



# JUDGES MATTER

## Judicial Service Commission Interviews

7 October 2016, Morning Session

Limpopo Division of the High Court (Deputy Judge President)

Interview of Judge A M L Phatudi

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Chief Justice Mogoeng: Good morning Judge Phatudi.

Judge Phatudi: Good morning Chief Justice.

Mogoeng: Is it fair to assume that you are not nervous?

Phatudi: Well, it comes naturally I think, Chief Justice.

Mogoeng: Well, for how many years have you been a judge?

Phatudi: Eight years.

Mogoeng: Are you part of the group of judges who are now in Limpopo, or are you still in Gauteng?

Phatudi: We have written letters that requested to be transferred to Limpopo, and from the beginning of the year they gave us letters of appointment as acting judges in the Limpopo Division, pending the finalization of the transfer process and signature by the president.

Mogoeng: So you are in Limpopo already?

Phatudi: Yes, and the appointment has been extended up to 30<sup>th</sup> June.

Mogoeng: And incidentally, that's where you grew up

Phatudi: That's the place I am familiar with, yes. I practiced in Limpopo, Polokwane.

Mogoeng: For the time you have spent there, what problems or challenges have you noticed, and how do you intend to deal with them, so that the Court can perform better?

Phatudi: First, I would like to indicate that, because it has been proclaimed that we have three division, let's say the main division and the two local divisions. The one is the Limpopo Local Division, Thohoyandou, and then the Limpopo Local Division, Lephalale, which has been proclaimed, and then

the main division. The Lephalale Local Division as of now hasn't been that much active, because matters are still coming from that very particular division. The challenges that one saw in the Limpopo Local Division, Thohoyandou, for which I've been privileged to head, or to lead, especially from the 25<sup>th</sup> of January up until the 1<sup>st</sup> of April, the JP gave me that privilege to run that division. That's when I then realised and found that there were quite a number of challenges. The said challenges would be the number of matters, the criminal matters, put on the roll which are not trial ready. By not being trial ready, I mean that the accused is still at large and has not been arrested yet, but the matter is already in the High Court, trial roll. Counsel for the Legal Aid at times would come to court and say that we didn't have the contents of the file, and as a result we are not ready to proceed with the trial. Those are some of the challenges that one identified on the criminal section. And to rectify those, I intended that there should be a pre-trial conference to be held of all these criminal matters. In fact the first five weeks, it's where I've identified all these problems, and during that I implemented, with the permission of the JP, that we should then deal with the pre-trial of these matters. Based on that, if you can draw up a duty roster, and a roll, which I did, and based on these one can see when these matters are coming to court, which matters have been postponed, and why they are postponed. And when they are postponed because of the challenges I mentioned, the matter should be removed from the roll, or if the contents of the docket is given to the counsel for the Legal Aid or the defence, then I would postpone it but to a week or two, for them to familiarize themselves with whatever, and on a Friday before the start trialling on a Monday, then they would have to come to my office and indicate as to whether they are ready, and everything is to be proceeding. Based on that, for the later part of the term, the five weeks, I personally managed to finalize about four criminal matters. On the civil cases, the major challenges were matters which retired judges are the ones who probably left them hanging, in the sense that some you'll find that the matter has been heard, it's a trial matter, it has been heard, but the judge reserved the judgment, and the judgment never came. But because of the judge being a retired judge and not being easily accessible, I discussed that with the JP and said, of all these matters, why can't we get these files, one reads the evidence, because it's already on record, and then prepares a judgment. But however, he persuaded me to say that won't be possible because if it's in a trial matter, then the credibility finding of the witnesses would be a problem. But in the motion proceedings, those are the ones that, one can deal with those in that very particular. But however, I tried to, with the support staff, like the registrars and so on, I requested them to identify all such matters, so that we should then place them on the roll, and deal with them as expeditiously as it's reasonably possible. As of now, I can mention that they're about two matters that I've already placed on the duty roll for the term to be reheard and reconsidered in that very particular aspect.

Judge President Makgoba: Thank you Chief Justice. I have no question to the candidate.

Mogoeng: Thank you. My Singh?

Mr. Singh: Thank you Chief Justice. Judge Phatudi, the position that you applied for is a leadership position. Can you explain to this forum what skills and experience you can bring to this position if you are appointed, especially assisting the Judge President?

Phatudi: Assisting the Judge President, as I indicated as of now we have three divisions, two local and the main one. What I intend to do, would be firstly to coach up the practice directive in such a manner that as a Deputy Judge President I'll be in a position to regulate the issues and matters in the Local Division, Thoyandou, and the Local Division, Lephalale, and even the main division. One might I ask how I can do that. First would be the case-flow management. Second, with the pre-trial system that which it's in place, I would put me in a position to deal with such matters. In the Local Division Thohoyandou, the roll-call is held on Mondays, for the matters that will be placed on the roll for the

following week. Meaning that, once at the roll-call, all the matters that will proceed to trial the following week, will then be put on number of days and the judges will be identified, and sent to the Thohoyandou Local Division to deal with such matters. But as I as I indicated that the local division in Lephhalale, it's still new, there is no much of infrastructure, but it's there on paper. But that will be dealt with as and when the volume of work comes in. As a short term basis, first would be the practice directive, which would then allow me as the Deputy Judge President to can regulate that. The duty roster and the roll is one key aspects that one would have to deal with, because we will be rotating all these judges from the main division. And once a matter is placed on the roll correctly, nicely in terms of that roll, it will then be regulated in terms of that practice directive. Meaning that if a matter in Thohoyandou will be running, then a judge will be sent there, he will be in a position one to prepare himself, the file will be then given to him, and even the travel and accommodation processes will then be dealt with. Same applies with the Lephhalale issues. For all the other matters, all the judges who will be available, then the roll call of the main division will then be dealt with with the number of judges that are there at the time.

Mogoeng: Thank you Commissioner Singh. Commissioner Motimele. And Judge Phatudi, so far as possible, if you can just be direct in answering your question, unless it's unavoidable. They will ask for elaboration if they need it.

Commissioner Motimele: If I may direct your attention to page 4 of the questionnaire, number 6. Have you found that, judge? There is something that disturbed my sense of how I understand the Constitution, and it's really fundamental. Of course you understand the three organs of the State. The judiciary being one of them, and that judges are appointed, not employed, is that not so? Now if you look at what you say 6, please furnish chronology, particulars of employment since leaving school, you said judge of the High Court, from 2009 to date, employer 'the President of the Republic of South Africa', can you see that? I want to afford you the opportunity, because I've told you how it disturbs me to think that judges work for the President of the Republic of South Africa. I don't even think judges are public servants. What do you say to that?

Phatudi: I think you are right. The only thing is that the President who signed the certificate of appointment as a judge.

Motimele: You don't work for him?

Phatudi: No, no, not at all.

Mogoeng: Commissioner Hellens? Some of them write that they are employed by the Department of Justice (*laughter*). Most of them.

Commissioner Hellens: Thank you Chief Justice. Judge, as a Deputy Judge President, you would fill in for the Judge President whenever he was absent, and you would take on such duties as he allocated to you, that we understand. So I would test your suitability to be a Deputy Judge President as against your ability to be a Judge President as well, would that be correct?

Phatudi: Correct.

Hellens: Now, would you say that it's the function of a JP or a Deputy JP to monitor the work of his judges, to look at their judgments from time to time, not to interfere or act as an appeal court, but just to see that standards are generally kept up?

Phatudi: Judges are independent, all that might be administered is when are they delivering the said judgments. But that of the content of their judgments, I'm afraid we may not even go deep to that end, because of their independence.

Hellens: So you wouldn't take it upon yourself occasionally to look at judgments coming out of your judges, not acting as a judge of appeal, but just monitoring the quality of the work coming out of your Division. You wouldn't do that?

Phatudi: I would do that, if you are talking of the quality of work, yes we'd do that.

Hellens: Do you feel capable of judging that quality of a fellow judge? I'm not talking about being a court of appeal, I'm just saying, keeping an eye on standards, structures of judgments, apart from delays et cetera, just looking at the content.

Phatudi: At the structure of it yes, maybe one can look at that as well.

Hellens: You're aware of the case of *Minister of Safety and Security & Another v Linda*, where your judgment was taken on appeal to the full bench?

Phatudi: No.

Hellens: You are not aware of it? You're not aware that your judgment was overturned on appeal in somewhat harsh terms?

Phatudi: It hasn't been brought to my attention.

Hellens: It's been reported in the Law Reports, (2014) Volume 2, Criminal Law Reports 464. You haven't noticed that a judgment of yours has been overturned, number one, and number two, overturned in somewhat harsh and strident terms? No?

Phatudi: No.

Hellens: Well, I suggest that you read it, and I suggest it's a failing of you, and I'd like you to answer that, not to follow judgments of yours that go on appeal, because that's how one learns. It's a matter involving an arrest without a warrant, where the appeal court in short found that you applied the wrong test on whether there should have been an arrest or not, and secondly, that there was a paucity of reasoning on the damages. The court said that 'a judge should set out the facts and his or her reasoning in relation to an award of damages, and they go on to find that you did none of that. It was almost a figure plucked from the air. You did not know about that?

Phatudi: No, I did not know of that, but normally when there is a judgment from the full court, they normally give that to us so that we can learn from our mistakes, but that was never brought to my attention.

Hellens: But don't you read the Law Reports when they come out?

Phatudi: Well, we do have a glance and peruse them, but as I'm saying that, that's what's been agreed upon, that if there is any judgment that was overturned, then it would be brought to the judge's attention.

Hellens: I have difficulty on a number of levels. One, you appear not to read the law reports, two, you don't follow what happens to judgments that are appealed against, and three, as a DJP aspirant, you don't seem to have the qualities in judgment writing to oversee, in the most neutral sense of that word, other judges.

Phatudi: I hear you.

Advocate Semanya: I am one to accept readily that all judges must have access to the full spectrum of work that comes to their division. But isn't there something to be said about trying to match complexity of matters with how senior or junior a particular judge is, in relation to the entire bench. Would you consider that useful to take into account when allocating work to judges, if appointed?

Phatudi: Yes, I would do so.

Commissioner Singh: Following up on Commissioner Motimele's question, when you stated that you are employed by the president of the Republic of South Africa, I thought it quite a coincidence that when I looked at 16.4, at judgments that were successfully appealed, two of them were against the President of the Republic of South Africa. Number one and number three. Can you just give us a bit of a background on those two cases, or either one of them, that you can recall, the *Mansingh* case or the *Nzezeni* case, and why you reached the judgment that you did?

Phatudi: On the *Mansingh* case, it's the matter of senior counsel status which, when I considered the matter, looking at the Constitution at the time, my interpretation was that the President does not have the power to confer the senior status to the advocate. However, the Supreme Court of Appeal and that of the the Constitutional Court settled the law in that respect, for which I learnt from their judgments. In any event, all judges, we preside and administer justice to all persons alike, without fear, favour or prejudice, that's what it was.

Singh: And again the *Nzezeni* case if you can recall just briefly?

Phatudi: The *Nzezeni* case, if recall well, it's the matter where the chiefs of the, I think it's the Thohoyandou area, had applied that they be given stipends, or continue to be paid stipends. I found not to be consistent with the law, and therefore dismissed their claims. However, on appeal, I think they confirmed the order, but however the reasoning which came up there to me was more educative, and I'm following their law as well.

Mogoeng: Thank you Commissioner Singh, you are excused Judge Phatudi.

Judge Phatudi: Thank you Chief Justice.