



JUDGES MATTER

Judicial Service Commission interviews

06 April 2017.

Eastern Cape Division of the High Court (Judge President)

Interview of Judge J E Smith

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

Mr Smith: On July 2010 that I was appointed.

CJ M. Mogoeng: Yes, and that makes it what? Is it ...

Mr Smith: Just about 7 years. Short of ...

CJ M. Mogoeng: A little under 7.

Mr Smith: Yes.

CJ M. Mogoeng: Yes.

Mr Smith: Yes, Chief Justice.

CJ M. Mogoeng: Tell us what your plan is? What challenges are there? How do you intend to deal with them if you are appointed?

Mr Smith: Yes. Chief Justice, I think a logical place to start would be at least two long sessions with the former Judge President, retired Judge President Somyalo and with the present incumbent Judge President to pick their brains. I think that is what I would do for a start. Insofar as my strategic vision if I were to appointed for the Bench. And one find yourself after having applied that you think about it, you think about why do you apply and what is it that you would do if you were appointed. And having looked again at all the, first of all, the constitutional imperative at the statutory imperative which would be the Constitutional, I think it is Chapter 8 of the Constitution; setting out the responsibilities and the role of the judiciary in the country. And I also then the particularity of the, regarding the role of the heads of court set out in the Superior Courts Act, which has been given contend to in the Norms and Standard and I think one will have to start with the first strategic question is that what do you want to achieve? And for me this answer is simply encapsulated in the constitution imperative that a person, a litigant in a civil matter who comes to the court from the day that the summons is issued, or the application is launched that that person gets quality service that will ensure the expeditious processing of the pleadings; that the hearing will be set down expeditiously; that in the interim while a trial date is being awaited that there will be measures put in place in order to ensure that the trial, if it is at all possible, that the trial is settled, either settled or that the proceedings are shortened. And then, of course, the challenge should be once the trial had been completed that the management of the head of court in terms of the, in terms of the Superior Courts Act extend to ensuring that judgement is then handed down expeditiously in accordance with the behest of the Norms and Standards. And if one think about it in that fashion, Chief Justice, the implementation of an effective sustainable case flow management procedure and system is core to the whole process because I spoke about the initial process of issuing starting with the issuing of the summons that in terms of the case flow management processes presently envisaged that already the case flow management would start at that early stage that which in the task the case flow management task team, we refer to as the as stage 1, which is where the Registrar and the office of the registrar would monitor compliance with the Rules of Court to ensure that cases are not unnecessarily

delayed. Because that is often where you'd find, if you interrogate the issue of backlog that you'd find where the backlog, the biggest problem is with regard to the backlog is that for some reason or the other it is still possible for litigants to manipulate the system in order to delay cases, so you can get a recalcitrant litigant that can delay a case. If there is effective monitoring by the Registrar, staff of the registrar at that early age at least one can then make sure that the case is brought to the stage of the close of pleadings as expeditiously as possible. And where it is clear to the Registrar that there is unnecessary delay or recalcitrance that the matter then be referred to a case flow management judge for further directives. But, if that can happen it will, one can then follow the course of the pre-trial, sorry of the case flow management process and of the Norms and Standards that to ensure that the case is put before a judge to certify it as being ready for trial as expeditiously as possible and then to give further directives regarding pre-trial conferences and the first pre-trial conference and further pre-trial conferences in order to ensure that when that matter comes before court that it is ready to proceed. Everything is ready to proceed, because Chief Justice, it is often ignored that the fact that for some reason or the other whether it is the fault of the judiciary of the presiding judge or whoever's fault, if a matter doesn't proceed and we are sometimes asked to glibly make an order that cost shall be in the cause. One often forgets that somebody will have to pay that cost, and for poor litigants who are funding their cases it may well be the end of the road for them. A cost order, even if it is not an adverse cost order means that he or she will have to pay for those advocates. So the implementation of case flow management will take care of all of those problems. The responsibility of the head of court doesn't stop there. The Act makes it clear that apart from managing procedures relating to case flow management the time period for the handing down of judgments is also falls within the prerogative and is also the responsibility of the head of court. So that will also have to be managed because it is cold comfort for litigants to have their cases before a court expeditiously but then they have to wait 6 months or what a year for judgment to be handed down. And fortunately, we've got Norms and Standards which have promulgated, I think in 2014, which said very, very clear guidelines as to who those issues are to be managed. So if one is to devise a strategic plan for management one must have those deliverables because that is what I call them. I know it is not judicial language, but those are deliverables those are things to ensure that whatever administrative

processes there are in place, are all supporting the accomplishment of those objectives. You don't have to reinvent the wheel. You don't have to change anything, the Norms and Standards are very clear, they're there they are in any event the prerogative of the Chief Justice. So the only thing that needs to be done is for those Norms and Standards to be implemented and for the processes, the supporting administrative processes all work together to achieve those on a very mundane level for example. I am talking about administrative processes. The issue of, for example whether the recording facilities, are they working? If there is a power failure does the generator have diesel or whatever? Those are mundane issues but if they are not properly managed on an ongoing basis they have quite serious consequences for litigants, because people can travel from Johannesburg to Grahamstown; if the court is not ready to proceed somebody will have to pay the cost. So, in a nutshell I've put of, a lot into that nutshell, but in a nutshell the strategic plan is to make sure that all the administrative processes work towards the implementation and the achievement of those ideals which are set out in the Constitution and which have been given body to in the Norms and Standards promulgated by the Chief Justice.

CJ M. Mogoeng: Am I mistaken in thinking that you're a member of the National Committee that deals with case management representing ... [interjects]

Mr Smith: No, no you are not.

CJ M. Mogoeng: Representing the Eastern Cape.

Mr Smith: Yes, no you are not Chief Justice. I am on that Committee together with Griffith J in Mthatha.

CJ M. Mogoeng: Yes, yes.

Mr Smith: The two of us in committee.

CJ M. Mogoeng: Now, what you have just said seems to outline what the business of that committee. What we seek to achieve through its work, its mandate as refined

and carried out by the courts. What I, speaking for myself, am particularly interested in is the following; is something similar to what politicians do when they want votes these are the problems, how do we tackle them? In a very practical way. So you work in a court system, in the Eastern Cape, you are familiar with the specific problem that hampers court performance. Access to justice, a proper coordination of the roles of the key role players in the court system. What problem have you identified, it may be in the province in general and then you may also, then individualise problems and say, but over and above that in Mthatha High Court these are the problems; in Bisho these are the problems, in Grahamstown these are the problems; in PE these are the problems and my plan, my manifest of a want of a better expression, is this, this how I am going to tackle them so that there can be greater efficiency and effectiveness in the running of the court system as it applies to those local divisions of the High Court, as it applies to the Regional Courts, as it applies to Magistracy. So, the principles are there fine you've outlined them but what are you going to do so that at very practical level those things that must be done differently are done differently; those things that need to be done the same way that they have been done but with greater emphasise are done that way. What resources need to be marshalled together so that you know, you are more impactful as the new JP in giving expression to the greater vision, or broader vision of realising access to expeditiously delivered quality justice.

Mr Smith: Yes. Thank you, Chief Justice. The, I must say when answering your question at the outset that the key to all of this, in my own view, is lies in the implementation of an effective case flow management system. Because if one just think about it logically the business of courts is to make sure that you adjudicate expeditiously and in terms of the Constitutional principle which I don't need to, but ultimately ... [interjects]

CJ M. Mogoeng: Yes. Can I interrupt you?

Mr Smith: Yes, sorry.

CJ M. Mogoeng: I know you interrupt counsel all the time too it is not a problem for you.

Mr Smith: Yes.

CJ M. Mogoeng: You see, I agree with you. My understanding is that that is being implemented already, even in the Eastern Cape. So what I would particularly be interested to hear from you is whether or not it is being implemented in all the courts what are the glitches, how are you dealing with them how do you intend to deal with them more effectively going forward?

Mr Smith: Yes.

CJ M. Mogoeng: But if you start from the premise that case flow management must be implemented; the Norms and Standards must be observed; it is as if that is not the case already.

Mr Smith: Yes.

CJ M. Mogoeng: Those are general principles, broad principles. Let's tackle the issues on the ground. Let's touch the problems, the issues and deal with them. That's what I am speaking for myself, I am particularly interested in and maybe just so that I don't interrupt you, also demonstrate or highlight in the course of doing that why you believe that you have what it takes to be the one doing that effectively. In other words, what leadership, what managerial strengths are you going to inject into the system, are you bringing in?

Mr Smith: Yes, thank you. I have already prefaced my remarks, Chief Justice. What I want to say regarding the business of the court and the implementation of case flow management there is certain institutional problems that is hampering its efficacy to the level that one would want it. It is working, it has caused improvement I think in the statistics that has come out. It is there for everybody to see that everybody agrees that it is working. Institutional problems is one of those that have been identified by the committee, of which I am a member, namely that the practice directive which was initially issued in order to set off the implementation of case flow management has not yet been promulgated in terms of the rules. So it is not a Rule

of Court and while we were quite emboldened to implement it regardless of that, on the basis but there are the Norms and Standards so we can implement it and it is legal. The fact of the matter is that in implementing penalties when the case flow management procedures are not followed. We are a bit hamstrung and we have to go back to Rule 37, in order, for example, to decide where you can then grant cost orders if persons are recalcitrant. So that is a bit of a problem and my understanding is at our last meeting we have finalised a draft which we believe is one that can be put before the Rules Board to be implemented in due course. That has gone to yourself, Chief Justice, and will eventually if it has not been considered by the Heads of Court will eventually be considered by the Heads of Court so that to address that problem. The other problem that in the first stage of case flow management, which is where the Registrar's Office is quite key in ensuring that with the pleadings that time limits are adhered to. The problem also is that the Registrar and we had a conference where we spoke to the, we were briefed by the Registrar's Office which is probably being the most effective, and that is in Western Cape. But still, problems that when we draw attention to litigants of these shortcomings insofar as compliance with the time limits are concerned we can't go beyond that. In other words, we don't have powers to implement a remedy. We can only refer it to the judge, who can then give directives. The other problem which call an institutional problem is that one which has also been identified by this committee is that, and we've made representations also to the Heads of Court, is the fact that for some reason whereas the previous Supreme Court Act had allowed empowered Heads of Court to issue practice directives and make local rules. The new act, the Superior Court Act, doesn't have a similar provision, which we believe wasn't deliberately done. We believe that it was really just an oversight so it leaves, it effectively leaves us with a Judges President with the inability to amend the local rules in order to ensure proper implementation of case flow management. So those are the institutional, if I may call them institutional, challenges then there is still a problem in the office of the Registrar and the Court Managers Office with regard to staff, sufficient staff to assist with the implementation. Other logistical issues such as shelving, for example, where the files can be kept. You had files lying around on the floor and all those types of things which are challenges, not insurmountable but they do make it a bit more difficult for case flow management to be implemented. Despite all of those things under the leadership of the JP case flow management has been implemented firstly, by way of a

pilot project; which was in first started in East London, Bisho. Which is the smallest of the local seats and then to the other areas, to Mthatha as well. We have now, at the last meeting, judges meeting, our committee Griffith's and I were mandated to devise a uniform, a uniform approach to case management which will then be implemented throughout the region, everybody. Because there has been complaints that we go to Mthatha this happens in Grahamstown its done on a more informal basis, this happens. A uniform approach to case flow management which will include case flow management of criminal matters, which has also quite essential. So with effect, hopefully with effect from this, from when we start on the 16th or 17th of April, there will be, there will be those rules. We have already done consultation with the practitioners and all of them are ready, they are willing they see the advantage and we have no doubt that we are going to have their support. But coming back to the things that I would do practically is to ensure that those, the office of the support staff are probably staffed, first of all. That all the resources are there. The case flow management we are not yet at the stage where court recordings and everything has been digitised, but one of the briefings given by I think it is JP Mlambo in one of our meetings is that we are on our way there. It is going to make things so much easier if court records and everything, proceedings are digitised. It will be easier to generate the report; it will be easier to hold litigants and attorneys accountable insofar as the implementation of the Court Rules are concerned. I would concentrate on those issues. I do believe that as I've said, the core business of the Court being the resolution of justiciable disputes between parties. That the case flow management remains core and all those administrative processes that underpins and assist in the implementation of the case flow management those must be grown and those must be encouraged to grow. Insofar as, Chief Justice, my own position is concerned ... [interjects]

CJ M. Mogoeng: Maybe before you go beyond that and of course that digitisation process stems from the same committee that you are serving in. It started there, isn't it?

Mr Smith: Yes.

CJ M. Mogoeng: Yes, you may proceed.

Mr Smith: Dealing with your question as to what I bring to the party, so to speak; I'll try to be to answer your question without, with modesty that's what I'll ... [interjects]

CJ M. Mogoeng: You shouldn't be modest.

Mr Smith: I obviously as you know, I have not acted as a DJP, I have not acted as a JP so I can't claim to have that experience. I have, I started acting in the High Court in Bisho in 1998, in Grahamstown in 2000 and I've consistently on a yearly basis spent at least a month or two acting. I do understand, I do understand what does it take in order to ensure that a judge walking into a court at half past nine in the morning must walk into a functioning court where everything is ready for the litigants to present their case to the judge. I understand the administrative processes, the support staff that needs to be working properly in order to achieve that objective. While I don't have experience in the administration of judicial management as a JP or a DJP I do have extensive experience in administering a law firm, which was not a small law firm, for quite some time. In which, obviously the objective and the imperatives being different but essentially also managed on the basis there is the objective to provide quality service to members of the public, how do you get there and how do you make sure that the support staff and everything makes it possible when a client walks in he is matter is being attended to immediately. He is going to pay a reasonable fee and all those things. And I do believe that the principles essentially remain the same. That one must bear in mind not to elevate administrative processes to the core objective, because they not the core objective, they merely supportive of you achieving the core objective. So what I do bring is, unfortunately, only that experience and I do things, I get things done that's how my mind work Chief Justice. I believe in achieving things.

CJ M. Mogoeng: The answer that I have been trying to source out of you, relates to what is born out of the assumption that in anticipation of this interview at least you've scanned the environment that you hope to lead over and said Mthatha High Court, in what state is it. What are the challenges? What possible solution? What about Bisho? What about PE? What about Grahamstown? And the Magistracy over which I will play or have an oversight role, what challenges do they have? Where

specifically? How am I going to tackle them so that coming here you are able to say I am not an outsider, I operate in that province; let me tell you about it. Let me tell you what hampers service delivery or access to justice. The quick finalisation of cases and so on. Let me tell you about backlogs and where they are and how they can be tackled. In an easy to understand language, which you don't have to be a lawyer to understand.

Mr Smith: Yes.

CJ M. Mogoeng: These, this is the practical steps that I'm going to take to deliver justice to the people, much better than ever before. Build on the progress made by my predecessors. Are you able to touch on that?

Mr Smith: Yes. Chief Justice, I can speak from my experience that when I sit in Grahamstown this happens, and perceive these problems when I sit in Port Elizabeth these are the problems Bisho and Mthatha, these are the problems. I would say that first of all there is a real need to get uniformity in the province. There is still too much a sense that when you go to Bisho that it is still of the old Ciskei and Mthatha still part of the old Transkei. I, if I were to be appointed my priority would be in terms of my own experiences and where the biggest problems are. My priority would be to focus on the Mthatha, the Mthatha area. That particular area of jurisdiction of that court. There are problems there. I think the problems are more acute in so when you deal with criminal cases. I believe that those problems can, most of them can be addressed through the Provincial Efficiency Enhancement Committee where all role players are present. There are just too many obstacles to judges finalising matters within the time frame that they should. And I'll give you an example, if I go to Grahamstown in the morning, on a Monday morning, we'd have a meeting. It would come out of that meeting when I get into my chambers at half past nine, the practitioners would be waiting for me, we are talking about criminal cases now. Waiting for me, they know exactly they would tell me how many witnesses there are going to be, how long it going to be. We know, we've got the week, we need to finalise the matter by the week, and we go. I robe, and I go into court, and that is how matters generally go there. There are problems, I am not saying that there are not problems, that is how the matters is generally go. When you get to

Mthatha it's very difficult to even get the court to start. There'd be a problem, this one would be late, that one would be late, the prisoners would be brought in late. All types of obstacles and in the end you find yourself at the end of the week, and you are just frustrated because I know, I know I am aware of the fact that the Norms and Standards says that judges must sit for, on average 4.5 hours a day, I think, but the fact of the matter is ... [interjects]

CJ M. Mogoeng: That's for the Magistrates.

Mr Smith: But the fact of the matter is that it is difficult, it is difficult in criminal cases where there are pleas for time, for consultation time, for this witness you cannot simply, you can push and you can castigate and you can encourage and prod a little, but you can't just say no for a postponement until, or the matter to be adjourned to 2 o'clock because this witness and that witness is not present because it has implications on fair trial. So, I would start in Mthatha, with the assistance of the incumbent JDP to make sure that first of all, we have a series of meetings with all the role players to do those mundane things. Just say, let's just make sure that on a Monday morning and in each day of the week prisoners are thereby half-past eight. And that arrangement is made for them to be fetched, not as 3 o'clock; but at half past four, when the court can adjourn. Those type of practical things I would concentrate because they have huge implications for the finalisation, the finalisation of matters. And then secondly, I would ensure and take forward what the present JP has done with regard to the implementation of case flow management, to make sure that this is uniformly implemented in all the courts in the Eastern Cape.

CJ M. Mogoeng: JP?

JP C.T. Sangoni: Thank you very much, CJ. You are as we have confirmed a member of the National Committee?

Mr Smith: Yes.

JP C.T. Sangoni: Insofar as case flow is concerned. And what is your view insofar as particularly Grahamstown and Port Elizabeth, is it being practised there? Is it being implemented?

Mr Smith: JP, not to the letter as practice in East London there is a more informal type of case flow management and the fact of the matter is, as you know in meetings there has been to some extent resistance to the implementation. There was a view expressed in the meetings that well, things are working, things are working here we look at our turn around times. Courts are starting in time, civil matters are never postponed and you will recall in those debates in all those debates I have at pains, together with Judge Griffith J, to say to them that that may well be and regardless of what your views are on the issue of case flow management and its implementation it is neither here nor there, because the fact of the matter is that the CJ is promulgated. The act says that there must be case flow management. The CJ has promulgated Norms and Standards we have to do it whether we like it or not, its something that we have to do. But there has been resistance, but I am happy to say at the last meeting you will recall that we debated the issue, once again, and after explaining to everybody what the probably the final result of the amendment to the draft rule will be, and how it is to be implemented there was general support for the implementation of it. So hopefully with your forceful presence behind us, we will get a resolution on the, I don't know JP if you have received the draft ... [interjects]

JP C.T. Sangoni: I did, I did receive something. And I said to myself there it now comes. I didn't know whether it is because there is going to be this meeting, or it was before that?

Mr Smith: No, it was before. You will recall that we were mandated. It came a bit late, I must say, but we were mandated to make sure that it is before the -. So the long and the short of it JP is that all the judges know that really the time for debating the efficacy or the desirability of case flow management is really gone past. We are way past that. ... [interjects]

JP C.T. Sangoni: What was the ... [interjects]

Mr Smith: Because it is an imperative, it is something that we have to do.

JP C.T. Sangoni: As far as you are concerned what was the reason for all this resistance? Because when you look at it, I am not saying some judges are not knowledgeable, but it came from knowledgeable people; why you don't expect them resisting anything that comes?

Mr Smith: I think, first of all, JP, its resistance to change generally. But, you will recall when the case flow management came about, I think it was before the Norms and Standards, first when you came from the Heads of Court meeting and you introduced this issue of the case flow management, I was one of those most vocal against it.

JP C.T. Sangoni: I know.

Mr Smith: And you then said, well you look like the person that should on that committee, and you put me on the committee and I changed. I changed immediately, it was my road to Damascus but I came back from the first meeting, convinced that this is what we need to do in order to fulfil the statutory and constitutional responsibility of the court. And I think that people will in due court (sic) everybody will, in due cause everybody will see the advantages of it because, you know, as I say, it is not something that we can debate any longer.

JP C.T. Sangoni: Now, when it comes to, I thought the reason you'd be giving for us not having taken off was the fact that apart from the fact that some people resist it, but the question of saying there was no support staff; I think at our last meeting, for instance, it was pointed out there has been support staff and it was taken away because we are not anything about this.

Mr Smith: No, there was some, some misunderstanding when I am talking about the implementation not of the case flow management as the you know the, from the point where there is certification of a matter to be trial ready. I was talking about the implementation of case flow management prior the stage 1 that we refer to where the Registrar has got to do to certain things. But you were right, there was a case where

people were appointed and then apparently nobody knew about it and then those people were taken away. So I, my understanding, my understanding is that in talking to the departmental functionaries at the meeting when we spoke about this problem; that it is really not a problem. Once we implement and we need staff we must just tell the, they do have a budget so I'm just saying that it cannot be an excuse, we just need to be upfront about the support staff that we do need.

JP C.T. Sangoni: But in Mthatha is that not one thing that is going on? The implementation?

Mr Smith: Yes, now it is working. I was there 2 weeks ago, and it is working. We pre-trial conferences. The attorneys have given their support and it is working. But as I say not phase 1. You are still, the whole process is still dependent on the file being brought before the case flow management judge at the point where there is an application for a trial date. So that is when it starts.

JP C.T. Sangoni: And what is the position with the Bisho and East London?

Mr Smith: Bisho and East London is much smaller than in terms of volumes, so it is possible but even there the case flow management is essentially from the point were close of pleadings and then an application for a trial date and then the matter referred to case management judge for certification when the directives will then start to issue.

JP C.T. Sangoni: Is that not what was suggested by Judge van Zyl and was acceded to?

Mr Smith: You mean the first.

JP C.T. Sangoni: Yes.

Mr Smith: I am not sure. I am not sure.

[Crosstalk]

Mr Smith: I am not sure if that has been, it that has been implemented but my understanding is in all there when I deal with case flow management it is always from the point of the, of a request for certification for it to be trial ready.

JP C.T. Sangoni: Now, the question I put to one of the candidates that have come through, so far, is that; if you are to look at our systems, our performance in particular, as Eastern Cape division, what is your view? Are we completely behind the other division or are we behind the other divisions at all when it comes to performance. And you start with Mthatha and just go through the five of them.

Mr Smith: Ja. Look JP I can, I can, I am not going to claim that I can recall the details of the statistics that were put before us. But my overall impression was that you remember in meetings we get those statistics, we go through them. We interrogate them. My overall impression was that we were not doing too badly. The areas that we could improve, not do too badly. I recall that in terms of the average time spent in court we were more or less, I think it was 2 point something hours per day. But more or less within the ballpark of the, of all the other divisions and in that regard also, you will recall that there were quite lively debates with the Departmental Functional Recess to exactly the importance of that statistics relating to the time spent and pointed out there can be so many reasons why a judge spends only 1 hour in court per day which can be circumstances beyond him or her control. But you will also recall that what we have done on your instructions that judges are now required, that when you start late you start off by recording the reason why you are late. When you adjourn early or adjourn at any time, you record the reason so that hopefully when those, when the statistics can incorporate instead of simply providing the time of the sitting of the court can also incorporate the reason why a particular judge didn't sit for the required hours per day, then it will be more telling and more instructive. But overall my view is that we were not doing too badly. But we agree that if we do certain things, some of the things that we have started to implement then we can improve. We can ensure that trial dates are allocated more expeditiously. I think in Grahamstown that is still a problem, in East London and Mthatha quite a bit of progress has been made in that regard. But, I think you have to wait more than 6 months maybe even 9 months to get a date, a trial date in

Grahamstown which, I am not sure I am speaking under correction maybe even longer, but I know for a fact that it is not where it should be. And it is something that we must look at. So if one says that your strategic plan is to do all these things and to improve, it is not that you are saying we are doing badly. I think the idea is for us to continuously improve and try and reach that ideal.

JP C.T. Sangoni: Now, uniting the divisions of the Eastern Cape is a problem. Do you agree?

Mr Smith: Yes, it is.

JP C.T. Sangoni: Now, I supposed you'd have a plan than to put them together?

Mr Smith: Yes.

JP C.T. Sangoni: What is that plan?

Mr Smith: If I just ...[interjects]

JP C.T. Sangoni: I won't ask you ... [interjects]

Mr Smith: I just want to qualify my answer to you and say that uniting is a problem. I think that you will agree that the relationship between judges of all the various local seats in the division is, to say the least, very collegial. I don't think, I really don't think that that is a problem.

JP C.T. Sangoni: Speaking in general?

Mr Smith: The collegiality, generally, I'm speaking generally I know that obviously you there would be exceptions to the rule and I think that because we have that unity sense of purpose within the Eastern Cape I don't think that it will be such a big problem. The one, one of the things that your predecessor JP Somyalo has done, and which you have also done is to ensure that there is a proper rotation of judges. That you don't have a situation where Transkei judges are just going to sit there in

Mthatha and all the time, but you know that you had, you were forced to curtail that as a result of the austerity measures that were implemented so hopefully when things improve in the economy and that austerity measures have been suspended and it is possible for us on a reasonable and responsible basis to ensure that judges rotate, that will also, that will also do a lot because otherwise, you are really going to sit with the problem that you have 3 separate courts or even maybe 4 separate courts sitting as local seats all the time. I do believe in answering your question as to how the division is going to be, can be unified. I do believe that I have the support and respect of judges in the division. But, hastening to add that it is not exclusive to me, that all the candidates have that same respect and support so, the attitude of as it been expressed to me by all the judges is that it matters who get appointed we are going to support you. So, I'm saying that I am just making the point that if I were to be appointed that I don't believe that it will be a problem that there will be resentment or disagreement on the part of any judge. I am sure all the other applicants can probably say the same thing and it's true for them as well, but ja.

JP C.T. Sangoni: CJ, thank you.

CJ M. Mogoeng: Thank you, Judge President. Premier?

PREM P. Masaulle: Thank you. In a very crisp way, mine is really very short. What attributes specific to yourself that should make the Commission to look at you above the others?

Mr Smith: It's a difficult question but can I just say this that I bring to the party my unique way of approaching matters. Which as I try to maybe not successfully explain is to break things down to the fundamentals. I am essentially a very practical person. I believe in setting goals and then putting measures in place to achieve those goals and I do believe I've always believed that my, one of my attributes that has helped me manage, and successfully manage and grow a large, quite a large black firm of practitioners is the fact that I get things done. As I said earlier, I just make things happen. That I believe is what I do best, and I am not saying that other practitioners are not equally qualified, but the other thing that I want to say is that I do believe and I think my track records as an attorney speaks for itself that I do

believe that I have understanding, appreciation understanding of the importance of maintaining transformation on the Bench. It is strategic objective that we ensure that progressively that the plan is put in place to ensure that progressively the Bench is going to be representative of the population. I am sure that other candidates can probably claim the same inclination, but I am trying to put it in a nutshell Premier. I don't know if I answered your question.

PREM P. Masaulle: Yes, now except that you keep referring to others. I wanted it directly to yourself and what you bring into it. Just the last point on transformation, you did make reference there to the apparent reluctance from some of the colleagues in Grahamstown etcetera, can you say what influence you hope to have, or you can assert so to as to achieve the very objective of transformation. Not only in Grahamstown but across?

Mr Smith: Ja, I think I'm particular that, I think when we dealing with the issue of transformation I want to say that this is just my impression that the difficulty that we have had and the resistance that we have had with the implementation of case flow management should not be transposed to an attitude against transformation. I do believe that all the judges, all the judges obviously some more than others understand the need to transform. I do not foresee that there is going to be any serious challenges to such a strategic objective. And in any event, I do believe that I can find a way to bring those that are still unrepentant onto a, on board. I think that having spoken to all of the judges, in particular those that are perceived to be against the implementation of the case flow management, especially when it comes to this time, with the appointment of judges in the division there is an understanding, sometimes granted a grudging understanding, but there is an understanding that things have changed and it is not going to be business as usual and certain things will have to happen for certain strategic reasons and one of them is transformation. I doubt very much that one will encounter meaningful protest in that regard.

CJ M. Mogeong: Thank you, Premier. It is an unfortunate coincidence that the two divisions, most of the colleagues are white, isn't it?

Mr Smith: Yes.

CJ M. Mogeong: Yes.

Mr Smith: Yes, it is JP.

CJ M. Mogeong: Commissioner Notyesi?

COMM Notyesi: Thank you, CJ. I think Judge Smith, in fact, good afternoon.

Mr Smith: Good afternoon Mr Notyesi.

COMM Notyesi: Let's start where the premier start. I mean if we can put it bluntly, the resistance to the implementation of the case flow management was the Grahamstown High Division, in particular, the white judges. And you were supporting them initially, though you changed.

Mr Smith: No, no I that is not, that is not what I said. When I, when I said that I expressed reservations about it was the very first meeting, I didn't even know that case flow management was going to be implemented. They had no clue, it was the very first meeting that the JP came and explained to us and said look this is going to happen, I want you to understand. And we debated and the JP then said to me, John you are so vocal I think you must serve on this committee and come back and report to us objectively whether you think it is a good thing or not, because I can see that you are cynical and if you are convinced you can come back and convince others. That I, the resistance to the case flow management and the perception that it is white judges, it is so that in Grahamstown most of the judges there are white judges, and it is so that those who expressed resistance were white judges, but I must say, I must say it to now and the JP will confirm this that the resistance was based on rational arguments reasoning why they believed it was not necessary in Grahamstown, of cause they were wrong, we told them so, because we said that well it is not a choice any longer you have to do it. But as a JP one should be careful of not always approaching things in that way. If you want to bring people on board you, you know it would be divisive to now deal with white judges only who have been perceived to be objecting to case flow and all the other unfortunate inferences that

would attach to such a – what you need to do is that you need to engage with them logically, reasonably, intelligently and need to convince them and fortunately, in this case, we don't even need to convince them because the law says, the Chief Justice has promulgated he has pronounced that there will be case flow. So it is not as if they have the choice, but you want to embrace and you want to bring people in.

COMM Notyesi: In fact Judge Smith I'm only limited to three questions, there were a lot I hoped to debate but I have to limit to three questions. In relation to your committee, that is formulating the ... [interjects]

CJ M. Mogoeng: Yes, Commissioner Malema?

COMM J. Malema: I just want to follow on the first question. Because we are not getting an answer. We are not asking you to give us what you think you should when you are a Judge President. We are asking you what happened in the past? When this was introduced white judges rejected it and you were part of them. And you for whatever reason, and then, later on, you realised this was a good system. So are we in agreement that this case flow management was rejected by white judges?

Mr Smith: No, it's not. It's factually not correct Mr Malema. Let me tell you what the correct position was. When it was initially debated and the JP will bear me out with that. Initially, I am talking the very first opportunity when the JP said there is going to be case flow management; and we didn't know anything about it. It was not only white judges who were cynical about it because it was something new to all of us. You know we were saying are we going to be going being attorneys again? We are now going to sit and manage cases, now it means that one judge is going to have 200 files that is. But those were the type of debates and at that stage it was generally just a debate about the pros and cons of this new concept. I think it was before the Norms and Standards as well, JP. It was just after the CJ had formed the committee. So at that stage it was just a genuine interrogation of a new system, that was going to have fundamental impact on the way in which judges – at a later stage when, shall I say I've been on the road to Damascus and I came back and said look this thing must happen for the following reasons and then fortunately soon thereafter

the Chief Justice's Norms and Standards came which then enforced the thing. There were those pockets of resistance, and unfortunately, they were expressed by white judges, that is a reality, but what I'm saying is that they were not, the views expressed were not so unreasonable that one could infer from that any malicious intent. I am just saying that they came up with arguments, even though we did not believe it was valid and we dealt with those arguments and I am saying that in going forward, in bringing those people on board one has to deal with them in a particular way, the fact of the matter is that we are still going to work with them, they are our colleagues and apart from this particular issue the Eastern Cape bench still remains a united one. We are quite a happy lot. JP will correct me if I am wrong. We get along well, collegiality is there, so one must just manage those type of, one will almost say colonial resistance to change.

COMM J. Malema: But that is not what we are asking. That is not what we are asking and you are becoming very defensive and in the process, you give it out and then come back and polish it out, and that is not leadership. We are looking for a leader here, and you must help us to identify a leader. It's very simple, it is not white colleagues who rejected it is okay, you must say that it was not only white colleagues, it was all of us. And then, later on, you guys realised that it was a good thing to do and all that. But you say it was not white colleagues only, all of you had a problem and then you give us a long story in the process you say, unfortunately, it was white colleagues who had a problem with it. Now I don't know what is the real story. I need to know was it white colleagues who rejected it because earlier on you even agreed that there is a problem with a case flow management again in Grahamstown and the Chief Justice says and unfortunately the majority of judges there they are white, and the answer is yes. So if it, was it what, I mean white colleagues at the initial case and even now we still have white colleagues still resisting it if there is no proper case flow management in Grahamstown.

Mr Smith: No, I explained I said in the initial meeting where I expressed reservations about case flow management it was the very first time that this issue was debated and most of the judges, I think the only one who had known anything was, in fact, a white judge, it was Griffith J, who explained to us assisted the JP and explaining to us. So when the matter was debated all the judges were critical about this. The

implementation of case flow management in Grahamstown came much later after we have implemented it in Bisho. And it was in that point in time that there were particular judges who now despite the fact that there were these Norms and Standards issues still expressed the objection to it. I hope I have answered your question.

COMM J. Malema: [01:03:20 inaudible]

Mr Smith: Ja.

COMM Notyesi: In fact Judge Smith, to tell you I mean Grahamstown case flow management, even today is just informally implemented, it is not where in Mthatha or other, East London, where in order for you to get a, you matter getting a date finalised you have to go through the case flow and proof that that was done. In Grahamstown that is not done.

Mr Smith: Yes now ... [interjects]

COMM Notyesi: Why can't you simply confirm that point? What is your, you are creating the impression that you are applying the case flow management when we are not?

Mr Smith: No, no Mr Notyesi, with all due respect I've never created that impression, in fact, I agreed that the case flow management in Grahamstown is done on an informal basis. It is not, and I have also explained that at the last meeting with the behest of the JP Griffith J, and I have drafted a document guiding the implementation of case flow management uniformly throughout the province. So it is not as if we or the JP is not doing anything about that.

COMM Notyesi: My last question then, you say you committee has consulted some attorneys. Why did you consult the attorneys for instance in sectors like Sector 15 like Mthatha area when you were forming this uniform rules because we have issues about how the court in Mthatha is run. There is always when you there it will not

start; practitioners have you heard anything as you have consulted with other attorneys.

Mr Smith: When I spoke about consultation with attorneys I spoke about the initial implementation there was consultation with attorneys in Bisho, East London which the DJP had to do and assume that there was also consultation with attorneys in Mthatha with the implementation of it. In Grahamstown there is also consultation, the initial stage now. What we've got now is we've got this new procedure, uniform procedure that is going to be implemented and then there will have to be obviously will have to be consultation throughout the province.

COMM Notyesi: CJ, thank you very much. I would have loved to ask questions.

CJ M. Mogoeng: Thank you very much, Commissioner Notyesi. Commissioner Norman?

COMM N. Norman: Thank you, Chief Justice. Good afternoon, Judge Smith.

Mr Smith: Good afternoon Ms Norman.

COMM N. Norman: Thank you. In answering in one of the questions by the Judge President you indicated that as far as you are concerned transformation is strategic. I thought transformation was a fundamental issue and not a strategic issue. Can you just explain to us as why you look at it and you think it is actually a strategic issue?

Mr Smith: Let me just say I said it was a strategic issue because what I intended to convey is that one needs to have a strategy for it, it is not going to happen by itself. You are not going to get black judges, you are not going to get black women judges just coming out of the woodwork. There needs to be strategy to ensure that there is a pool of competent lawyers appearing in the High Court arguing matters of substance and gaining experience to enable us to identify potential. One would have to engage with the public sector in that regard. One would have to, for example, just make sure that you talk to the government to ensure that more emphasis is put on putting measures in place that women advocates and attorneys be given an

opportunity to do some of these more substantive matters. Because that is the only way in which you gain experience. But I am saying there are other ways in which you can do it; in order to create that pool. But I am just saying when I said it is a strategic issue I just meant to say that you need to think about it. You need to plan for it, you need to engage with all role players on an ongoing basis in order to ensure that you have this pool. It is not just going to happen out of the blue.

COMM N. Norman: Yes, thank you. Then following-up on that plan you would say look I must have a strategy so that I can bring women on board. And I am looking at what I see as happening within the division. Now the National Enhancement Committee that you said you are on, your serving as two male judges.

Mr Smith: On the, on the?

COMM N. Norman: From the Eastern Cape?

Mr Smith: No, it's the Case Flow Management Task Team.

COMM N. Norman: Yes. And you, so there is two male judges on that committee, and then lets then say now you have the two male judges who know exactly the case flow management implementation who will be able to implement it effectively, all right? Now taking that then and looking at the two positions that are held currently by male judges as deputies and then this commission, if you are successful you become the Judge President, and looking at your ages, all of you, for any women then to take over on the part of that management the maximum that it will take that female judge would at least be 13 years, if one looks at your ages. That is your age, the age of the two deputies judged, that is if you all decide to retire at the age of 70. Is that correct?

Mr Smith: Ja, no that is correct.

COMM N. Norman: So your plan, you can only implement it after 13 years?

Mr Smith: No. No I think, I think first of all first of all the reason why there are two male judges on this committee is probably because I was too talkative in that meeting and the JP was trying to spite me and say, you're going to that committee and, I'm just saying on a lighter note. But, you are absolutely right, one needs to be sensitive to these issues but your question, your question and the statement that you make throw up another challenge. Is that unless there is a strategy to bring in the persons of a certain profile in order to transform and you appoint the wrong people they are going to be there for a very long time because judges are getting younger. So it is not, as if in the past, you know judges are appointed after 60 years or so. Just to illustrate my point I, and I don't believe that it takes as long as you say. I have a photo in my chambers of, taken on the first day when I, after the very first meeting. I look at that photo every day and there is almost half of those judges have gone. Some of them gone on to the SCA other things, but the fact of the matter is that within a space, relatively short space of time there was an opportunity for I think about 8 or 9 appointments within the Eastern Cape, so these things arise much quicker than you think. The turnaround time for judges, things happen and vacancies arise from time to time in the most unexpected way as we know life can sometimes throw us. But, I am saying that if those occasions arise and you don't have a strategic plan to ensure that there is a pool of people with the right profile to be appointed you are going to be forced to make appointments that you regret later. And on occasions, this body had to say, for example, I think it was one was a vacancy in Port Elizabeth that we are not going to make an appointment at this stage because we don't have the right person to make that appointment. And I think it is the right thing to do. If you do make that appointment your point becomes so much more instructive and that is that you sitting with that person for a very long time and it just makes things more difficult. But, hopefully, I will be around for 13 more years somewhere.

COMM N. Norman: Thank you. Thank you, Judge Smith. Thank you, Chief Justice.

CJ M. Mogoeng: Before I forget Judge Smith, tell me what your experience is in relation to the courts in the Eastern Cape. My experience and that of other colleagues is that quality work that would help practitioners develop their forensic skills, whether we are talking about government department at national or provincial

level or municipalities, or state-owned enterprises or the private sector that work goes to white male lawyers. You rarely come across one woman, black or white, or black men however competent they may be doing that work. I have asked colleagues because of the shock that I often experience at the Constitutional Court. Even the state, what is the position difference in the Eastern Cape?

Mr Smith: No, Chief Justice. Unfortunately, unfortunately not, I think a lot has to do ... [interjects]

CJ M. Mogoeng: Even where there are juniors they can be as many as three you'd be lucky to find a black person there unless they've come to know the judgement.

Mr Smith: It is unfortunately so and a lot can be done by public entities to ensure where they do have, because they have the purse, pulling the purse string. There is a lot that can be done to ensure that they are not doing enough. But having said that I do get the sense that there is a realisation on the part of some entities, for example, I spoke to one practitioner just about two or three weeks ago and he told me that he is doing some work for Eskom. He told me that they are forced first of all if the matter if there is not a competent black senior counsel involved if the matter is senior counsel then the junior must be black woman, first of all, you need to look and then motivate to them as to why you couldn't find them. And the fact of the matter is that unless you do those things deliberately, and forcefully it is not going to happen. But, the public entities need to assume responsibility and a lot of pressure can be put, can be brought to bear on those private entities, that do business with the government also to ensure that they take the necessary steps to ensure that black practitioners are given an opportunity because it is all that they need to show their skills.

CJ M. Mogoeng: Well for what it worth, I was talking to one minister from Britain, they've only just started with women and the minorities. Minister?

Female: Chief Justice, may I please [1:15:10 inaudible]

COMM: Following-up, good afternoon.

Mr Smith: Good afternoon.

COMM: Judge Smith. Now, and ones hears on the transformation issue or rather ideas at a theoretical level and how it should be done, but I am concerned because I see that were a partner, director, CEO of Smith Tabata van Heerden for 26 years.

Mr Smith: Yes.

COMM: And according to this report from the Eastern Cape Society of Advocates its dubbed the largest black attorneys practice in South Africa. Now my question to you is a practical one of what it is, what is it that you have done in order to ensure that that vision of transforming firstly the profession and secondly the judiciary becomes a reality in our lifetime.

Mr Smith: Yes, thank you for that question. We have when I was in charge of the practice together with my partner Dumisani Tabata we introduced a policy at a very early stage when the firm was in its infancy stages that we will brief black advocates. We have worked with advocates like Judge Langa, who was Pius Langa at that stage, Thembile Skweyiya whose later then became the Constitutional Court Judge, Boyes Morane who I believe is still practising we briefed Jappie, JP Jappie and many other, other black practitioners. We also, as a matter of policy, decided that we were going to train black lawyers. I can't give you numbers because I would now just speak off the top of my head, but there are many, many black women that we trained. The first, I think one of the first black conveyances and notaries in this country is trained by our firm. And the policy, well in 2009 I left the firm, but that policy is still there and on many occasions when they have matters before me those matters are done by young black advocates that are being briefed on a regular basis. So those policies were put in place, the problem is that there would always be dissatisfaction because you can't brief everybody. You know there is an expectation that we prefer certain counsel, and unfortunately, in practice, the attorneys would here would be able to tell you that it is like that. You build up a relationship with those practitioners, for example in those days that that I'm talking about them, there were many other competent black practitioners counsel which for one or other

reason very seldom did work for us like Justice Poswa for example, and Vuka Chabalala, it was known that our firm had a close relationship with those other counsel and it, as I say, it is difficult when you build up a relationship, so there would always have been, and I know that in the past some of the counsel was saying but you never give us work, and we try to give work, but obviously then what also happened was that we at some stage simply did not get any instructions from the State Attorney so we went entirely dependant on private individuals, we did some work for municipalities. So it has become increasingly difficult. Also, as a policy, as a matter of policy even though the firm was large enough for some of us, like a mentioned my partner Tabata to specialise in litigation, and appear in the High Court on occasions, we still believed that we have a responsibility to build, to contribute to the growth of a proper Bar so we preferred to rather brief advocates but ...
[interjects]

CJ M. Mogoeng: Did you brief them in political trials or even commercial matters?

Mr Smith: Some commercial matters as well, Judge ... [interjects]

CJ M. Mogoeng: And mostly?

Mr Smith: Mostly political trials. Ja, mostly political. But the reason -

CJ M. Mogoeng: Yes, judge.

Mr Smith: I wanted to say that the reason for that was obvious because in these political trials you had to, you had to instruct counsel that you trusted because during the course of consultation with your client's revelations could be made that could put others at risk, so the issue of trust ... [interjects]

CJ M. Mogoeng: No, that I understand I was piercing into the commercial line because it has been, it has a history. Minister?

MIN F. Muthambi: It is a follow-up question with regard to the case management system that was introduced. The recommendation by my JCP amongst all the other

three candidates, it says you are undoubtedly the most capable administrator. Then the question, it's a follow-up to say, what's your change management understanding. I'm raising it in relation to the issues that the colleagues have raised with regard to the case management system. My understanding that was brought to all of you as judges is that has to be change management system and then was it the cultural landscape that made you not to agree with this case management system knowingly that also change is inherently unsettling can you comment to that?

Mr Smith: Sorry it, Minister just to make sure that you are asking what's my experience with change management?

MIN F. Muthambi: Yes.

Mr Smith: Thank you. When I'm just, I'm not sure about the date but I think in 1996 our firm merged with quite an old established white firm. During the course of that process, we had to ensure that the culture of our firm that we have established prevail and we had to take on members of that firm and staff of that firm to whom the culture was entirely alien. So we had to make sure that we bring them aboard, not only to understand but also to support this culture that our firm wanted and during the course of that process, I learned a lot about how do you manage people to embrace change. When to cajole, when to back, when to be nice and when to simply say well if you don't accept this then it's you must go, if you stay this is how it is going to be. So, within the context of that amalgamation, I learned a lot about how do you manage people with regard to change and Minister, I think you also hit the nail on the head when you spoke about the resistance to changes. Often just the fear of the unknown and if you bring people on board and you explain to them reasonable people you explain to them the need for the change. How it is going to impact positively on everybody and why it is imperative for the change to be implemented. Generally speaking, you will get most people on board but one can obviously not guarantee that you will just have to manage any dissatisfaction.

MIN F. Muthambi: Okay, on paragraph 8.1 the last sentence with regard to the Eastern Cape Society of the advocates.

Mr Smith: Yes.

MIN F. Muthambi: Here, "he always delivers his judgment promptly." Do you agree with the statement?

Mr Smith: Yes, no I do. I do agree. Minister the issue of delivering ... [interjects]

CJ M. Mogoeng: I think she'll follow-up she needs more than what you have given.

Mr Smith: Sorry.

MIN F. Muthambi: Do you agree.

Mr Smith: Yes, sir.

MIN F. Muthambi: And you aware of the Norms and Standards as signed off by the Chief Justice in 2014

Mr Smith: Yes.

MIN F. Muthambi: Which it says every effort shall be made to hand down judgements no later than three months after the last hearing?

Mr Smith: Yes.

MIN F. Muthambi: You are aware of that?

Mr Smith: Yes.

MIN F. Muthambi: Can you share with us then, you remember the Rail Poloma Case in which you heard it on the 18th of May 2015 and then you delivered the judgement on the 17th of September 2015, also the judgment of Gross Point Trading versus [01:25:11 inaudible] System you heard the matter on the 22nd of October 2013 and delivered the judgment on the 25th of February 2014. The other case is the case of

Western Cape Parks and Tourism Agency versus The Wildlife Region South Africa you heard the case on the 13th of October 2015 and delivered the judgement on the 18th of February 2016. In essence, in all the cases it was four months later. Then we have got expectation if you are to be appointed as a Judge President of the Eastern Cape High Court to say we want you to lead through the front, how are you going to lead if there is this way and you didn't even comply with your own Norms and Standards?

Mr Smith: Yes, thank you, Minister. The cases which I have attached here I deliberately put those cases because those cases were complicated matters where I was compelled to take my time to consider them very extensive heads were filed and unfortunately it is not always possible in these matters to deliver a judgement within the three-month period. There are very few of my matters that go beyond three months. But in some cases, it becomes very, very difficult you write your judgement; you make changes; you look at it again; you look at the Heads of Argument again and because of the complexity and the importance of the case you want to do things properly and then you take longer than the Norms and Standards. I do think that insofar as my other colleagues on the Bench is concerned all of them are aware of the fact that I take particular pride in the fact that I deliver my judgments as quickly as possible under the circumstances. I would not unnecessarily rush it where there are complicated matters I would take my time and if necessary go beyond the three months. I think that I will have the moral authority to monitor the delivery of judgment on the part of other judges. I don't think that anyone of them will be able to point fingers to me and to say, but yourself you are not doing your work and you are not delivering your judgements. But it is unfortunately sometimes you do take longer and particular in full Bench matters you have to confer with your colleagues, they take time, you have to convince them of certain things, the possibility of minority judgements and those things. But I do believe that I generally deliver my judgments as expeditiously as possible under the circumstances.

MIN F. Muthambi: Thank you, Chief Justice.

CJ M. Mogoeng: Thank you, Minister. Professor Ntlama?

PROF N. Ntlama: Thank you, Chief Justice. Good afternoon, Judge Smith.

Mr Smith: Good afternoon Prof.

PROF N. Ntlama: How are you?

Mr Smith: Fine thank you.

PROF N. Ntlama: I am also well. Now, let's go out and come back to the courtroom how do you envision to improve access to justice from Aliwal-North to Grahamstown?

Mr Smith: Ja the, I must confess that insofar as you referring to Aliwal-North is a possible seat for a circuit court, I supposed that is what you do. I know there is circuit courts and I know that in terms of the Act the Judge President has the power to proclaim circuit courts in order to enhance accessibility to justice. I supposed that is something one will have to look at, but as I am where I am sitting now I don't have sufficient information to say to you that a circuit would be better placed in this area or on that particular area. But it is an important issue to look at.

PROF N. Ntlama: There are also four institutions there at home, from Rhodes to Walter Sisulu?

Mr Smith: Yes.

PROF N. Ntlama: In the Transkei. What role do you think they can play in enhancing the capacity of the judiciary in the Eastern Cape?

Mr Smith: I don't understand your question, are you mean in terms of a possible pool of judges from the academia? Is that what you are referring to?

PROF N. Ntlama: [1:30:39 inaudible]

Mr Smith: Yes, no that is something that has to be looked at. One must look at that. But having said that it is important, I mean members in Grahamstown for example, I am not too sure that it happens on a regular basis in the other courts. I supposed in Mthatha as well, but members of the academia often appear in the Grahamstown court and then apart from the theoretical knowledge, the understanding that they have of the law, able to gain experience as well. But, it is something that one needs to look at, it could be a very important component of the pool, in order to get transformation going.

PROF N. Ntlama: Thanks, CJ.

CJ M. Mogoeng: Thank you Prof. Commissioner Masuku?

COMM T. Masuku: Thank you, Chief Justice. Good afternoon Judge.

Mr Smith: Good afternoon.

COMM T. Masuku: You were nominated by two firms.

Mr Smith: Yes.

COMM T. Masuku: You've got a letter that comes from a that's titled Settle Nine?

Mr Smith: Yes.

COMM T. Masuku: And this groups says, "It gives me great pleasure on behalf of Settle Nine, all attorneys in our Adelaide Alexander, Port Beaufort, Grahamstown, Port Alfred and Somerset East" that is quite extensive, the cover.

Mr Smith: Yes.

PROF N. Ntlama: On the last page of their nomination they say, "to the best of our knowledge, of his judgements, to the best of our knowledge none of his judgements have been upset on appeal and we strongly recommend and support the nomination

of Judge Smith as the president of the Eastern". Did you see this nomination letter before it was sent here?

Mr Smith: I cannot recall, I think it was sent to me. But obviously, I disclosed in the questionnaire which of the judgements have been ... [interjects]

COMM T. Masuku: No, no, no but what I'm asking is did you see this letter when, before it was sent here?

Mr Smith: I think it was sent to me.

COMM T. Masuku: Sorry?

Mr Smith: I think it was sent to me ja.

COMM T. Masuku: Did you see this particular statement? That ... [interjects]

Mr Smith: Yes, I did yes.

COMM T. Masuku: Did you, why didn't you correct them?

Mr Smith: No but I did, I did disclose in the questionnaire that I have several judgements have been upset, so I just, I didn't think that the commission would be misled by such a statement.

COMM T. Masuku: Yes. No, I ... [interjects]

Mr Smith: Maybe I should have but I just thought, that look I've made full disclosure, I've given a list of the judgements that ... [interjects]

COMM T. Masuku: No in fairness to you they do say, to the best of our knowledge. So I mean it is clear that they haven't seen any judgement in which you ... [interjects]

Mr Smith: Maybe they just thought my judgement were so good that there shouldn't have been upset.

CJ M. Mogoeng: Thank you, Commissioner. Acting President Maya.

PRES M. Maya: Thank you, Chief Justice. Good afternoon Judge.

Mr Smith: Good afternoon, Judge.

PRES M. Maya: You mentioned a number of black counsel whom you briefed when you where you were still running in attorneys practice.

Mr Smith: Yes.

PRES M. Maya: Did you ever brief women advocates?

Mr Smith: There were ... [interjects]

PRES M. Maya: In the Eastern Cape that is?

Mr Smith: Yes, I can recall that Kosi Thuma was briefed. I can't think about any other advocates of the top of my head. There were not many around at the time, in any event in the Eastern Cape. But, Kosi Thuma I use to brief her.

PRES M. Maya: No, it's just when you mentioned your erstwhile partner's name Dumasani Tabata it reminded me that your firm actually did a lot work in the Mthatha High Court when I was still practising there.

Mr Smith: Yes.

PRES M. Maya: And at the time, I think I was the only black woman advocate in the entire Eastern Cape and I don't ever recall receiving a single brief from your firm.

Mr Smith: I, speaking under correction, Madam Justice I think there was an attempt made by Mr Tabata to brief you once, I don't know what happened but in any event what I understand. But certainly, even insofar as our correspondence in Mthatha it was Xholapedse's firm, Xholapedse Incorporated in Grahamstown it was Sandi, both who later became judges but that was part of the policy. I am not saying that it was perfect. At some stage I became more involved in the administration and things happen you don't always know, but I am saying that was the policy of the firm.

PRES M. Maya: Thank you, judge.

CJ M. Mogoeng: Thank you very much, Judge Smith, you are excused.

Mr Smith: Thank you. Thank you Judge, Commissioners, thank you.