



JUDGES MATTER

Judicial Service Commission Interviews

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Free State Division of the High Court

Interview of Advocate PU Fischer SC

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Chief Justice Mogoeng: Good evening Advocate Fischer.

Advocate Fischer: Good evening Chief Justice.

Mogoeng: Are you well?

Fischer: I am very well, thank you and good evening to all the other honourable commission members.

Mogoeng: You were interviewed before?

Fischer: That is correct Chief Justice.

Mogoeng: In your own words, just take a few minutes to impress us and tell us why you should be recommended for appointment.

Fischer: In brief, I find myself involved in an ever growing, ever expanding experience of myself as a human being. Realising that for years I have possibly adopted the wrong approach, one of withdrawal and side-lining and being critical and judgmental. Over the years I have come to realise that I need to get more involved. The profession has, over the years, frustrated me somewhat, as I have felt that I couldn't do what I had come to understand as my constitutional obligation and that is in fact to simply give back what has been given to me over the last 30/35 years as a legal practitioner. I believe that having walked that walk, which has involved a lot of

spiritual introspection, and an understanding of who I am and where I've come from, and why I have at times possibly done the wrong thing and taken the wrong road down an incorrect path, I feel it is time that I give back to the legal profession what the legal profession has done for me, and I believe the best way to do that is to comply with what I understand is my constitutional imperative to do that. In honouring, especially the legacy of people who are important to me and have played an important role in formulating and maturing me as a human being.

Mogoeng: How else have you prepared yourself for possible appointment, since your last interview. Are there areas of improvement, if any improvement was needed?

Fischer: I can assure you Chief Justice, there is always room for improvement. I am forever looking to improve myself. I have a philosophy in life that every person who crosses my path, no matter what their creed or calling is my teacher. I believe I must learn from every human being and in the process I believe I can learn and grown and in fact eventually give back to the community. It has in the process humbled me and made me realise that possibly for too long in my life I have been somewhat arrogant and somewhat aloof. I am accused of being that kind of person, although I can assure you I am just a very private person, who I believe has grown in the process, and I think I can in fact enrich the Bench in what is a diverse society we find ourselves in.

Mogoeng: When you say you have been accused of arrogance, did you get a sense that there may be a sense of truth in that? I ask you the question, because I have come across a few colleagues, very pleasant during the interview, but somewhat different after being interviewed in their engagements with fellow colleagues, and they left me wondering how they treat litigants if they can treat their colleagues this way.

Fischer: Yes, I think, I can only by way of an example explain my personal experience and to answer your question briefly and shortly, yes eventually having come across various people who have said to me you come across as aloof and somewhat private, I have realised that perhaps I do project that image. It is not something I am proud of, I realise it is something I have to work at and ultimately I see life as a work in progress. I believe I do not stop growing at a particular stage of my life, I believe that this is just a new chapter in my life which I am hoping to fulfil. I am fully aware of what is required of me as a person who would be called upon to sit in judgment of facts and possibly people who have either done a wrong or possibly erred in their civil relationships with each other. I am acutely aware of that and what I have discovered is that once people get to know me I am not what I appear to be. It is just something I have to work on as an individual. I can assure you that I have realised that what one needs to do is have an empathetic ear, listening to the grievances of those who come before you seeking justice and fairness.

Mogoeng: You have been in practice for such a long time and a silk for a long time that I am unable to take you through your experience. It is obvious that you are a highly experienced advocate, is it not so?

Fischer: I have experience yes, I believe I can bring value to the Bench. I have a good relationship with my Judge President and that is why I am here, to be given the opportunity to do that. Because I believe that I can add value to that Bench in terms of my experience. It is one thing to short track access and elevation to the Bench, but I believe I do have the experience from years of exposure, first as an attorney and for the past 30 years as an advocate.

Mogoeng: Finally, as you had indicated previously Bram Fischer was your uncle.

Fischer: Yes, revered, what can I say. I can never be Bram Fischer, he is a unique human being. I have often wondered about him and have spoken to people about what he was able to do and what he was capable of doing and in fact what he did. I suppose in starting to contemplate and meditate upon these realities it was very simple. The preamble to the Constitution on which the very foundation of the very reason we are all here, obliges me to honour people like Bram Fischer and I cannot think of a better way.

Judge President Molemela: Advocate Fischer you have acted in our Division for 14 months and you have previously acted in the Eastern Cape for three terms. How long does it take for you to produce a judgement?

Fischer: Yes that's right. I had a look at that in preparation for this interview and I see there was a single judgement that stood over for about six or seven weeks, and the only reason being was that the advocates appearing before me asked to hand up written heads of argument. I believe the written heads of argument were only delivered during the Christmas recess, I had already gone on holiday and I got back the middle of January, got back and delivered the heads by the end of January. By and large I believe it is imperative that judgments are delivered as soon as possible and I think my average must be three to four weeks maximum.

Molemela: You have had occasion to do circuit court duties, what is your experience of the manner in which circuit duties are allocated?

Fischer: I believe all judges of the divisions, permanent and acting appointees, should be prepared to do circuit court and I have come to experience your division of the work and allocation of the work as seeking to achieve that. Without favour or fear of spending time away from home, we have all done that, it is part of the job we do and I believe it is imperative that we all do that as part of our exposure to the people in the countryside and giving them access to justice. This is something I support unconditionally.

Molemela: You have had occasion to do pre-trials have you not?

Fischer: Yes.

Molemela: So you have had opportunity to be involved in case management, do you think that it is useful?

Fischer: I think if properly managed, absolutely. In Bloemfontein the pre-trials are held on a Monday afternoon and I think if the judge allocated those pre-trials prepares, they can be very fruitful and useful. My experience the way case flow management is managed in the Free State is that if anything the attorneys are complaining that trial dates are allocated too soon. Which is a tremendous achievement as far as I am concerned, because as we all know justice delayed is justice denied. It is a winning recipe in the Free State, I do not know how it would work in the bigger divisions, but it certainly works in the Free State.

Premier Magashule: With the challenges of transformation in general, in terms of transformation of society and the judiciary in particular, what would be your contribution to fighting racism?

Fischer: I think we are all individuals and ultimately we all bring certain values to the bench that are particular to us as individuals. I have through the path of growth and awareness that I have been walking the past couple of years have come to realise that we have simply got to transform society and in particular the mind-set of the individual. I believe I have a matured mind-set and have overcome many obstacles which were ingrained in me as a young boy, a young man, dealing with my fellow students first at varsity and then later as professional. I have come to realise that the transformation of society involves primarily the transformation of the individual who believes he or she can add value to that society and serve that society. Ultimately, as an aspirant judge I see myself as a servant of that society, with what I believe is a liberated and progressive mind-set, which has overcome what I believe are those aspects which drive us apart and would rather focus on those realities and aspects which draw us together as human beings. I like focussing on the fact that we are all human beings primarily, before we happen to be male or female, black or white.

Commissioner Nyambi MP: When responding to the Chief Justice you talk of a short track to the Bench, what is that?

Fischer: What I mean is that I have found that being exposed to the length of period I have, I can bring a lot of experience to the Bench. I believe that in order to believe proper transformation, one cannot, like in my case, expect a suitable candidate to spend 25 or 30 years preparing for the Bench and that is why I am a great supporter of educational programmes for both aspirant and serving judges. I am mindful of the fact that even serving judges would be exposed to sensitivity training, because some people simply do not realise what the iniquities have done to this fractured society. I believe we have to exercise extreme patience, extreme compassion and extreme awareness of the need to transform. We talk about race and gender transformation and I support it unequivocally. We cannot continue down the path we did until 1994

and it has to be moved along at a greater pace, failing which the public will lose faith in the judicial system and have no trust in it.

Nyambi: Are you able to speak any African language?

Fischer: I am afraid not and it is one of my most embarrassing and should I say, unfortunate realities of my life. I wish I could, but I do not know how to change it at this stage of my life. Many years ago I thought I was a clever little man, because I spent a lot of time on my grandmother's farm throwing stones, swimming in the dam and shooting with a 'catie' and thinking at least I can let of a couple of cursing phrases in Sesotho. I am so sorry I did not learn a language, because that would enable me understand people better.

Nyambi: You are also referring to just basic greetings?

Fischer: Yes, things like that. I cannot begin to brag about it, I wish I could apologise to the nation at large. I think it is a great pity that we are not obliged to learn several of these African languages. So we will get to bridge of the fear and the uncertainty that a lot of us possess.

Nyambi: What are you doing about it?

Fischer: Well at my age I have come to accept that I will never master a language to the extent that I could conduct a consultation or even a court case in an African language, and I would like to suggest that the best way forward is to accept that in order to engender trust and faith in the population at large, they should be given access at large, they should be given access to the language of their choice, knowing that their version of events would be properly interpreted and placed before the judicial officer. To that extent, that is all I can rely on and I am deeply sorry about it I wish I could answer a question like that.

Nyambi: How can language, gender and race legitimise confidence in the judiciary?

Fischer: As far as race and gender are concerned, obviously the more representative the Bench is of the society it professes to serve, the more legitimate and accepting it would be in the eyes of the public at large. I cannot begin to think how an individual must feel if they are confronted with a judge who does not begin to understand them, who does not even look like them, who does not even sound like them. To that extent I am deeply regretful that I cannot speak a language of the African continent, but I do believe that in having the bench more representative of the demographics of this country it would instil more confidence in the ordinary man on the street.

Nyambi: You are aware about the demographics of the Division of the Free State High Court?

Fischer: Yes, Commissioner I believe I am aware of the numbers.

Nyambi: What would your advice be to the Commission to advance what you have just explained?

Fischer: If one has regard to your constitutional imperatives, if I understand the relevant section I think it is 174, the phrase there is to be broadly representative, and I emphasise the word broadly representative, of both race and gender. Which in my humble opinion means there is room for something less than a mathematical exactitude and I would think that even if this austere commission decided to appoint someone like me I could pursue and advance that perception of a broad representation, notwithstanding the fact that I am a white man. I cannot negate that reality, I am what I am and that's all I ever can be, but I do believe that my mind has grown up.

Mogoeng: Thank you Commissioner. Maybe before you get in trouble, let me give you the opportunity to clear the following. You learn a language to communicate with those who speak it, am I right?

Fischer: Yes.

Mogoeng: Now if you wanted to learn some swearwords, what did you want to do with them?

Fischer: I am probably going back to when I was seven or eight and my friends of then, a fellow by the name of John and his brother McKenzie, they taught us things that I would love to talk about, but I do not think this is right time or place. Whether we were shooting turtle doves or 'mossies' with our 'caties', if you could not hit a bottle at fifty paces with an arm thrown stone, you were told in no uncertain Basotho terms what an idiot or pathetic fool you were. Whether we picked up cow dung to help the parents with the floors of their houses, those words came naturally and rolled off our tongues, but I promise you I am not trying to suggest that I can begin to communicate other than perhaps offer an expletive, but I have long stopped that because I do not think swearing is an appropriate pastime for an advocate.

Mogoeng: That is why I am affording you the opportunity, so many years later you remember that you did make an effort to learn the language, but you were very specific about your area of interest. So, I am just saying to what end did you want to be favoured with that vocabulary.

Fischer: I can assure you that as a senior advocate sitting here, the last thing I would want is to be known as someone who swears and curses. It is really something I do not promote and in fact I do not use those words anymore. I can assure you I think it is simply not proper and right. It is not in keeping with the kind of propriety and integrity which is expected of someone who is aspiring to the bench.

Mogoeng: I was only offering you the opportunity to clear it in advance because I have a long line of Commissioners here. Judge President Mlambo?

Judge President Mlambo: Thank you Chief Justice. You obtained silk status in 2011, am I correct?

Fischer: That is right.

Mlambo: Have you ever taken pupils?

Fischer: Not as a silk, somehow our practices do not justify that, but I can assure you that in the twenty some odd years before that on a frequent basis. What I am called upon to do is to assist with so called advocacy training, in preparation for the annual exams.

Mlambo: I think my question is whether you have taken pupils, whether it is as a silk or before?

Fischer: Yes, not as a silk, but before that absolutely.

Mlambo: How many do you think you can count?

Fischer: I would think about six or seven, not more than that. We found that as our practices progressed away from your classic unopposed motion court, we were approached less frequently, simply because our practices did not justify a junior who would not be exposed to the normal run of the mill matters which a junior should involve themselves in.

Mlambo: Well you would not normally take a junior to an unopposed application, let us just stick to the question. I asked you if you had ever taken pupils, you said six or seven, I am just interested in your transformation credentials. How many of those were black?

Fischer: I think possibly two. Yes, I think two of them were, but the Free State has not had that many black practitioners, and I think by the time their numbers increased to the extent that we have seven or eight black members, I was already of such a status that I was not approached. The bar council would simply allocate a pupil to a colleague and I was outside of that parameter.

Mlambo: You say possibly two, do you remember them? Who are they?

Fischer: I cannot, sorry, I am afraid I cannot remember.

Mlambo: Okay, let us leave that. As a silk you have lead legal teams in matters, am I correct? Like you are the leader in a matter.

Fischer: Yes, it does not happen as frequently in the Free State in terms of having a brief in which you are then given the freedom to draw in juniors.

Mlambo: It is easy to deal with, have you had matters where you have had juniors or not?

Fischer: Yes I have.

Mlambo: And what race were those juniors?

Fischer: I do not want to take credit for this, because it was simply by virtue of my instruction, and most of the instruction emanated from the State Attorney's Office, and I was instructed on the basis that I would draw in a junior from the ranks of my black colleagues.

Mlambo: So you have had black juniors.

Fischer: Yes.

Mlambo: It is not a difficult question, I simply asked if you had had black juniors or not. How many silks do you have in the Free State bar?

Fischer: Would you give me half a minute please? [Counting] I think there are eight silks, but I speak subject to correction.

Mlambo: Is there a black silk?

Fischer: No.

Mlambo: What is your view about briefing patterns? You see I am asking this as the head of a court, we want to draw practitioners who will reflect the demographics of the country, to instil confidence in society.

Fischer: As far as briefing patterns are concerned, I must be very candid my experience of private sector briefing patterns is that they brief far more of the white colleagues than the black colleagues. As far as your government institutions are concerned, there is I believe a programme in place to brief more of the black colleagues, and that is my experience of Bloemfontein at this moment.

Commissioner Schmidt MP: On page five of your questionnaire, you indicate the cases in which you have appeared, not more than ten, which you regard as the most significant and why. You have indicated that you had been an advocate for 30 years and it is disappointingly brief, to the extent that it is nearly vague. A case involving contempt of court and *emphatio curiae* which was finalised in the Supreme Court of Appeal, the Shifren principle and the with regard to the Lesotho Highlands Water Development scheme. I would have expected a more elaborate and a more precise and more concise indication of cases which you have been part of with some significance.

Fischer: If I can be very blunt about it, the Free State has its own unique type of litigation. My experience firstly as an attorney where I had clients who were based in Bloemfontein, who eventually moved head offices to Johannesburg for arguments sake. Later as a member of the Bar, we simply lost those clients, which is a great pity in terms of the exposure and experience it could have provided for practitioners.

You simply found that your major corporates were briefing the Johannesburg and Pretoria Bar and bypassing Bloemfontein. It has the negative spinoff that even with briefs emanating from state departments, because there are no black silks in Bloemfontein they would frequently and still do brief black silks from as far away as Cape Town. It is understandable that such a silk would say I am not prepared to work with a junior from Bloemfontein, I want to work with a junior from my seat, and in the process we find that the Free State practitioners are side-lined. That has been an unfortunate reality, and I think it is dictated by commercial reality and expedience, which has negative spinoffs for Bloemfontein and the exposure we have.

Schmidt: The last thing I want to ask is on page 9 of your questionnaire, you give quite an expose as to your life journey as to how you reached the point where you are at the moment. I would just like to indicate, to raise the issue once shortly and you basically say "in keeping with what would later be a spiritual awakening I came to realise that if I was true to myself I had more in common with Africa and its peoples, soils colours and sounds and thus regard myself as an African". But in regard to these about 10 or 12 paragraphs, in light of that you did not think it was necessary to undertake the study of an African or an indigenous language. What I am trying to say is that it is one thing to talk the talk, but another to indicate some form of objective measure. I am asking you was that your best answer with what you have stated here and your failure to learn an indigenous language?

Fischer: My simple experience was that as one gets older it becomes more difficult to learn a language like that and I did not see it as a stumbling block, because I have simply adopted a mind-set and lifestyle where I communicate with and attempt to overcome differences with every single person who comes across my path. I am now accused of being possible too familiar, because I really believe it begins with the individual and it is my life's mission to convince whoever I come into contact with, whether he is putting diesel into my motorcar or debating an issue with me in a court, is that we are all human beings and have so much more in common, rather than what is focussed on namely our differences. Yes I do regret that, I cannot deny that. I really wish I had learnt an African language, it would have made me a better person.

Mogoeng: What do you mean you are accused of being too familiar?

Fischer: I have this habit of seeking to communicate with every individual, whether I am in a restaurant or at a filling station or whether I am in a shop or even when someone is knocking on my window wanting to beg for money, I simply try to communicate to that person that, hello, we are all brothers and sisters, I am not about to lecture to you or to tell you what you should have done right or what you are doing with your life. I have found that what I am trying to do is enhance the individuals' dignity and self-respect and I cannot stop doing that.

Mogoeng: Is there a particular group of people about whom the familiarity was expressed?

Fischer: No, my probably most vociferous critic or protagonist is my wife, who says just shut up now man and stop talking to the people. It is an ongoing problem I have, she believes I talk too much to whoever crosses my path.

Commissioner Notyesi: I understand you acted in Umtata in about 2003, was that when Judge Somyalo was the Judge President there?

Fischer: Yes, whom we had acting was Judge Pekko [?] and then later Miller took over, and then later Chris Jafta.

Notyesi: You must have enjoyed Umtata?

Fischer: Well it is a unique part of the country, in fact I could not believe how beautiful the Eastern Cape is, I must tell you that.

Notyesi: I would have loved to read your judgment among the judgments you have attached here, the one that was delivered on 17 March, but you wrote it in Afrikaans. What is your view with the proposition that court language and documents, I know Afrikaans is an official language, they must at least be in English. What is your view on that?

Fischer: I do not stand in the way of that at all, I think it creates uniformity. I am mindful that a lot of the judges and practitioners are not as adept in Afrikaans. I feel sorry for those who are passionate about Afrikaans, but possibly we have to strive for a pragmatic middle of the road approach and I really do not stand in the way of English being the lingua franca of our courts. Yes, I am concerned about perceptions and what the man or woman in the street think about the courts being a mainly English speaking forum, but hopefully that could be overcome by having qualified interpreters assisting them with advancing their case.

Notyesi: Just recently you are sort of regretting that you could not speak indigenous languages. Meaning that you would like to communicate with them and reach out, particularly as a judicial officer. But when your judgements, as recently as 2011 are still in Afrikaans, is there any attempt to reach out and make sure that your communications everyone is able to understand?

Fischer: Up until about five or six years ago I was of the view that I should write a judgment in the lingua franca of the parties litigating before me and for that reason I would write some of those judgements in Afrikaans. I must be frank with you, I would prefer to write them in English, because I am far more at home in English. But when the advocates are addressing me in Afrikaans, when the witnesses are testifying in Afrikaans, I feel obliged to deliver the judgement in Afrikaans. I have subsequently changed my mind and am no longer doing that.

Notyesi: Lastly, what is your view on accountability of judges, that is judicial accountability in relation to the independence of the judiciary?

Fischer: I think accountability is an absolute necessity and at the end of the day judges are not only accountable to the office they hold, they are accountable to the people they serve. That is why it is so important that over and above the type of characteristics judges have to have in terms of their integrity and impartiality and propriety. They have to be accountable to the people who have come to them for redress and come to them to resolve their problems. At the end of the day if one wanted to embroider on this debate one could get down to the rule of law and how judges as part of the judiciary are there to protect the rights of the individuals.

Commissioner Malema MP: The customary marriage thing, when did it become a law?

Fischer: If my memory serves me correctly, it was sometime in the year 2000. I know it was promulgated in about 1998, but I think it only came into effect in 2000.

Malema: It was a completely new thing to you, right?

Fischer: Well I think it was necessary thing, but yes it was a new law.

Malema: I am asking if it was a new thing to you.

Fischer: The Act? Yes, the Act was a new thing there had not been an Act like that before.

Malema: Customary marriage.

Fischer: The Recognition of Customary Marriages Act.

Malema: Customary marriage.

Fischer: I was aware of the fact that that took place, yes.

Malema: But it is not something you learnt at school or anything. You just came to be more familiar with it when it became an Act.

Fischer: Yes Mr Commissioner, I will be honest with you, at school we were never taught about it, and at university we did this strange subject called comparative African government and law, at UCT. All they did was focus on every government, aside from the government of South Africa, probably for obvious reasons. We were taught about Ujama socialism and things like that, but no, not as a practitioner and not in my studies did I ever come across anything relating to that.

Malema: And now you know it, customary marriage. It is there it is law, you know it.

Fischer: There is a law, I am aware of that.

Malema: You know it, because you have got interest in it, right?

Fischer: It is a law which I have never been called to adjudicate upon or in fact deal with. I am aware that it is a law which recognises customary unions and in fact

stipulates the requirements for the validity of such, sets out the propriety interests of the parties and I also believe it also deals with the manner in which such unions are terminated.

Malema: Me and you are going to take a very long time, if you are going to answer the questions I am not asking, with the hope that I will move from the question.

Fischer: I am sorry.

Malema: I am saying you now know it, despite the fact that it was not taught at school and it came very late in your life, in 2000, because you have got interest in it right?

Fischer: In any law which affects the people of this country, yes I believe I do.

Malema: The same way the languages affect the people of this country. Why are you not knowing the languages, because they affect the people of this country?

Fischer: It is something I deeply regret.

Malema: And I am trying to demonstrate to you that it is not true, that it is not difficult to learn a new things, as long as you have got interest in it. You now know customary marriage, because you have interest in it. You know customary marriage now, because you have interest in it. You can learn the language even at your age, because you have interest in it. As long as you have interest, you can learn.

Fischer: You could say that.

Malema: So do you agree, that you do not have interest in learning our languages?

Fischer: I think that would be stretching that point too far.

Malema: If you have interest, what have you done? Have you applied to any school to learn Sotho, have you done that? What efforts have you taken to learn the language, besides learning vulgar?

Fischer: I did not learn vulgar, it was just something you were exposed to over weekends and eventually you just picked it up. Other than that, I have not made any effort to learn an African language.

Malema: Because you do not have interest in learning African language.

Fisher: I simply adopted the view that if I tried, I would not believe that I had the necessary skills to conduct a trial, cross examine or understand the nuances, which is something that develops over years.

Malema: I do not want any of you to learn a language for the purpose of conducting a trial. The question in relation to you learning languages is for the purpose of social cohesion, not for you conducting a trial in Venda or Shangan or anything of that sort;

it would be a mess with 11 languages. All we want is to see a judge who has an interest in reaching out to the people of South Africa as a leader.

Fischer: I simply adopted the view that language was simply one of my weaker attributes and I could rather try to reach out in other manners and means.

Malema: So you do not have interest in learning our languages?

Fischer: I do, but I think possibly, it is not that easy Sir.

Malema: No, you cannot say it is not easy before you even tried. You never tried, you never registered for Sotho language or made any effort. Leadership cannot say that, before you even try you say it is difficult.

Fischer: I do regret having not done that.

Malema: Do you agree that you lacked judgment in concluding, even before you started in concluding that it is difficult? That is a lack of judgment for a person who wants to be a judge. You have not tried, yet you concluded that it is difficult. Is that not a lack of judgment?

Fischer: You would not be remiss if you said so.

Malema: I want you to agree with me, if you do not agree, then let it be.

Fischer: No, I do not agree with you that it is a lack of judgment on my part.

Malema: It is a perfect judgment?

Fischer: No, no one is perfect around here.

Malema: I am saying you not learning our language and concluding that it is difficult, without even any attempt to learn it is a very good judgment? Qualities of leadership amongst others you admit, well in your language you say concede, that I think it is a lack of judgement to conclude before I even started. If you say to me I took lessons and I could not succeed and I concluded it is a difficult thing, I will accept. Even before you start you conclude this is not an easy subject, for me is a lack of judgment.

Fischer: What I think I was trying to say is that my experience is that as children of 3, 4, 5 years old one picks up these languages without even studying them. I now regard myself as being of such an age that even if I spent my time in the company of people speaking only this language I would not pick it up as easily as a child would. From that point of view, it is much more difficult at this stage of my life.

Malema: You will not even take an effort, because you are too old to learn this language. Then after discussing this with you and canvassing with you, you still do not see the need to somehow try to learn, perhaps Sotho in the context of the Free State.

Fischer: I wish I did.

Malema: No, I am saying after this would you consider taking some lessons in Sotho?

Fischer: It can only enrich me as a human being and yes, why not? I think what you have really drawn home to me is the extent to which my failure to do so can be interpreted as indicative of something lacking in my make up as a suitable candidate, and I accept that.

Minister Masutha: there is a view that language, culture and ultimately law are instruments of conquest, subjugation and control. And that one nation would want to impose its own on a nation it considers to have defeated. Would you agree with that perspective about history?

Fischer: Yes.

Masutha: Of course Roman Dutch law does not apply in Holland anymore, because Napoleon defeated Holland and substituted the common law with the French Code. Our Constitution seems to seek to reverse that in the context of South African history and jurisprudence. Is that your understanding of what the Constitution seeks to do in our context as well?

Fischer: Yes, that I agree with.

Masutha: Would you therefore agree that it is necessary that legal scholars, jurists etcetera, practitioners in the profession, should strive to mainstream principles deriving from indigenous law which accord with our Constitution in an active way in order to redress this legacy of conquest if you like?

Fischer: Unequivocally so, yes.

Masutha: Would you agree that if you are an agent of change, and I am not imposing that on you, you should participate in such an effort by firstly familiarising yourself with the principles I have described from indigenous law and striving to be a factor in driving that transformation?

Fischer: Unequivocally so, absolutely.

Masutha: Is it something which you will give a thought to after this interview, over and above the apparent undertaking to try and learn some indigenous languages, Commissioner Malema suggests to you?

Fischer: I have no doubt that in order to promote the legitimacy of the bench and in fact the whole legal system, it has to be more representative of the values of the population that live in this country. What stands in the way is this whole principle of stare decisis, which encourages a lot of practitioners to simply see what was said and done last year or the year before. I would like to believe and that is the way I

look at things is to try and push the envelope and think outside the box, realising that we have to legitimise the bench. Failing which whatever orders and judgments are handed down, will simply be ignored by the people who have lost all their confidence in a system they do not begin to understand. We can have a discussion all night long about experiences I have in this regard, where clients are incredulous about principles and values which have been handed by the Romans, Roman Dutch and English law. And saying they cannot believe that is what the law says and I think to myself well something is wrong here, we have to fix it. That is something which anybody sitting on the bench or aspiring to sit on the bench should be participating in.

Masutha: One such principle I would like to propose to you comes from the Pedi language, and states that you cannot be a judge in your own cause. Do you not think that could be a beautiful principle of universal application where someone could start from perhaps, just as an example?

Fischer: Absolutely, I hear what you say and I don't see the need to cling to something which is tainted by objective, subjective and subconscious perceptions of hurt and pain. What about how the people on the ground feel and what about what affects them? I support that kind of initiative whole heartedly.

Masutha: There is also a view that the legal profession, in particular maybe not exclusively, is fraught with persistent remnants, to put it mildly, of racism that continues over two decades following democracy, and that results in the exclusion from meaningful participation of those who have been historically excluded. Has that been your experience?

Fischer: Absolutely. To give you an example, on a very small scale and something which I have personally encountered is in unopposed motions, dealing with something like default judgements in respect of mortgage payments. The procedure being that the creditor would approach the court and get judgement on default and would then have to approach the court on the papers, duly amplified, to seek execution, in other words attachment and sale of the fixed property, under rule 46. I have thought it simply improper and that it cannot be countenanced that someone who has been living in a home and paying off the mortgage bonds for six or seven years is suddenly faced with an arrears, judgment is taken against that person and before they know where they are they have lost their house. In keeping with judgments that come to mind, such as the Jaftha and Rand Merchant Bank judgments, I have strived to set out in bullet form certain requirements which I suggest the banks place before courts in trying to convince the court that it is appropriate to execute and sell. Why we cannot address that, revisit that and do something as simple as rescheduling. Yes, it flies in the face of what the banks are doing, but I think it is something which addresses the needs of the people. You cannot have a man lose his house, simply because he is 2, 3 or 4 months in arrears on a mortgage he has been servicing for the last seven or eight years. It is

something like that which I believe has to be addressed and cannot see why it cannot.

Masutha: I just for now want to stick with inclusivity in participation with those who have been historically excluded in the past, as part of the legacy of redressing the legacy of racial exclusion. In keeping with that objective, don't you think that the onus is more on those who enjoy a privilege in this regard to take up the initiative themselves to see to the reversal of that status quo? Be it on the basis of approaching their own clients, who approach them on the basis of their race, to insist on principles of inclusivity as a precondition to providing them with legal work. Preferably, in an organised fashion, that is the organised profession.

Fischer: I think it can be achieved and what I have encountered as a practitioner is that very few people challenge the parameters within which they operate and simply accept this is the way it has been done and this is the way we shall continue doing it. It is a challenge which I enjoy, because counter intuitively, I like to think there is always a solution. We live in a horribly fragmented society, we live in a country with all the potential in the world, but there is so much discrimination, suffering.

Masutha: Have you ever acted in that line personally as an individual or collective, by confronting in that manner. Or is it something which you believe in, but have not actively acted out?

Fischer: What I do do and continue doing, because I do not know what else to do aside from roll my own sleeves up and go out and do something. I have possibly to an extent not endeared myself to a lot of my colleagues, because I challenge them in a collegial manner on old, entrenched views and values; to say they simply cannot think and reason like that. That is something I love doing and I continue doing that. As I have said earlier in the interview, as an aspiring judge I see myself as a servant of the people. I see myself as trying to convince and encourage the person down there that I am not the enemy and in fact I am here to help. That is something I would like to be given the opportunity to do until I stop practicing law.

Acting President Maya: You have practiced in the legal field, first as an attorney and then as an advocate since 1981?

Fischer: If my memory serves me correctly, yes.

Maya: According to your application.

Fischer: Yes.

Maya: And you have been acting as a judge intermittently since 1999, which is about 17 years.

Fischer: Yes.

Maya: At paragraph 6.3 of your application form, page 5, you are asked to list cases in which you have appeared, which you regard as being the most significant. You listed only three. Do you have any reported judgements in the 35 years you have been in this field? Either a case in which you had appeared in as an attorney, advocate or where you presided as an acting judge?

Fischer: Of significance?

Maya: No, any reported judgement at all.

Fischer: Sorry, I do not think I understand the question correctly. Are you saying is there any reported judgement in which I appeared either as an attorney or as an advocate?

Maya: That you can take credit for. A matter which you argued as an attorney, an advocate or a judgment you penned yourself.

Fischer: Yes. Sorry, judge I do not understand the question.

Mogoeng: This is the question: there are times when you would appear as an attorney.

Fischer: Yes, that is so.

Mogoeng: And because of the quality of the contributions you all make, that judgment ends up being reported. It also does happen that as an advocate you are involved in a matter and your cumulative contributions result in the judgment in that matter being reported. There are also times when sitting as an acting judge, you write a judgment and that ends up being reported in the law reports. Does that apply to you? Has that happened to you, whether as an attorney, advocate or judge and if so how many such cases can you tell us about?

Fischer: Sorry. There are several of my cases attached to the application/nomination form, that relate to judgements which I penned that have been reported in both South African Law Reports and Butterworth Law Reports.

Maya: You did not indicate that in your application form.

Fischer: I am sorry they are actually at the end of the bundle of documents.

Maya: There is a bundle, but you had not indicated whether those are reported.

Fischer: I apologise for the misunderstanding.

Commissioner Nkosi-Thomas: My question relates to paragraph 6.3 of the questionnaire. You have given us three cases which you view as the most significant cases that you have dealt with, but then you do not tell us why. You refer to the Shifren principle on non-variation clauses, which emerges from an old Appellate Division, as it then was, 1964 case. Therefore, when this matter served before the

Supreme Court of Appeal, I assume the whole issue about non-variation clause one could not say it is res nova? It had been resolved one way or the other, by the AD then. Why then do you list this case as significant? Did it infuse the Ubuntu principles, the *Napier v Barkhuizen* principles? Just why is it significant in terms of jurisprudence and its development?

Fischer: What got me thinking about it, although I was on the winning side on this matter. What bothered me and still bothers me was the whole basis upon which that principle endures. I am mindful of the need for legal certainty and contractual certainty, but I am also mindful of the fact that we live in a very challenging and diverse country. We are possibly seeing, what was referred to by the Minister, the tentacles of Roman Dutch principle once again riding roughshod over the realities of the society we live in; namely where parties contract with each other and one of them conducts themselves in a certain way, one simply refers to a principles. It has passed constitutional muster, but I think the debate is still long from over and I think it will be revisited on numerous occasions.

Nkosi-Thomas: Of course, but the question really is: did this judgment add or contribute to the jurisprudential landscape as we have it? Or are you just saying I was in a case which applied the well know Shifren principle?

Fischer: I think it reinforced that principle and the anomaly about it is that it is something I still feel uncomfortable about.

Mogoeng: Thank you Commissioner Nkosi-Thomas. Thank you very much for your time Advocate Fischer, you are excused.

Fischer: It was a pleasure Chief Justice. Thank you very much.

