



JUDGES MATTER

Judicial Service Commission interviews

12 April 2018.

Free State Division of the High Court

Interview of Ms S Chesibe

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Chief Justice Mogoeng Mogoeng: Good afternoon, or is it evening, Ms Chesibe.

Ms S. Chesibe: Good afternoon, CJ.

CJ M. Mogoeng: Are you well?

Ms S. Chesibe: I'm well.

CJ M. Mogoeng: Yes. I'm trying to check where to begin, but maybe let me apologise to you too. You ought to have been interviewed yesterday? We said we will interview you today at four – I beg your pardon at two and it's only three hours later that we're beginning with your interview. We apologise to you for wasting your time and maybe even causing you a measure of nervousness. Let's just try and start at the beginning. Where did you obtain your degree?

Ms S. Chesiwe: My first degree, LLB I obtained at Vista University.

CJ M. Mogoeng: Yes.

Ms S. Chesiwe: And then the second degree I obtained at UOFS University.

CJ M. Mogoeng: At?

Ms S. Chesiwe: UOFS. University of the Free State.

CJ M. Mogoeng: Yes and what about diploma in labour?

Ms S. Chesiwe: And the labour diploma I did through a correspondence college, Oxbridge College, which was a correspondence course.

CJ M. Mogoeng: Yes. Now, just in your own words, tell us how or why you believe you are ready for this position? Don't rush yourself. Just explain why you believe you are ready. What is it that prepared you for the position of High Court Judge.

Ms S. Chesiwe: Thank you, CJ. CJ, I think I'm ready due to the following reasons, since I graduated in 2002 I've been in the legal field, whether it was as an advocate or whether private practise, whether in the – acting as a Magistrate, acting as a Judge for two years in different divisions, North and South Gauteng, in the Free State division and I have done so far with my acting stints, I've performed well with the judgments that I've been writing under the guidance of my senior judges and the exposure I've had for the past two years I think has prepared me well to be able to find myself on the bench.

CJ M. Mogoeng: Yes. Now, you would know that there's a particular case that you were asked about at some length the last time you were here.

Ms S. Chesiwe: Yes, CJ.

CJ M. Mogoeng: Would you want to deal with that?

Ms S. Chesiwe: Yes, I would greatly love to do that.

CJ M. Mogoeng: Please take your time.

Ms S. Chesiwe: What happened in that case and it slipped my mind on that day, as the trial went on...

CJ M. Mogoeng: It is a rape case?

Ms S. Chesiwe: The rape case. Yes, it was a rape case.

CJ M. Mogoeng: And then can you just remind us what the concern initially raised by the MEC was, so that as you address it, even those who might not have been here at the time like Judge President Jappie can have a sense of what the issues were.

Ms S. Chesiwe: Yes. The concerns that the MEC raised was that the Trial Court gave the accused a life sentence for the rape of a minor child and then on appeal we reduced it to 15 years. What happened in that case, when – during the appeal argument, the State, as the Trial Court considered that as the trial started, the accused was not informed of the prescribed minimum sentence would be applicable and at the end of the trial they realised that they didn't tell the accused that he might be sentenced to life. They didn't explain the implications of the prescribed minimum sentence and at the appeal hearing the State considered that and the State said yes, we are aware that he was not told of the prescribed minimum sentence applicable in this instance. As a result it was kind of like violation of his rights to a fair trial. In that way they realised that the life was unfair for the fact that he wasn't made aware that he will be facing life sentence if the Court finds him guilty. That was part of the things that I forgot to mention, and the State considered that also.

CJ M. Mogoeng: Now, who were you sitting with? Was it another Acting Judge or a permanent Judge?

Ms S. Chesiwe: I was sitting with a permanent Judge.

CJ M. Mogoeng: What experience did that Judge have? For how many years had the Judge been permanent?

Ms S. Chesiwe: The Judge...

CJ M. Mogoeng: More or less...

Ms S. Chesiwe: As a Judge?

CJ M. Mogoeng: Yes.

Ms S. Chesiwe: I would say he was recently appointed, maybe one – a year or two appointment.

CJ M. Mogoeng: Yes and do you have children?

Ms S. Chesiwe: Yes, CJ, I've got three children.

CJ M. Mogoeng: Now, is any of them a girl?

Ms S. Chesiwe: I've got two girls.

CJ M. Mogoeng: As a mother who even has girls, what would you say to a criticism that says in that manner you demonstrated disregard for the children – of their interests, of women, of children and maybe the criticism that sticks to suggest that you really don't care that much about the wellbeing of women, the violation of women or girl children?

Ms S. Chesiwe: CJ, the criticism would be fair, but at the same time I would say when you look at the constitution itself, Section 35 that says every person has the right to a fair trial. One has to balance those rights of an accused person, as well as the rights of the victim. One does take cognisance of the fact that rape is happening

in the country, but at the same time, one shouldn't be blinded to the fact that there's also the rights of the victim, as well as the rights of the accused to be balancing out on each of other to ensure that the accused himself is also not given a trial that is not fair.

CJ M. Mogoeng: Do you get a sense that the public understands these nuances, or has the abuse against women and girl children been so rampant that the feeling is that for rape against minor children you must really go as high as possible.

Ms S. Chesiwe: The public, if one listens to the public, one gets the sense that that's what the public wants that the accused must be sentenced as harsh as possible, but at the same time we are aware that the public opinion and public interest must also be balanced, because sometimes the public is not aware what the law says. All the public knows is that this is what is happening, this is what we see, and this is what must be applied to. They are not aware about the interest, the things that happen regarding the rights of an accused person as well during a trial process itself.

CJ M. Mogoeng: Yes. Do you regard your approach to this matter as an error or are you satisfied that you dealt with the matter as according to you circumstances demanded that you should?

Ms S. Chesiwe: CJ, as circumstances demanded at that time, I felt I dealt with it well, for the fact that when it came to light that he was not informed of his rights, that the prescribed sentence would be applicable. So, under those circumstances I feel I dealt with it well.

CJ M. Mogoeng: Yes. Now, if criticism were to be to the effect that you lacked judgement in that matter, what would you say?

Ms S. Chesiwe: Criticism is one of those things that do come to Judges, because if you don't get criticised, it means you might not be doing well, so criticism will come to any person, to any Judge and one must accept the criticism as part of building you, part of maturing you, so that you know that in the future, something like this happens, you'll be able to handle it the other way and the fortunate part we have,

where one does these kinds of things where your judgment might not have been properly applied, we have your next appeal where the person or the State can appeal the decision of what was given and take it further, so one cannot be naive and not accept criticism. Criticism is there, and one must accept it as building you.

CJ M. Mogoeng: What if any lesson have you drawn from this case, coupled with your previous interview?

Ms S. Chesiwe: Lesson that one has to learn, or one has learned is that any matter that comes before you, especially when it comes to rape issues of minor children, one must look at them very seriously and look deep into it and see whatever you're going to decide will be what's expected of you as a Judge.

CJ M. Mogoeng: Yes. Any other thing you want to say before I hand over to the JP, in relation to your suitability for appointment?

Ms S. Chesiwe: Any other thing that I would say is that what I've learned so far through the – specifically the two years of acting that I've learned a lot and I'm still learning and I'm still prepared to continue learning, because being a Judge is not something that happens overnight. It's years of experience that comes along with it. So, as a person, as you grow older, you learn more, so I believe with continuous learning and continuously in this position, one will get and improve as time goes on.

CJ M. Mogoeng: Yes. JP?

JP: Thank you, Chief Justice. Good afternoon.

Ms S. Chesiwe: Good afternoon, JP.

JP: When did you start acting in our division?

Ms S. Chesiwe: My first time I started acting in the division was in 2012.

JP: 2012.

Ms S. Chesiwe: January to March.

JP: Yes and the JP at that stage was JP Musi, isn't it?

Ms S. Chesiwe: JP Musi was the one who had called me the first time.

JP: All right, and when were you invited again?

Ms S. Chesiwe: Then I was invited again in 2016 January.

JP: Yes, and you have already indicated that you acted for two years. You've been... This is now your third time at the JSC, isn't it?

Ms S. Chesiwe: This is my third time at the JSC.

JP: Yes, the last time you were here was in the October interviews.

Ms S. Chesiwe: The October interviews.

JP: Would you say there's any additional experience that you have gained since your last interviews and if that is the case, what experience is that?

Ms S. Chesiwe: Yes, I've gained extra experience, because when I left here, I continued to act when I left the October interviews, then in February of this year I was at North Gauteng High Court, continuing to act. March this year I was back in the Free State division, acting again. So, I feel as the months go by, every time I continue acting, I gain more exposure, and this builds my experience and gives me more confidence.

JP: Are you satisfied that through those acting stints in the Free State and Gauteng, you have now received exposure to all aspects in the law and that you are comfortable that you can deal with any case that's allocated to you?

Ms S. Chesiwe: I'm definitely comfortable that I can deal with matters that come before me and the experience that I've been given between the two divisions has built that experience very well.

JP: Thank you. Thank you.

CJ M. Mogoeng: Thank you, JP. Thank you, MEC?

MEC: No, no, thank you very much CJ. Most of the questions that you raised I think has covered me very well, except to say also thank you very much, Ms Chesiwe for showing interest.

Ms S. Chesiwe: Thank you.

MEC: Just one little question.

CJ M. Mogoeng: Sorry, MEC, if you could draw the mic closer, so that you can be audible. Thank you.

MEC: No, I was just saying that just for your own insight, with regards to the experience, I've realised that you've also done on the Labour Law.

Ms S. Chesiwe: Yes, MEC.

MEC: Yes, what is your understanding with unfair dismissal?

Ms S. Chesiwe: My understanding of unfair dismissal is when a person who's been dismissed can be procedurally note – when procedures were not followed, when a person is just told, you are being dismissed and the procedure was not followed within the employment services, it will be regarded as unfair dismissal.

MEC: What are the key components of one to be referred to be unfair dismissals?

Ms S. Chesiwe: The key components, (indistinct) I haven't done labour in a long, long time, would be whether the person was informed, why he is being dismissed and the reasons for the dismissal and if there was no disciplinary said hearings before the dismissal.

MEC: If I put it to you that there are two components of unfair dismissal, which is substantive unfairness and procedural unfairness, what would be your comment?

Ms S. Chesiwe: I would say you're correct, MEC.

MEC: Thank you, CJ. Thank you.

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

Mr Msomi: Thank you so much, CJ. Good afternoon, Ms Chesiwe.

Ms S. Chesiwe: Good afternoon.

Mr Msomi: I've got just one question and I think it's going to require you to explain one or two things and it's a media coverage relating to a matter that you heard in January and it's contained in the document prepared by the Democratic Government and Rural Rights Unit [sic]. There are two issues that they raised in the matter relating to Richard Kuduka. Does that matter ring a bell?

Ms S. Chesiwe: Yes, I'm sitting with the file right in front of me.

Mr Msomi: Yes. The issue that is made out there is that you say, and I quote: "It is an extremely serious matter for a Court to intervene in decisions that were taken by the elected representatives by an organ of State and that if an open Court has to intervene it should be done in extreme circumstances." What did you mean just by that quote? What were you talking about?

Ms S. Chesiwe: In that aspect, I was talking about where institutions that have been set up to do certain things and administratively be done what they're supposed to do

– to be doing, where they have followed the procedures with regards to that specific part of – the tender part, because it was a whole tender thing that was happening. So, those kinds of – where that kind of body has been set up to do these kinds of thing and they didn't – there was no misdirection, there was no irregularity, there was nothing unbiased or unfair. It is quite weary for the Court to intervene where procedures were followed properly in these instances.

Mr Msomi: So broadly, under what circumstances can a review decision be made? What will be the consideration of a Court of law broadly, in order for you to be able to review a decision and set it aside, either in terms of (indistinct) or common law?

Ms S. Chesiwe: Broadly will be simply where the whole process was unfair, there was an irregularity, there was biasness on the party of the body that was doing the tender, for example, so if the other applicant in the case is able to say to the Court, this is what has been happening, this is what was done, then the Court has to intervene and say yes, in this case you didn't follow the right process to attend to this matter.

Mr Msomi: The issue that is being made out of this media coverage and I think you have an opportunity perhaps to explain yourself now, is that you said in the same vein: "There were strategic considerations that gave Malembe or her trust advantage, despite their considerably less (indistinct) the bid." And then the media says: "Chesiwe's ruling does not elaborate on what these strategic considerations were..." and then they go on to make an allegation that Malembe was the daughter of the Province's Premier. What do you have to say to that, if a member of the public were to ask you as they are, what strategic considerations were you talking about and why did that not persuade you to rule otherwise? Thank you.

Ms S. Chesiwe: Thank you. The FBC, which was the First Respondent in this case, in their place they've got supply chain policies, management assess policies, how to dispose their policies and what criteria they use when they choose their tender bidders. So, in this case the strategy they used in terms of their papers also is that the Respondent – the Third Respondents in the group of category they had was the one with the lowest qualified, in terms of the group, for example just a BEE –

qualified in terms of the BEE and qualified in terms of their disposable supply management chain, disposable of assets. So, their strategy consideration was mostly with regards to the whole BEE concept – how to empower in terms of the supply chain and the requirements that they put in the adverts to say what are the requirements for the adverts of disposing those assets. So, the second part that you say, the ruling of the daughter of the Premier – the Premier’s daughter, when the application became before me, before me I had the facts, I had Applicants, I had respondents, I had no knowledge of nobody’s daughter, the Premier’s daughter, so I applied what I saw before me and if one looks at the papers, the founding papers of the Applicant himself, the Applicant talks that he went to the MEC, who was MEC Zwani, and the tender date was extended and from then on the MEC told him, me and the Premier will not allow you to be treated like that, but in the Applicant’s papers, he doesn’t state that there’s a confirmatory affidavit that says the MEC confirms, I said you will not be treated like that by the First Respondent. So, there’s a whole thing that came out, out of the founding papers, of the Applicant and with those other aspects, for example, the Applicant had meetings with the First Respondent’s employees, after hours at Wimpy’s and so on. So, there is a lot of things that the Applicant mentions, but the issues of daughters and Premiers and all those things, before me there was no such things.

CJ M. Mogoeng: Commissioner Fourie?

Mr Fourie: Thank you, Chief Justice. Good afternoon, Ms Chesuwe.

Ms S. Chesuwe: Good afternoon, Mr Fourie.

Mr Fourie: Ms Chesuwe, I assume that you’ve seen all the comments made by the interested parties and the law bodies?

Ms S. Chesuwe: Yes.

Mr Fourie: And I wish to particularly refer you to the comments made by the Black Lawyers Association and I assume that you’ve read that.

Ms S. Chesiwe: I've read that.

Mr Fourie: If I may just quote some of it to you. "Ms Chesiwe's time in the legal profession is very limited. She was admitted as an Attorney on the 9th of June 2005. In January until September the following year she joined Legal Wise as a Legal Advisor. That was only after six months of her admission. After nine months with Legal Wise she resigned and re-joined the law firm until 2008. Ms Chesiwe did not acquire enough practical experience as an Attorney, as her stay in the profession was for about a year." I'm going to read more of the comments to you, but if I pause there, what is your comment to that?

Ms S. Chesiwe: My comment to them is that – to that comment is that like I said already, I graduated in 2002. I've been in the legal field since 2002 till date, so if they talk about the experience in the private practise, because I would say experience comes from different levels, different fields. Private practise, family advocates, Legal Wise, acting as a Magistrate, acting as a Judge, all those things put together, one would look at the experience that I've gained over the years. It shouldn't only be looked at one point of that specific area in the same private practise. So, put together all those things, where I've gone through. I would take the experience that one has gained over the years and I mean, experience in any position doesn't come over night. It happens over the years. You get better as you stay longer in any space and your experience improves as you go along.

Mr Fourie: Then if I may proceed and again, I'll read everything: "A lack of practical experience in the practise of law shows itself in her judgments" and then they quote three judgments in particular and in respect of the last one, they say in the case of Jiyani versus the Road Accident Fund, "It is very difficult to deduce if she understands the application general contingencies in cases of loss of income." Is that a fair comment?

Ms S. Chesiwe: It's a fair comment, because (indistinct) get the dates of those judgments it is early in the year, I think early 2017, thereabout. So, when you look from 2017, early in the year, down to last year December, one has improved within that year a little bit better. So, like I said, I think for example when I was in Pretoria, I

spoke to some of the Senior Judges and asked them with regards to writing of judgments, how does it improve? How do you get better with time? And they said well, for example, you can't get it right overnight. It takes time. Build it up over the years.

Mr Fourie: And then just two more quotes. "As it appears in paragraph 6 of her JSC form, Ms Chesuwe has not been employed since 2016. This calls to question how she's been called to act when she's not in any form of practise." and perhaps you should comment after I've read the last part.

Ms S. Chesuwe: Yes. From 2016 I...

Mr Fourie: Let me read the last part and then you can comment on both. "BLA does not at this stage support her appointment. This decision was very difficult to arrive at, since BLA stands for support of women within the profession and the judiciary. We are of the view..." and this is the important part that I want you to comment on. "We are of the view that if we support Ms Chesuwe at this stage, we will not be doing her any favour, as she will be out of her depth when required to deal with complicated cases." Just two issues, the issue of employment and then that you'll be out of your depths at this stage.

Ms S. Chesuwe: The issue of employment, as I said, when I left in 2015 December to join acting, I've been acting since then to date. As a result it was difficult to be in any private practise, because you will not be at the practise at all, because you'll be at the High Court all the time, for example, during recess, I have part-heard matters that I must complete, so in any practise I wouldn't have been available at all at that practise, because I was acting continuously for these two years, so it was difficult to be in any practise, because even if I was at a practise, the practise would've felt, you are never here, so what's the use we are keeping you here? So, because of the continuous acting of two years, it made it difficult to be in any practise and the second part, if I may get it again, you said was...?

Mr Fourie: That they say they will not be doing you any favour to support you, as you will be out of your depths, when required to deal with complicated cases.

Ms S. Chesiwe: In that case I would say it's not something that I will agree with the BLA, because in any situation for any person, I mean, we all know through life you learn as you go. Any challenge that comes your way, if you are prepared to face that challenge and resolve it, then there's no need to be discouraged that you cannot do it. Complex issues or complex matters do come, but you will have a way of resolving or sorting them out, so if I look back, the past two interviews, when I came here, BLA supported my applications, they didn't have a problem then and I would believe possibly the past two years maybe chances are the judgments might not have been as well improved as now, because fortunately last week I received a message from the Johannesburg law firm that made me aware that there's a judgment I wrote in November – last year 2017 that has been reported. To me it's a sign of improving. It means that's improvement as you go along. So, the issue of depth and complexed for me, it shouldn't be an issue. It shouldn't deter a person if there's potential for the person to go further.

Mr Fourie: Thank you. My last remark, you...

CJ M. Mogoeng: No, volenti. Volenti.

Mr Fourie: If I may be permitted, I will, if not, I'll stop.

CJ M. Mogoeng: Yes, there's been too many though, Commissioner.

Mr Fourie: It's the same quotes.

CJ M. Mogoeng: You went beyond three even.

Mr Fourie: Okay, thank you. I'll stop there.

CJ M. Mogoeng: Thank you. How does it work where you have acted? Do they give you matters that they know, you don't have the experience to handle or do they give you only matters that the JP knows you'll be able to deal with? I'm trying to understand the depth complexity issue – out of your depth issue.

Ms S. Chesiwe: Yes. I believe, CJ, when the JP allocates files, the JP knows probably all the strong characters of every person – where are you, where's your strength, but with time, obviously as you are longer in the field, obviously when I start my first term, it would not be fair to be given a complex matter, because you're still learning, but as time goes on, four, five years down the line, you'll be given complex matters, because your learning process is over now. And in any event, as a Judge, you are learning forever. You will get matters forever, so you'll be forever learning. I mean, you're going to your retirement – some of the judges are going to their retirement and they tell you, I'm still learning. So, the issue of depth and complexed, I still – I don't agree that it should be an issue that should deter a person from achieving what a person has to achieve.

CJ M. Mogoeng: I sought to understand it, because I thought in every Court you make sure that people don't deal with matters that they are not able to handle. But anyway, Commissioner Singh?

Mr Singh: Thank you, Chief Justice, I've been covered by Commissioner Fourie on the BLA comments. Thank you.

CJ M. Mogoeng: You're excused, Ma'am.

Ms S. Chesiwe: Thank you, CJ. Thanks for the opportunity to come.