



JUDGES MATTER

**Judicial Services Commission interviews
1 October 2018**

**Electoral Court
Interview of Judge B H Mbha**

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Judge B.H. Mbha: ... to further that objective.

CJ M. Mogoeng: What kind of experience do you think someone who serves in the Electoral Court ought to have? What sort of things ought a judge like that to know?

Judge B.H. Mbha: First and foremost one will have to appreciate the constitutional imperatives, the right to vote; something which is entrenched in the constitution. And of course one would have a working knowledge, in fact, a good knowledge of all the legislation, the acts governing elections. For now, we have got 3 primary acts governing our elections; we have got the Electoral Act, the Electoral Commissions Act and the Municipal Elections Act together with their regulations. So one would really have a good knowledge of those acts. One would also need to have a good knowledge of the applicable jurisprudence, the developing jurisprudence, which is taking place worldwide. I think our Electoral Court, so far, has acquitted itself well in that area.

CJ M. Mogoeng: Have you familiarised yourself with the applicable legislation?

Judge B.H. Mbha: Yes, I have Chief Justice.

CJ M. Mogoeng: What challenges do you think the court has if any?

Judge B.H. Mbha: I think that court, the membership of the court has to be expanded. At present, it consists of 3 judges and 2 members. When we are having elections there are many actions that we care and the court tends to be busy. If one thinks

of the upcoming elections in 2019, where we are going to have both national and provincial and local elections; that court tends to be busy. So I think the first challenge is, we need to increase the number of judges. The personal many, many in that court. Secondly, I think, with time, that court will need to have its own secretariat because I believe it tends to be quite busy.

CJ M. Mogoeng: Does the workload suggest that it required more capacity or are you just being futuristic?

Judge B.H. Mbha: I am just futuristic Chief Justice.

CJ M. Mogoeng: Very well. Chairman Shongwe

Judge J. Shongwe: Thank you, Chief Justice. Judge Mbha there are comments by people, certain organisations, on your application one of which is there are no women judges in the Electoral Court. Would you want to comment on that?

Judge B.H. Mbha: Yes. Presently there is a female member in the SPACA, and the Chairperson and 2 other judges who are males. I have thought that perhaps in the future, one could think of appointing acting judges in case one of the 3 gets ill or indisposed, that is where I thought perhaps one could try and increase or put in female judges. Initially in an acting capacity, of course, with a view that in the future we could increase the number of female judges. But as I have already indicated, the act specifies 3 judges and 2 non-judge members but it is something that needs attention that we should have more female judges on the Electoral Court.

Judge J. Shongwe: Thank you. Now I have looked at your CV, a very illustrious one, with a wealth of experience, the way I see it. What benefit do you think you will bring onto the Electoral Court with the experience that you carry?

Judge B.H. Mbha: I have always believed that we have got an imperative to develop, to always develop our jurisprudence. I think if you have a peek at all my judgements I have always placed emphasis on constitutional aspects, in almost all my judgements; the right to vote being the right which is entrenched, I think we need to continue to develop our jurisprudence in that area.

Judge J. Shongwe: In my experience when elections are about a few months coming, usually there are many applications and appeals coming to the Electoral Court before, during and after the elections. In my experience Electoral Court matters are inherently urgent matter, do you think you will be up to it to deal with this? Especially that in 2019 we will having general elections, national and provincial, in this country.

Judge B.H. Mbha: Throughout my judicial career I have, not only in relation to the Electoral Court but throughout my judicial career I have always believed that judges we have got to deliver our judgements timeously. You can go into all past judgements, I have never delayed because I believe delayed is justice denied. I have always strived not to delay with judgements and that is prime, it is prime to me. Our duty as judges is to deliver judgement, deliver justice as quickly as

possible. As you have correctly pointed out, Electoral disputes, by their very nature, they are very urgent and they should be given the urgency they deserve.

Judge J. Shongwe: Thank you, Chief Justice. That is all from my side.

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

COMM A.J. Nyambi: Thank you CJ. Afternoon Judge Mbha.

Judge B.H. Mbha: Good afternoon Commissioner.

COMM A.J. Nyambi: Because you have done your homework about the Electoral Court, besides the issue of the numbers, what might be another thing that you think is a critical challenge of that court?

Judge B.H. Mbha: I have not seen the rules but I think there will be a need, if I do get appointed, the first thing that I intend doing is have a look at rules governing the court and whether they need to be updated, they need to be developed. As of now, I really have not gone into the nitty-gritty at the operational level of that court, but if I do get appointed, obviously, that will be the first area I would like to look at. I have already stated that, in the future, I would like to see the Electoral Court having its own secretariat because I believe is quite an important court in our system.

COMM A.J. Nyambi: I am fine CJ.

CJ M. Mogoeng: Thank you, Commissioner. Commissioner Fourie.

COMM C.P. Fourie: Thank you, Chief Justice. Good afternoon Justice Mbha.

Judge B.H. Mbha: Good afternoon Commissioner.

COMM C.P. Fourie: You have referred to the composition of the Electoral Court consisting of 3 judges and 2 non-judges. Seen that you are aspiring to lead that court, can I ask your views on whether you are comfortable with that composition or whether you rather see all the members of that court to be judges. In answering that I would like to get your views on why the legislator decided to compose the court of, at least, 2 people that are non-judges. What would you do when you get this position and how do you see the ideal composition of that court?

Judge B.H. Mbha: I think having non-members is valuable, they bring invaluable experience. I have looked at some of the judgements that had been delivered by that court and the non-members really bring – it is like if you are sitting in a criminal matter, being a judge and you have assessors; they really bring sort of an outside experience, which is really valuable. I would recommend that that setup be kept. Having judges and non-members because they bring a different aspect. I still think 5 is not enough. I think in the future I would recommend that the numbers be increased. If I am being told we are going to have national elections, local elections, provincial all sorts of disputes can arise all over the country and 3 judges and 2 non-members – and incidentally presently there is only 1 non-

member, we do not even have 2 non-members. I am sure you are all aware there is a vacancy that still needs to be filled up.

COMM C.P. Fourie: Thank you, Chief Justice.

Judge B.H. Mbha: Thank you Commissioner Fourie. Commissioner Norman.

COMM T. Norman: Thank you, Chief Justice. Good afternoon Judge Mbha. My question really relates to the distinction that you make in one of your judgements, in the Moyo judgement.

Judge B.H. Mbha: In the?

COMM T. Norman: Moyo judgment. Where you make a distinction you deal with the freedom of expression and then you make a distinction between true threats and political hyperbole. What I want to understand is giving the fact that this environment that you want to venture in, will have a lot of both; how do you plan to deal with those challenges?

Judge B.H. Mbha: I do not really see that as a challenge. The point I make in the judgement is that there should be complete freedom of speech. Hyperbole it is just that and we should expect that in an election tension get high, it gets raised, as long as there is no violence or threats of violence then fortunately in our legislation there are codes of conduct wherein threats, intimidations are outlawed. So there is a code of conduct that guides that. To the best of my recollection each time there is an election all political parties are brought together and they all sign that code of conduct and they make undertakings to adhere to that.

COMM T. Norman: Thank you, Chief Justice.

CJ M. Mogoeng: Thank you, Commissioner. Commissioner Smith

COMM Smith: Thank you, Chief Justice. Judge whilst acting in the Constitutional Court in 2016 you wrote a judgement *Laubscher NO versus DuPlan and Another*, you went for the majority judgement and your judgement was criticised by Professor Pierre de Vos. It dealt with a matter concerning interstate succession rights of unmarried same-sex partners in a permanent same-sex partnership. The basis for the criticism seems to be that in coming to your judgement and arriving at your conclusion you seem to have put the word "marriage" or "marriages" in terms of the Civil Union Act rather than refer to a marriage without the inverted commas. By doing so Professor de Vos indicates that you demean the institution of a marriage in terms of a Civil Union Act. Now I think it is just something you need to deal with to clear the air. Thank you Mr Chair.

Judge B.H. Mbha: I did read Professor de Vos criticism, which I appreciate because I have always maintained that our judgements must be subject to public scrutiny. But where I differed with Professor de Vos *in limine* was that he had wanted me to veer from the issue of intestate succession and to get into some other area. Okay, I cannot recall the facts, I have not read the judgement for some time. But my colleague Justice Froneman dissented even though he agreed with the outcome

by venturing into a separate area of marriage. My point of departure was that the issue at hand did not require of me to go into that area. I felt I just needed to confine myself to the issue of interstate succession pertaining to same-sex relationships. Professor de Vos criticism was *in limine* he wanted me to go and venture into some other aspects of marriage but this case only concerned interstate succession and my argument was that we have to confine ourselves to the issue and opportunity would arise in the future to deal with that aspect.

CJ M. Mogoeng: Commissioner Smith?

COMM Smith: Thank you, Chief Justice. I am not sure whether I made my question clear, so I think I should put it slightly differently. What is basically says is; a marriage concluded in terms of the Civil Union Act is a marriage. You refer to a marriage in terms of the Civil Union Act in inverted commas, as a marriage which in his view demeans the institution of marriage in terms of the Civil Union Act. So a Civil Union Act marriage is something different than marriage in terms of the law. Thank you.

Judge B.H. Mbha: It has never been my intention to demean a marriage between same-sex partners. If there were commas, I do not know, I cannot recall in which context were the inverted commas inserted to the word marriage. But it was never my intention to demean marriage between same-sex partners and 10 other judges of the constitutional court agreed content with my judgement and I do not think any one of us had any intention to demean marriage between same-sex partners.

CJ M. Mogoeng: Minister?

JM M. Masutha: Thank you, Chief Justice. Justice Mbha, good afternoon.

Judge B.H. Mbha: Good afternoon.

JM M. Masutha: You are going to be appointed in circumstances where elections are just around the corner. What preparatory work do you think will be immediately confronted with to ensure that that court is put in good stead to deal with what, I am sure you would agree with me, likely to be quite a very active litigation space in the courtroom.

Judge B.H. Mbha: Yes, thank you, Minister. The first thing I intend doing would be, of course, calling a meeting immediately with the other members of that court that would be my first port of call to ensure that we are ready, all the support structures are in place. Needless to say, I would also have to meet or liaise with the chairperson of the commission to ensure that they are ready on their side in their roles because elections are taking place in 2019 it would be important that the court is ready to roll. I cannot have much to say, other than what I have said, as I say to date I have not been a member of that court. But obviously, things have to be ready and yes.

JM M. Masutha: Chief Justice, through you; I am sure you would agree with me that South Africa as a society, especially in the political space, has increasingly in recent years become more litigious that it is resorting to courts to resolve disputes

other than other platforms, which then places an even greater burden on the court in terms of volume let alone other burdens that it places on the court system. Do you believe that the judiciary can or should do anything to encourage alternative dispute resolution and the use of alternative forum for that purpose other than the courts? And perhaps leave the courts to deal with matters as a matter of last resort? Or do you believe that that is entirely the provocation of litigants to worry about that all that courts need to do is receive disputes and deal with them and that is it? I just want to get your sense of where you see the system going in this regard. Thank you.

Judge G H Mbha: Thank you for the question Minister. I will try to answer the question by specifically confining myself to the electoral setup. The legislation we have, fortunately, it provides that before matters can come to the court, there are systems in place. We have depending of course on the type of disputes that arise, we might have an issue at the ballad office. There is an officer who should deal with that. The matter can be escalated to the commission. The commission has got to deal with that, in terms of the legislation. So there are systems in place so the court is really the last resort. No matter can come directly to the court. The commission, for instance, has got to resolve that matter. It is only if the litigants are unhappy with the outcome received at the commission level, it is only then that the matter can be referred to the court. The court is, in this instance, the last resort. Thank you, Chief Justice.

CJ M. Mogoeng: Thank you, Minister. Commissioner Mpofo

COMM Mpofo: Thank you, good afternoon Justice Mbha.

Judge B.H. Mbha: Good afternoon Commissioner.

COMM Mpofo: Thank you. I just want to ask you about access; access to the court. I just happen to remember I just did 2 cases, well not just in the past few years and both of them emanated from the Northern Cape. The one was heard in Jo'burg my opponent was Commissioner Lindi Thomas and the other one was heard in Bloemfontein. Like you I have not looked at the rules recently but that seems to suggest that either from the rules or from the act there is something that allows matters to be heard outside of the jurisdiction where they have occurred. At face value that would seem to impede access to justice for litigants. It is good for the lawyers, it is great for us, to just drive up to Pritchard street but should there not be something be done about that? To make the court itself more accessible to the place where the dispute has occurred rather than the convenience of either the judges or the lawyers?

Judge B.H. Mbha: Yes, quite correct. In fact, when I was saying, for now, I am looking at introducing the usage of acting judges in that court. I was specifically having that in mind. At present there are only 3 judges and 2 non-members and I would like to see a situation where the court actually goes to where the people are and we can only achieve that if we increase the members of that court. As a starting point, I think utilising acting judges would help. The act only mentions 3 judges and 2 non-members, but there is nothing that precludes the usage of acting judges. That court has got a status of the High Court so the constitution would help. The

constitution provides for the appointment of acting judges. So, what I am having in mind is that we should have as many judges as possible spread all over the country, precisely to enable access to everyone in the country.

COMM Mpofu: Thank you CJ.

CJ M. Mogoeng: Thank you, Commissioner. Prof? Would it be possible to appoint acting judges without a vacancy?

Judge B.H. Mbha: No -

CJ M. Mogoeng: Should you not rather ask for a bigger number of judges for the Electoral Courts so that you can achieve that objective rather than seek to appoint acting judges to non-existent posts?

Judge B.H. Mbha: You are quite right Chief Justice, you cannot appoint an acting judge if there is no vacancy but it is something that is really occupying my mind. The concern to me that there are only 3 judges. To change the law is going to take time. We have got elections coming up next year. What does one do? If it all, we have got 4, 5 electoral disputes, matters that have got to be heard. What do we do? It is something that I will engage your office, engage all relevant stakeholder, the Minister as and when the problem arises but I can foresee problems arising. I think next year is going to be quite busy so we are going to be stretched. I can just anticipate that.

CJ M. Mogoeng: And last, and just by the way, why did you not read the rules?

Judge B.H. Mbha: No, I have read the rules.

CJ M. Mogoeng: Oh, I thought you said you have not familiarised yourself with the rules.

Judge B.H. Mbha: No, I have read the rules, Chief Justice.

CJ M. Mogoeng: Okay, I was a bit surprised, that is why I needed to clear it up. Okay. No other question? Thank you. Thank you, you are excused, sir.