

Judicial Services Commission Interviews

Friday 09 October 2015

Eastern Cape Division of the High Court (Bhisho and Mthatha)

Chairperson: Chief Justice Mogoeng Mogoeng

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Interview of Judge S M Mbenenge

Chief Justice Mogoeng: I take it that you have familiarised yourself with the state of the Bhisho court, the state of the Eastern Cape High Court, you have identified the challenges and you have some thoughts on what needs to be done to bring about improvements in the operations of the Eastern Cape. Share with us why you think you are the right person for this position and what suggestions you would share with the Judge President to improve court performance and to improve whatever needs to be improved in the operations of the court.

Judge Mbenenge: Perhaps before delving into substance of the question relating to my vision, let me start off by saying that I have come a long way with the setup of the Eastern Cape. I started acting as a judge way back in 1997. I have the advantage of being exposed to different leadership styles. When I was initially appointed I remember that Zietsman JP was a judge, I interacted with JP Saunier[?], I have interacted with JP Sangoni, it exposed me to different leadership style. Getting back to getting the substance, I do indeed have a vision, and that vision does not necessarily have to do with me being judge at the moment. I have seen things from a distance as a practitioner. My vision is based on my exposure as a practitioner in the Eastern Cape, Mthatha, Bhisho, Grahamstown and Port Elizabeth. The position of the DJP is indeed a position of leadership. When I talk about leadership, I do not mean ascension to power, but descention to servanthood. What I would like to highlight is that it is indeed good that these positions of DJP have been created to aid to Judge President in giving effect to the norms and standards for the performance of judiciary practice issued by the Office of the Chief Justice. And the vision, by and large, centres around that, because when one scrutinises that document, one sees that many of the causes for concerns are addressed in that document. Being an assistant to the Judge President, and being the other Deputy Judge President, I see a committee being set up involving the Judge President and the two Deputy Judge Presidents. The first thing that I would like to share as my vision is the identification of potential acting judges. I believe it should be done in a structured fashion. I am by no means implying that it is haphazard, but all I can say is it has to be structured. There has to be a way connected with members of the legal profession. Judges are in a position to see good lawyers, if I may put it crudely like that. They would be interacting with the governing bodies, identifying those persons with potential to become judges, appointing them, supervising them, making a constant follow up, on work done, even it means on a weekly basis, checking how the acting judges are performing, so that at the end of it all one has an idea of how the acting judge is fairing. I have seen persons acting many a times, and at times at the risk of destroying their practices, by the time they return to their practices they would find that their practices were destroyed all together. My view is that there should be a way of interacting with potential acting judges and potential judges, so when the time ripens to know that they are ready to become members of the bench, they would have been followed up by management, I mean the JP and DJPs. I see myself being of assistance in that regard, when it comes to the identification of acting judges.

The second point is, problems crop up from time to time. In my view, some of the problems should not arise or ought not to have arisen in the first place. There is a need for the office of the Judge President including the deputies, interacting with governing bodies of the legal profession, to ensure that problems are identified before crisis situations arise. We have seen in the province that here and there, there were problems that could have been cured. If there are meetings once a semester, or if it comes to a push, once a quarter, where there is interaction between the bench and legal practitioners. There is a challenge with reservation of judgements for unduly lengthy periods. I am of the view that that needs constant monitoring, in the sense that members of the bench should be expected to declare as and when a judgment is reserved, which would enable the Judge President to know which judgments are reserved. In my view, by the end of the term there should be an idea of how many judgments are reserved and it may impact on how one is placed where and how during the ensuing term. It may happen for one to attract three or four reserved judgments. One may find himself placed out in the bundus of the Eastern Cape, I call them the bundus, doing crime in a second court situation, where you find that there may be no time to work on those

judgments The manner in which the set up should be structured is such that, once there is an idea of how many judgments are reserved and who those judges are, it surely should impact on the type of work that they will end up doing during the ensuing term. I mention that, fortunately the norms and standards deal with that, they provide a three month period, but that guideline can be given expression to by the Judge President together with the Deputies, combining it. So that even if there is a complaint from the litigants or even the practitioners, it will not be a situation of saying I am going to investigate the problem, I will come up with an answer in due course. In a situation where there is already a ready answer, the JP or the DJP will know whose judgements have been reserved and when it is likely to be handed down. The issue of the rotation of judges within the local division, I believe the DJP should and will be of assistance to the JP in that regard. The problems I am going to highlight are linked to an earlier problem I addressed about reserved judgments but I will not use reserve judgments anymore. When it comes to the rotation judges to local divisions, it is a good practice. I would call it cross pollination, because in the Eastern Cape you get more commercial work in Port Elizabeth, more administrative work in Bhisho and Mthatha, you get more customary law in Mthatha court. So rotation of judges is good because a judge could end up presiding over courts of appeal and it is important for them to get, what I would call, a balanced diet. At the same time, I think there needs to be transparency on the issue of rotation. Judges should know that they are home based, 70, 80 or 60 percent of the time and they can go to other divisions on other occasions. There are budgetary constraints as well, because if judges are going to be moving around the division there are going to be more claims submitted and that would impact negatively on the budget. So that is a factor that needs structured supervision. Then there is the issues of the Constitution of the full court. I am addressing that in context of rotation of judges within the local divisions. In my view, from a practical perspective, judges meet during tea break, they talk about what they have been doing and share ideas about jurisprudential issues and issues raised in court. It normally happens for a judge of a particular division. After having discussed the matter with brothers and sisters in the same division, to end up attracting an appeal. The rotation system is good, especially if two of the judges, so they are in the majority, come from a sister local division, rather than have a situation of having two from the same particular division whence they are appearing. Case flow management is another matter I would like to talk about. I can do no better than salute the present management especially at Bhisho where I am. I have experienced a situation where legal executives marching out of my chamber having been informed that a matter is trial ready. They walk straight from my chamber to the Registrar to get a date, sitting in September already they were able to get dates in November. When it comes to civil trials, dispensation is running smoothly, I cannot say much about the criminal side of things. What I would like to say by way of introducing some improvements, if I may put it like that. I believe it would be good to have case flow management spill over to obligations. More often than not, a judge will sit in Motion Court, like it happened with me yesterday in Port Elizabeth. A situation where one party files heads of arguments, it is incumbent upon a judge to read those heads of argument, to read the entire file because you do not prepare on the basis that all the parties must have filed their heads. The one party is entitled to pursue the matter, if the other one is resting on his laurels. The situation where you have to read the entire file, the entire heads of argument, and then on the day of hearing the other party that did not file theirs will show up and tell you there has been some form of settlement or they have agreed that the matter should be postponed. It is time wasted, resources are wasted. So I am toying around with the idea of the introduction of case flow management in a structured way such as is done when it comes to civil cases, civil trials, action proceedings even application proceedings, it could and should be applied.

I believe more interactive meetings are called for in the Bhisho setup. I say so because there is East London on the one hand and Bhisho on the other hand. The dispensation holding sway now is such that someone who is running Motion Court in Bhisho or during the particular week is doing the general applications for Bhisho and East London as well, it often happens for colleagues to not know where their other colleagues are. Yes you could simply take the roster and get an idea of where the people are, but I believe interaction is called for. So interactive meetings are important. I remember in Mthatha, acting there, that there used to be meetings every Monday. It could be a fortnight situation, where people can get an idea of what colleagues are doing and how long cases are likely to run, so that if something collapses, you can know which colleague can come to the aid of the other, if they are encountering problems with their work.

Judge President Sangoni: You have said it so well in words, but have you really experienced anything you have been talking about, taking into account you have just been newly appointed, you have not attended a single judges meeting since you started in June, not even to the one at the beginning of this term. The question then is have you experienced anything that you have spoken about or are you talking to us knowing what we would like to hear?

Mbenenge: I think the starting point is contextualising something that is in your question. The first meeting was held in Grahamstown and I could not attend which was not of my making. This was because the JP allocated me motion court and general application. I interacted with the management and found that I had been excused from attending the meeting by reason of having to do the general application. I got the minutes of the meeting and I read through them, I interacted with someone who was the secretary at that

meeting. The second meeting, which was on Monday in Grahamstown, once again, but regrettably once again I was allocated duty. The norm, JP as you will know, is that those who have been allocated duty are excused from attending meetings. There were two of us allocated duty, myself and judge Revelas. The position was simply that it would have been unfair on my part, to say to Judge Revelas stay here by yourself while I attend a meeting in Grahamstown, especially when we know that we are excused from attending those meetings when we do duty especially that I left her all by herself yesterday yet there was a constant flow of general applications. I did not think it would be fair.

Sangoni: If you had a little bit of experience you would probably know that what you are saying it is not true.

Mogoeng: You may wish to moderate it a bit. You may wish to moderate the tone. Maybe you want to say that it is incorrect, untrue suggests falsehood, and I am uncomfortable with judges telling other judges that they are saying something untrue.

Sangoni: Fortunately those who approach me know that my tongue is very sharp.

Mbenenge: I can bear testimony to that. All I can say though is that it is not very different from me.

Sangoni: It is not correct to say that if you are assigned motion court that you are then excused from meetings. If you had a little bit of experience, acquainted yourself with the systems, you would know that it gave you no license to not attend because you have been assigned motion court. In fact, let me give a little bit of background, a bit of perspective everyone should understand. It is not one person or two persons who are given motion court. People are given motion court and most of them attend those meetings.

Mbenenge: Most of them especially those who are Grahamstown based. At the starting point, so that a cloud of tension does not descend, I think we need to clarify something. The fact of the matter is that I tendered an apology for not being able to attend the meeting for reason thereof that I was going to be doing duty, and by reason thereof I did not want to unduly overload Judge Revelas. It needs to be clarified that I did not absent myself from attending the meeting, I tendered an apology for not attending the meeting. But that was just by the way. Your question related more to am I talking from experience or not. Talking from experience had nothing to do with me being here attending an interview. I have been a practitioner in that division for 22 years, 11 years as a junior counsel and 11 years as senior counsel. When it comes to problems that beset the division, I can speak from the perspective of the consumer. I call for the present purposes, legal practitioners, consumers. I was not addressing them necessarily from the perspective that they are horrible or there are shortcomings. I think everybody needs to understand that these are areas of concern as far as I am concerned and if there is something in place to resolve these problems, I am saying there should be augmentation. If we all agree that there are such problems and they need to be attended to then so be it. If for any reason I have exaggerated some of these things, and the situation is that there are some problems, I am simply saying that the DJP is there to aid to JP in resolving these problems. Yes, I am talking from a practical perspective. The fact that I started in July does not detract from what I have said. As I indicated, I am not new in that division. I have acted as judge from time to time, and things are such that one can get to know about them, not necessarily that I had to be a full-time judge. I hope I have answered the silent features of the JP's questions. It may be that there is something I have not directly addressed.

Mogoeng: On a lighter note, Justice Roberts of the United States Supreme Court was not judge before he became Chief Justice, so do not be overly worried.

Mbenenge: Not only that, going back to the Eastern Cape itself, the two JP's who in my view are doing well, or the first one who is retired was appointed from rungs of junior judges in that division. I am by no means saying that I am here for the JP position, I am just addressing a point. This happened in the Free State as well. The JP in that division was chosen from junior rungs, and the heavens did not fall, everything is still in place.

Sangoni: Where do you see yourself after giving that example? The reason I ask that question is because you simply wanting to be taken up from a position of having been appointed yesterday then you lead.

Mbenenge: The people have spoken, I think that is where we should start. I have been nominated by no more than three individual bodies, not just individuals. Some of those bodies are national bodies. Transkei Attorneys Association say we met and took a unanimous decision that you should avail yourself. When I say the people have spoken, it has nothing to do with me imposing myself. The people have spoken and I have responded. They motivate in their letters of nomination and I do not want to be reading those letters line by line. They also motivate in their supporting letters, and in fact, way back in 2004, I want to read something that I read before but I want to contextualise it. Judge Saunier [?] at a point when I was taken sick had the following to say; he was not only appointed as acting judge in the Transkei division but also in the Eastern Cape Division, where his hard work, efficiency and knowledge of the law soon endeared him to most of the judges of this division. Now underline, and yet, I get appointed as a judge. Immediately thereafter just to

show that I command respect even among senior judges, the first thing that I get from a Constitutional Court judge, Justice Cameron, comes to me and I will just read the relevant sentence. Just a warm word of congratulations on your recent appointment as judge at the Eastern Cape High Court, Bhisho. You and Gerald Bloem are great acquisitions for the Eastern Cape and the judiciary. I do not believe that has changed. Then I also get a letter written by Judge Frank Kroon.

Sangoni: When is that one dated by Frank Kroon?

Mbenenge: It is dated 23 June 2015. Let me read. I am simply mentioning these because a question would arise. Our telephonic conversation refers when I conveyed my warmest congratulations on your elevation in the Eastern Cape High Court. You will recall our discussion some years ago in my chambers at Port Elizabeth High Court, when I sought to add you to seek an appointment to the bench. Your stance then was that personal exigencies did not permit you to take the step at that stage. I am so glad firstly, that you have been able to do so now. He continues, the mental aspect of the judge's role will lie easily on your shoulders. The one from Judge Cameron is dated 5 June 2015. I am simply mentioning this, not because I think I am bigger than my head. The question is going to arise from time to time, this person is new or this person is new. I do not want to say that this question is not legitimate. I can only say that the advert itself did not say that we need persons who have been judges for three years or something like that, that is the starting point. I am not in the least suggesting that experience as a judge is not a factor. As a judge I penned judgments that are serving in foreign jurisdictions over a time period which is something like one year. Some of those judgments highlight how we do things in this country. There is going to be question, why so soon. It has nothing to do with that.

Mogoeng: Let him address that, because I must admit that when I first saw your name I thought, what level of ambition is this? It comes out naturally. This man has not even greeted us but he is already applying for a higher position. I think it is important that you deal with it.

Mbenenge: I did harp on the fact that the notion of leadership means ascending to power should be dispelled altogether. It is a question of one availing himself to be more a servant. The role of a JP, the role of a DJP, those are administrative roles. It does not mean that one is necessarily in control of the other judges. Let us contextualise it. I have been nominated by bodies that have actually motivated why they believe I have leadership qualities. The issue of leadership is a tricky one. You cannot say, seated here as you do, I am a leader for a b c d reasons. It is better when you listen to other people saying for reason a b c d one possesses leadership qualities.

Mogoeng: Just to digress a bit. You have been the chair of the Mthatha bar at some stage?

Mbenenge: Yes, I was just going to deal with those things and say, they are not saying this person possess leadership qualities without substantiation. They cite Mthatha, they cite Bhisho, and in fact I also mention leadership positions I have held in the past.

Mogoeng: For how long and for how many terms were you chair of the bar?

Mbenenge: At some point I do remember I was Deputy Chair for a term.

Mogoeng: How long is a term?

Mbenenge: A term is usually one year long, but it does happen there that it gets extended. Memory will fail me now, but at some point I was Chair of the Bar, and at some other point I was a member of the Bar Council in Bhisho, and those are leadership positions that I held.

Sangoni: All told, most of them are raising the point of you being experience and you being in leadership positions and you practicing since 1997. People take that and assume it right down, giving support to you. It is true, I must clear this so that you do not repeat yourself, time and again I find myself having no problem having you as a judge but you leading, I must say personally, I do have a problem. People talk of experience, with all that experience, let us test that experience which you have. For instance you say you have been acting from 1997. I took the dates which were written by you and I have analysed that to say for instance in 1997 you had only four acting stints totalling 109 days. In 1998 you acted on two times and that totalled 63 days. In 1999 28 days, two times. In 2000, 66 days. In 2001, 64 days. In 2002, 8 days. In 2003, 38 days. In 2004, 19 days. In 2005, 12 days. In 2006, 12 days. In 2007, 12 days. In 2008, 12 days. In 2009, 29 days. In 2012, 19 days. And you agree with me that those are far apart, and they are not actually stints, for instance the one stint you only acted for four days. Even in 2000 it was for four days, eight days, twelve days. All that totals 491 days which is just about one year and six months.

Mbenenge: That is correct. If we could contain ourselves to quality and not quantity we will be in what we are here about today.

Sangoni: You agree with me on this?

Mbenenge: Yes.

Sangoni: I am doing the interviewing.

Mbenenge: Sorry, JP, I thought you posed a question.

Sangoni: If you have so much experience, people have ordinarily acted for more than that.

Mbenenge: I said we are here about quality and not quantity. They look at the period I spent and they say this man has covered more mileage than judges who have been judges for 5 or 6 years. Look at the cases I have reported and penned etc. I am just talking about judgeship now. Now the issue of four days, eight days etc, we must remember that that has to do with when someone has a partly heard matter and therefore to go back and finish it or someone has a reserved judgment. So I would not like it to not be contextualised. For those periods when I acted for four or eight days because it was a partly heard matter. If you compute all the days, it is one and a half years, I did not do my arithmetic work, however I would say in response that your concern is quite apposite. However, the period was well spent qualitatively and conductively.

Sangoni: The first point was so much you acted to acquire experience, I am happy you are conceding that. The second point is judgments. The impression that everyone got was that you made so many qualitative judgments, unlike other people, this is the impression that is given. How many judgments were there during this long period, as people say? Because what is written in your form here, you have about five or six judgments, but you analyse them and say this one was quoted in this one and that one was quoted in that other case, that one was referred to and so on. It takes a whole page for one judgment. Like on page six, one judgment but you have analysed it, it is so much to say referred to by so and so, if other people had done that, I think it would be much longer than yours. But the point I am making is that an entire judgment will take an entire page. And when it is reported it is like you have so many judgments. Pofanac is a 1998 judgment, then you refer to 10 times it was referred to. So it is not as big as you portray it to be. So if you want to use simple language, it is one judgment.

Mbenenge: I would have to drive a wheelbarrow to bring all the judgment I have penned during that period. I would like to remove the idea that those were the only judgments I penned during that time. You must remember that the form directs us what to do. It says, list the cases where you have written judgment, no more than, which you regard as being the most significant and why. That was non-compliance. I do not hold myself out to be better than other people, I am just being very cautious.

Mogoeng: I am concerned. We had a man here who should have been reported to the JSC whose name does not even appear on the list of those with reserved judgments. He was not alone. I am getting concerned that you want to discredit this candidate. Seek clarification, do not attack him.

Mbenenge: I did not amplify anything, I was simply answering the application form, mentioning cases and why I believe they were important. If they spill over to two pages, it is meant to show why I think they were important. It is not me who told them to take cognisance of my judgments. When they say a judgment I penned is of assistance to us in Namibia, why can I not mention that when I complete a form. That is the first thing, the second thing is, frankly, if I were to bring the judgments that I wrote, because this does not say judgments must be reported judgments, I would have to drive a wheelbarrow to bring those judgments here. There are tons and tons of them. I do not have to create voluminous around documents serving before the JSC. I thought I should clarify a few things. I did not understand you to be attacking me, I thought you were affording me the opportunity to explain myself. Regrettably, the situation is such that I must seem like I am bigger than my head, but the fact of the matter is that I have been nominated by judicial bodies, they have placed their faith in me. I was sitting in the tranquillity of my chambers to work there until people were of the view that I should avail myself and they went to town explaining why, that's why I say the people have spoken. In so saying, I am not saying I am better than other people.

Sangoni: Thank you for protecting me from the CJ. I have now been accused of not reporting someone and I am sure the circumstances have not been disclosed.

Mbenenge: Did you also mention reserved judgments in your question?

Sangoni: No. Let me ask the last thing, it is not the last one, I have many for you, but let me ask the last one. Have you tested your suitability insofar as your colleagues at all? Because you were absent at the last meeting, I invited all the judges, I said people must not give me mandates openly because you were not there. I invited all the judges to give a mandate as to who they prefer. Now have you tested what your position is with the other judges?

Mbenenge: I did with a few members of bar and colleagues. I think what we need to state as well is that, I am not responsible for the fact that more 'senior persons', other than Judge Van Zyl are not here today. I just want to mention that in passing. But I have not gleaned that people are resenting the nomination and possible appointment and thus have a negative attitude. The few colleagues I have spoken to, have actually in so many words, wished me good luck, and one of them said 'I have read the motivation letters and they are well motivated'. I am answering your question because it is quite pertinent. Another judge phoned me yesterday wishing me good luck. They would not do that if there was a feeling that I should not have come here. But at the same time, JP, DJPship is a facilitating role where talents are utilised. In other words someone is sitting there, looking at the shortcomings of this one, the strengths of this, facilitating hoe things are done. It does not mean, the JP or DJP is superior to the others. That is what I think leadership is. Like I said earlier, leadership is not an ascension to power, but a descention to servanthood.

MEC Manda Makupula, MEC for Education in the Eastern Cape: I am a part of the panel, I am deeply interviewing the candidate by listening. Listening is a skill.

Deputy President Maya: I raise my hand merely to place on record that I have known Judge Mbenenge since high school up to this point. I also want to place on record that I have discussed his candidacy with him as well. I am not going to ask any questions, I think your record speaks for itself. I just to take this opportunity to thank you again for availing yourself to join the bench. I am one of a number of judges who have begged you for years to join us because I think your mind is one of note.

Mr Singh: I am a bit concerned about the uneasy tension in the room that you could cut with a knife. But having said that, the last time you were here many of us said you look the part of a judge. It was a pity tome that you had applied so late in your career because from your record you certainly have done a good job. Today I see an advocate fighting acause. I just want to point to Judge Mbenenge that the people have spoken.

Mbenenge: Perhaps before we deal with that can I respond to the prelude part, the tension part of it.

Mr Singh: I was not asking a question, I was just expressing a view. But the question I want to ask, you say the people have spoken and you have responded to what they have said. I think you are aware that there are other applicants in a similar position to you, and in regard to those other applicants, I can use your terminology, the people have already spoken because they have given support to them. In particular I look at the letter from the Black Lawyers Association, Eastern Cape, which was signed by EM Makanya, wherein, I want to quote from there, the other honourable judge, whom you know, has been acting in this position for more than three years. Despite this, some members of the legal position in the Eastern Cape, the Transkei Attorneys Association and the Bhisho Bar, support Judge Mbenenge for this position. This raises the question whether these organisations and our organisation are destroying the spirit of the other judge if we support him in this position. In view of the fact that Judge Mbenenge has been appointed as a judge recently, effective from 1 July 2015. They go on in the letter to say, the rationale of the support of Judge Mbenenge seems to be that the organisation is looking at the future. In 2017, the JP might retire, but we do not know that. And then towards the end they say, in a nutshell, BLA supports the three judges for Bhisho with a feeling of discomfort with regard to the sensitivity of Judge Mbenenge due to the fact that the other judge has availed himself. This I would take as the people talking, how would you view these comments?

Mbenenge: Those views are quite apposite. They are expressed by Mr Makanya, as you say. I do not have a copy of the letter, but I hear what it embodies as you read it. It does not change my initial statement that the people have spoken. When I said the people had spoken, I was referring to the Transkei Attorneys Association, NADEL, and the Bhisho Society of Advocates in the context that I have not just been nominated by an individual, but professional bodies whose jurisdictional area, some of them are bodies that have jurisdiction over the entire country. Now I do not know what the position is in relation to the others, but I had to highlight that the people had spoken, because I am saying that it is interesting to note that in a situation where I could have nominated by my wife for that matter, but there are people, professional bodies, people who put their trust in me. It is not meant to say that people have not spoken in relation to other the candidates. You are better placed than I. The only letters I have are those that relate to me.

Mr Malema: One of the questions I forgot to ask you the last time we were here together was, whether you were Christian. Whether you go to church?

Mbenenge: Yes, I do.

Malema: What happens for a person to become a pastor in a church? What procedure do they follow?

Mbenenge: They get nominated, and then an election process is set in motion. Eventually they ascend to that 'pastor' in loose terms. Pastors, if we delve into that means calling someone who is a gospel minister in the true sense as opposed to a lay pastor, someone who is elected to office for a particular year.

Malema: I want to finish with you quickly, so if you give long responses we are going to take long. Now we all know that you cannot be baptised today and then tomorrow you are asking where the pastors are sitting. We all know that. Am I correct? We baptise you today, and then the following Sunday when you come, you are asking where are the pastors sitting?

Mbenenge: Interesting. The scenario you have postulated may not be that apposite in this instance.

Malema: I am not talking about the judge thing. I want us to first develop this rapport, that you cannot be baptised today, and then come next week and ask where are pastors sitting?

Mbenenge: Unless you have been appointed as a pastor, but if you have not been appointed as a pastor then you cannot.

Malema: So if a church baptised a person today they can appoint him as a pastor next Sunday?

Mbenenge: Not necessarily. Practically, I do not see that happening.

Malema: Even the smallest churches I know, which are attended in small shacks behind houses, they do not do that. You do not get baptised today and then next week you ask where the pastors are sitting, otherwise you are going to feed people snakes because you do not know the rules of that church. You know very well that you are my favourite, and I told you last time you were here, but not this time, I think it is too early, I think it is going to discredit you and the good image as a judge in that institution. Because you will know that those who serve in the legal fraternity and even the judiciary, they have got egos and the issue of seniority matters the most to them. I am not saying you are not senior because you have outlined your credentials. But in terms of seniority of judges in that place, no matter how long you worked and all that, I think there should be some more senior judges, well experienced who have been around and have not been consumers but rather the feeders of consumers and who know the ins and outs of that environment. Would you agree with me?

Mbenenge: I agree with you partly. Especially for the reasons I mentioned earlier. You will remember I mentioned earlier that the issue of being a DJP does not necessarily come from me. I am not saying, where are the pastors sitting, some people have said you deserve to be a pastor and they motivated why. That motivation is serving before you, and the issue of me discrediting myself is something that I cannot necessarily agree with you on, particularly because I have demonstrated that I command the respect of not only lawyers but also of judges, not just judges in my division, but judges serving in higher courts. I guess it is an open secret that I command respect to the extent that on one occasion I ended up being lead counsel in a matter that involved Constitutional Court Judges, because it is a matter that involves the JSC, it is not a matter I would like to discuss. So this has to do with the perception part of the story. So I do command respect and I would understand if ten or twelve judges were here being interviewed, I do not understand why the others are not here, I am not responsible for the other judges not being here. They have their own reasons for not being here, it may be self-centredness, I do not know, I am not saying it is so, I am only speculating.

Malema: You discredit yourself not for being nominated, but for not knowing when to say no. Because you are going to come across, and I thought I would not want to go there with you because I want to protect you and make sure that you become one of the best judges that we produced while I sit on the JSC. But to just come in and assume responsibility you are going to come across as having uncontrollable ambition for power and that alone is a weakness in leadership. I come from an organisation where, when I was a President of that organisation, I was nominated to go to Parliament and I said no. Even when people said you go to Parliament, I said no. You need to know that even if people nominate me, I can still, for the sake of my own integrity, and not to be projected to be suffering from uncontrollable ambition for power, for future's sake, I must not allow this. And actually it must be nominate much more senior judges there to assume that responsibility. Then we respect you even more, because we nominated you and you persuaded us not to accept the nomination because you think there are much more experienced judges than you.

Mbenenge: I have got a good track record of saying no. In 1997 there was a feeling I should be a judge. I am not the sort of person that if pointed to something will quickly say yes. How many years passed, up to and including April or March when I was here, and everyone said where have you been, including yourself, Commissioner. The second thing I would like to address is the issue of conflating with respect to power when it comes to judicial management. It has nothing to do with power. You may be coming from a different environment. I said at the outset, and I would like to repeat because it is quite pertinent, DJPship has nothing to do with power, it all has to do descending to servanthood. This is the person who must receive telephone calls after hours. It is simply a facilitating role, as soon as we remove the issue of power then we know what we are about today. The long and short of it. The conclusion of me discrediting myself is a conclusion that I cannot associate myself with.

Advocate Nkosi Thomas SC: The point about distinguishing between power and servanthood was well made. I just have a concern about what is happening in that division. We found out today that there are instances of chronic late handing down of judgments. The circumstances were, that it was so chronic that it ought to have been reported with us so that we deal with it appropriately. We stumbled upon it. That suggests to me, there might be space to reinforce leadership. I heard you well when you said you have a plan to remediate circumstances such as those, you are quite pointed about how you are going to deal specifically with this sort of issue. Now the question I would like to put to you is this. One of the commissioners suggested to you that the tension could be cut with a knife. Are you satisfied that you will be able to serve in the manner that you suggested to us with your JP?

Mbenenge: Absolutely. Actually, I like that question, because it may afford me an opportunity for the JP to come forth and say we are compatible. The JP is in fact somebody when I was still a boy encouraged me to study law. His firm, when I was still an attorney, used to brief me, the JP himself used to brief me. I remember on one occasion, he briefed me on a letter that had to do with his wife because electricity had been cut in Butterworth etc. I would like to allay the concerns of this house, the JP and I are very compatible. Being outspoken and stating your point and emphasising the point, does not necessarily mean you are fighting with someone. There was some interaction between the JP and I at some point. He was emphatic about the points he was driving home. The responses were similarly emphatic. I never got any idea that we were fighting with one another. JP please rescue me in this. We are compatible. I am always compatible with someone who speaks his mind because we resolve problems then and there.

Nkosi-Thomas: I just needed that assurance, thank you.

Ms Dikeledi Magadzi, Member of Parliament (National Council of Provinces): Earlier on you spoke to leadership and maybe the question would be your management and leadership style. What are your attributes that would be able to make everyone run around you as this is about leadership and management, and make sure that administration runs smoothly, that is my first question. My other question would be, the challenge of culture and language as you mentioned earlier on, the Eastern Cape is very rural. Culture and practice is still there, which as an African woman you always come across a challenge because we have certain ways of doing things as African women, particularly when it comes to finding ourselves in environments such as courts. How do you see yourself as part of the transformation agenda, dealing with the things that are an impediment to justice being received by women and the vulnerable in an environment which is not really according to their standards or their way of life? The issue of language which actually can also deny you justice, because a situation may arise where somebody else does this third party interpretation between the judge and whoever, the language command becomes an impediment. How do you see a situation or what are the things that you believe, that you would be able to rise to the occasion of making sure that these two particular things that I have spoken to are looked in such a way that justice will not be denied to people who are coming from the rural areas of our country, as a leader?

Mogoeng: In interest of time, if you can be brief as your responses permit you to be.

Mbenenge: I do believe that I have got good human relations on the issue of attributes of a leader. Being extroverted, and I believe I am, it helps those around you, to get to know, in an instance where a decision must be taken, from the outset know what the position that one has adopted is. I believe those are needed for one taking a leadership position. On the issue of culture, I am better placed indeed as somebody emanating from the Transkei. I say so because it is a rural set up. I am used to the rural set up by virtue of me being a black person. On the issue of language we need to tread very lightly. There has been a dispensation that has been set in motion to set up vernacular courts. I have just written a judgment, and that judgment was handed down about three weeks ago, in an instance where the magistrate concerned had conducted proceedings in Xhosa, everybody addressed the court in Xhosa, the judgment was written in Xhosa and the transcript was written in Xhosa. By the time that the review case served on my desk, the accused person had served his two years imprisonment sentence to a finish. There may be injustice so we need to balance the equation. We need to put in place mechanisms that are going to ensure that we do not move ahead and introduce vernacular courts without having set up a dispensation upon which that would operate. On the issue of women, in particular, I checked those judgments that involved me as counsel, especially senior counsel. I found that about 17 of them I had women advocates and so I have been interacting with women, and it would not be a problem having me from this background, interlinking those that are part of the dispensation and understanding the situation.