the opportunity to explain yourself in this regard.

Mr M E Nkosi: And I take the opportunity, Chief Justice. Thank you very much.

CJ M. Mogoeng: Thank you very much, Mr Nkosi. You are excused.

Mr M E Nkosi: Thank you –

CJ M. Mogoeng: Oh, I am sorry the Minister wants to – I am sorry Minister I did not see your hand.

MIN M Masutha: In fact I want on a light note I wanted to say we as politicians get much heavier stuff than that, in the form of outright insults sometimes but I think I concur with – but anyway I agree with the Chief Justice that indeed all of us have duty to make sure that especially as politicians to make sure that our judiciary which might not many instances be in a position to defend itself be treated with some degree of decorum. The follow-up that I wanted to make, and I just wanted to clarify the point, because my understanding of the original question relating to the briefing of black female counsel related specifically, that is the question itself, related specifically to those that are emerging. Because I recall Counsel Mpofo alluded to

baby juniors, so I just wanted to confirm if I understood correctly that your explanation about non-complicated matters being given to black female counsel with specifically relate to uncomplicated matters to allow those that are just new entrance, in fact, you used the word so that they are not thrown in the deep-end. But that you are not expressing a view that black female counsel necessarily deserves less complicated matters. I just wanted you to clear the air there for me.

Mr M E Nkosi: No, in fact, I think the question was specifically directed at young upcoming black female advocates. Insofar as females are concerned when I started practising the advocate I was using almost exclusively was a black female advocate and she actually worked on most of my matters to the extent that I actually had a problem when she was not available. She has since taken silk and I am actually waiting for the day when we are going to have black female advocates who are actually going to be available like she did.

MIN M Masutha: The second follow-up I wanted to clarify for my purposes relates to the question of your remarks disparaging not so much the disparaging part, not that aspect Chief Justice, my apologies. It relates specifically to the understanding that one of the fundamental distinctions between the role of the Supreme Court of Appeal on the one hand and the Constitutional Court on the other is that the Constitutional Court has the added obligation not only to interpret and apply the law in its traditional classical sense but also to ensure that there is equity in terms of the spirit and not just the letter of the Constitution. Could that not have been a consideration that you looked out in your criticism of that judgement. Because the way it comes across to me is that you seemed to have looked at the Law clinically and applied it mechanically in interpreting. I am not necessarily defending the judgement I do not have the facts I have not read the judgement but based on what you yourself are saying that there is sort to find some kind of balance between two parties or something to that effect. Isn't that, in fact, in line with the spirit of the Constitution so that the principle justice does not only be done but must be seen to be done with the case in point where that principle seems to have also been taken into consideration.

Mr M E Nkosi: It could be Commissioner as I say I may be wrong. But that was just an opinion I was expressing at the time.

MIN M Masutha: Thank you, Chief Justice.

CJ M. Mogoeng: Thank you. Just one last question so that you are not disadvantaged. You used to be the Vice President of the SRC while you were at varsity, you then also became a member of SANSCO but when you got to Shepstone and Wylie you seem to have cut ties with similar organisations including BLA and NADAL. Now the opportunity I want to afford you is this; a person may think that that environment disconnected you completely from the community you come from and its interests and that is why organisations that seek to advance interest of the previously disadvantaged no longer appeal to you. Would you like just to deal with it? I am not saying it is your position I am saying you need to be given the opportunity to deal with those issues.

Mr M E Nkosi: At the time when I went back to practice, and I started practising in my area of expertise my client were political parties and that was the time when we were ushering in the new dispensation. I was coming from my own political background which actually focuses my mind in one direction. Then I had a client who came from different other political formations who were coming to see me for advice. Then there was this thinking that, you know, you are actually leaning towards this direction. -

CJ M. Mogoeng: Have your own people?

Mr M E Nkosi: -- So what sort of advice can we expect to get from you. So I had to sit down and think hard about it. That I want to give my clients comfort that when they come to me I am not going to wear my political hat and do their work based on that. I am going to do it as a lawyer irrespective of who I vote for when it is time for voting. That I can do. I still have a right to do that. But as a lawyer I took a conscious decision that I would actually give my clients who have, you know, most of the time they are politicians I cannot distance them from that; that they should have the comfort of knowing that I am aligned to any side I am just doing work for them.

CJ M. Mogoeng: And that extends to NADAL BLA?

Mr M E Nkosi: No it does not extend to that. I think when it comes to NADAL and BLA it is actually more of a time constraint that I had that anything else because there was I time when I actually, you know, I would participate in their processes but to the extent of becoming a member I never got around to doing that formally. As I say, it is not out of any ill intention or that I had anything against the organisation. I am fully supportive of them.

CJ M. Mogoeng: No, I thought you needed the opportunity to deal with the issues frontally.

Mr M E Nkosi: Thank you very much.

CJ M. Mogoeng: Thank you very much, Mr Nkosi, you are excused now.

Mr M E Nkosi: Thank you very much, Chief Justice. Thank you very much Commissioners for the opportunity.