



JUDGES MATTER

Judicial Service Commission Interviews

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Gauteng Division of the High Court

Interview of Advocate I Opperman

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Chief Justice Mogoeng: Good afternoon Advocate Opperman.

Advocate Opperman: Good afternoon, Chief Justice.

Mogoeng: Maybe I must begin first by disclosing that you and I were colleagues and had a very healthy relationship - you, myself and your husband - who wasn't your husband yet, at the time.

Opperman: Yes, Chief Justice, that's correct. We did pupillage together.

Mogoeng: You hold a BCom degree?

Opperman: I do.

Mogoeng: And LLB?

Opperman: I do, Chief Justice.

Mogoeng: Has the BCom degree helped you in any way in terms of attracting commercial work?

Opperman: I honestly think not - no it has not assisted.

Mogoeng: Tell us a bit about your practice - how it has unfolded over the years, and how has it prepared you for appointment to the High Court?

Opperman: Well, I started practicing in 1990 and prior to that I was a prosecutor.

Mogoeng: For two years?

Opperman: It was just over a year in the District Court, and I think I was in the Regional Court for a month. I then did pupillage and started practicing. Initially, until 1994, I primarily worked in the Northern Cape, in Carletonville - inquests, representing communities and masses involving public violence – actions against apartheid structures. That was up to 1994, and after that I developed a more commercial practice to date, and I did a bit of matrimony work, and that's really it in a nutshell.

Mogoeng: Just so that I am not accused of not disclosing enough, I must also place on record that at some stage some journalists wrote about me when we needed offices for the Office of the Chief Justice, that all I wanted was a toilet. Your husband went out of his way to write an article rebutting them. I must place that on record so that I'm not accused of being somehow favourably exposed to you because of your husband. Anyway, after some time did your practice grow stronger - and if so, in what areas?

Opperman: Yes, Chief Justice. In commercial work, a generalist kind of practice - initially I did asset-based financing, litigation, and it just developed into different commercial disputes, arbitrations. Initially I didn't get much junior brief work, but later on in the late 1990s and early 2000s that changed, and I was confirmed silk in September 2014.

Mogoeng: Has the distribution of work to women improved somewhat and if so, since when?

Opperman: Chief Justice I don't believe the figures reflect that, if one looks at the composition of the Johannesburg Bar. There are over 1 000 advocates – 200 of them are silks and only 10% are women silks - 7% are white silks and 3% are black silks. I don't think that one can infer that women have been given the lion share of the work available.

Mogoeng: You will recall that when we started, there was one woman silk that was basically doing unopposed motions. Are women now being given quality work that empowers them?

Opperman: I think that there are women that are getting quality work. I have found the transition from a senior junior to a junior silk quite challenging. I think there are a number of features that play into this. More senior silks are staying within the profession, and it is top-heavy. As the younger silks move into the ranks of silk they have to compete with the more established practices of the senior silks. Quite frankly, I think the clients prefer to have somebody that has been around for 10 years rather than a year as a silk. I think that's the reality that women silks face.

Mogoeng: Do you as women silks support junior women practitioners?

Opperman: Yes. I have been quite fortunate to become a member in June 2013 of a new group which was formed at the Johannesburg Bar, Thulamela. It was spearheaded by leaders of our profession and it is a transformation initiative, and the more senior you are the greater your contributions to practice expenses. The point is to support and assist junior practitioners, including practitioners from historically disadvantaged backgrounds. One is supporting and paying for practices of these junior practitioners, and in addition we have a junior development fund where senior practitioners' skills can be transferred, and junior members can be drawn in and be introduced to the attorney, and be paid from the fund for a certain period of time. In addition, I have on occasion reduced my fees to draw in juniors of historically disadvantaged backgrounds. There are different ways of assisting and, compared to when we started, group 17 - it was a group of pupils and we were all very junior with very little guidance and assistance. I think this initiative of Thulamela is a wonderful one and yes, I think it does go some way in assisting younger practitioners.

Judge President Mlambo: Good afternoon Advocate Opperman. It's been a long wait from last year August – isn't it?

Opperman: That is correct.

Mlambo: You and I have been having discussions about you availing yourself.

Opperman: That is correct, Judge President.

Mlambo: You've acted for not less than 24 weeks in the High Court? And you regard yourself as ready now?

Opperman: I do.

Mlambo: I must say thanks for availing yourself, and thanks for the efforts of your husband. I know he convened a get-together to try and respond to my call that senior members of the Bar were not availing themselves, and in recent times my roster is full of silks who are prepared to come. In terms of judgment writing, you've not struggled at all?

Opperman: Well I've now acted in 2014, 2015 and 2016, and I don't find the writing problematic. One gets into a rhythm, a structure and a method, but I think when one starts acting one is particularly cautious and wants to consider every argument, deal with every argument, and to make it clear that one has considered it properly. This is time consuming and perhaps not always necessary. When I acted initially, I think it was a bit of a *vuurdoop* – I got two opposed motion rolls, almost back to back. I had 12 criminal appeals, and it was all a bit daunting. I came away with 11 reserved judgments, but because the Chairman of the Bar Council at the time had sent a circular that it would be considered unprofessional conduct if a judgment was not delivered within a period of six months from the date of hearing – some of them fall within the 4 - 6 month period. Since I became aware of my error, in 2015 and 2016, all my judgments have been delivered within a period of three months; in fact one of my reported judgments was delivered within a period of a week. And I can say the judgments that I refer to for example, the *Makwakwa* judgment on page 90 and the *Smith* judgment on page 114. The *Makwakwa* judgment was delivered on the very same day it was heard, and the *Smith* judgment was delivered the day after it was heard.

Mlambo: Other than that, you've had no problems? I've never had occasions to call you and reprimand you for reserved judgments?

Opperman: No, you have not. And even those that fall into those periods, the litigants didn't ask or complain. The judgments were delivered, they went out and I think in 22 weeks, I've written 42 judgments.

Mlambo: You may not be able to respond to this, but try. As I said, I thank you and those from your ranks, silks who've availed themselves to come and assist in the High Court. I still struggle to get more black senior practitioners to come - I'm talking black females. It's either Leah Gcabashe in Johannesburg or Advocate Nkosi-Thomas - although she's avoiding me these days. I'm having an oversupply of white male silks ready to come – are they not there, or what's happening? I'm not putting you on the spot - maybe you can assist in me finding them.

Opperman: There are so many competent women in my group.

Mlambo: I should just be more patient?

Opperman: I think you should be more persistent.

Commissioner Hellens: Thank you CJ. I also have a disclosure to make. Ms Opperman and I have known each other since she did pupillage – I think she came to court with me, and you've been my junior.

Opperman: I did and I have.

Hellens: I want to make one point – not really a question. The Thulamela group, for everyone that needs to know, is the leading group at the Bar with regards to transformation. Well it's right up there with the top. There's a cross subsidisation upliftment process along gender and racial lines and they are a model. Can you tell us in a nutshell what your judicial philosophy is?

Opperman: One should give, in my view, parties a proper hearing and then deliver a judgment – a well considered judgment within a reasonable time. The very basis of our legal system is that we want to prevent parties taking the law into their own hands. The way of doing that, in my view, is to give the parties a fair hearing where there is an independent adjudicator that demonstrates, so that it is not just a subjective consciousness of this quality, but it must be readily apparent - impartiality, not just subjectively, but demonstrated. The judgment must give clear reasons; there must be clarity in the reasoning process, because the court is accountable to a number of parties. A court is accountable to the litigants foremost, and the court is accountable to the courts of appeal, to this Commission - it only speaks through its judgment, and more often than not, a judgment is often directed at the loser. The reasons must be clear, it must be understood by the parties and it must come out reasonably quickly.

Hellens: If you could explain to us what you understand by the concept of separation of powers?

Opperman: Government consists of the legislature, the executive and the judiciary. There isn't absolute separation, but the different arms must be permitted to perform their functions. There must be respect for the different arms of government, and there is a system of checks and balances contained in the Constitution which will keep the powers on the straight and narrow. That is what separation of powers is designed to do.

Commissioner Nkosi-Thomas: Chief Justice. perhaps I should start of by making the declaration that we sit in the same group, so I am quite chuffed to hear we are regarded as the most transformed group in the country. Ms Opperman, I note that you said when you started with the interview that you did some work as a District and Regional Court Prosecutor, but then you came to the Bar and your practice is pretty much of a civil nature. How experienced are you as far as criminal litigation is concerned? Have you acted first of all in the criminal court, and if not, do you have experience and will you be able to handle that aspect of judicial office comfortably?

Opperman: I must confess when asking myself why I want to be a judge, one of the things that became apparent to me whilst hearing matters is that I do have sensitivity for the vulnerable. And I think it finds its roots in the work I did pre-1994 when I saw the economic oppression, state abuses, and perhaps also from my mother who was an East German refugee who came to this country with a standard 6 education and was economically dependent on my father. I have sensitivity for the vulnerable, and in

selecting the judgments that really spoke to me or what I really want to communicate to this Commission - I selected three of the five speak to justice being dispensed in respect of the vulnerable. The one is *Moyo v S* [(A435/2013) [2014] ZAGPJHC 204 (4 April 2014)] dealing with a seven year old rape victim and *Smith v S* [(A418/2013) [2014] ZAGPJHC 56 (28 March 2014)] who is a self-confessed crack addict. I do think I have solid grounding – I did lots of appearances under difficult circumstances pre-1994.

Nkosi Thomas: Both as counsel and as an acting judge?

Opperman: As counsel and as an acting judge I have done a considerable body of criminal work.

Nkosi Thomas: Thank you, and just for the record JP, I have responded and I've made myself available. Thank you Chief Justice.

Mogoeng: Then you must be charged a fee for using this platform to communicate to each other. Commissioner Singh?

Commissioner Singh MP: Just two questions. Particulars of your community and other organisation which you are or have been a member of in the past 10 years. You put 'not applicable'. Can you just speak to any involvement that you had with any community organisations in the past 10 years?

Opperman: I've been a member of the Johannesburg Bar and during that time I've had pupils, I've lectured, I've been involved in advocacy training and I've moved to Thulamela Chambers. Unfortunately in a marriage where one is married to another advocate and we have children, time is a bit limited to spread further. Perhaps it is not a good reflection.

Singh: I think Deputy President Maya will recall when we were on the sub-committee and we heard similar kind of challenges that women have, in particular when we had to make recommendations to this committee. Can we as a JSC rest assured, because you said your court appearance has been occasional, that the 23 or 24 weeks you have had acting has equipped you sufficiently for us to favourably consider your permanent appointment?

Opperman: I have 26 years experience as an advocate. Occasional is now and I was, as a junior advocate, in court almost every day. The more senior you become your court or arbitration appearances aren't that frequent. My skills and manner to adjudicate and assess evidence – I do have sufficient experience, in both the commercial and criminal field.

Minister Masutha: To your credit – I'm just looking at my Braille notes here. There's note to the fact that "she remains a fearless proponent of justice even to the extent of

exposing a judge on circuit who made racist remarks in chambers and in open court – she sought his recusal”. Now one would love to defer to the assumption that members of the judiciary over two decades of democracy have long rid themselves of the legacy of racial prejudice. Is it a phenomenon that continues to haunt the profession in any significant way, or is it something we can assume to be highly isolated? If it’s the former, what is it that we should be doing as a country to confront it head on and deal with it effectively?

Opperman: Minister, I think as a general proposition I think it’s not something that is common – it’s certainly not something that I have experienced of recent times. Everybody has, to a greater or lesser degree, prejudices and it’s because of that, either conscious or subconscious, that it is necessary to have diversity on the bench. If you put people together who are all alike their prejudices would become - they would conclude that this is natural. When one puts people together who are not alike, they will interrogate those assumptions, and putting people of diverse backgrounds together leads to a better debating process and to a better ultimate conclusion. For example, in the appeal courts, in assessing probabilities, it is so important to put people of different backgrounds together, because everybody brings a different perspective to the process. I would hope - and I haven’t experienced it personally, I’ve read about it - of any issues relating to racism. I think to deal with it is to focus on diversity on the bench.

Masutha: The concern about the exclusion of women and blacks from lucrative legal briefs or legal work, which is perceived as one of the most severe ways of expressing racism, is a challenge that continues to haunt the profession - in part fuelled by clients who still harbour racial prejudice and therefore would not give work to historically disadvantaged practitioners. What kind of interventions, if any, do you believe the state should consider in this regard specifically, trying and levelling the playing field?

Opperman: The Johannesburg Bar, toward the end of last year, passed a resolution in terms of which it was agreed that in any three counsel team, at least one of those three counsels must be black counsel. The Bar is working on the mechanics of it, but the resolution is to be welcomed. It came against the backdrop of what has happened in the silicosis matter, but that compels briefing patterns to change. The state could also get corporates together and to make sanctions, or perhaps legislate even. It’s a very difficult topic to address, and I think the professions must deal with it internally, as the Bar has attempted to do quite recently.

Commissioner Semanya: You come with commendation, and I might add that it is well earned and deserved, by much respected members of the profession who think you should do the work of a judge. In your own words, why should South Africa entrust you with the responsibility of presiding as a judge?

Opperman: I do have compassion for the vulnerable. I do have a strong work ethic. I find it very difficult to promote myself and I'm not entirely sure how to address this, but I believe I can do the job. It's not a job – it's the highest calling and it would be a great honour to be given this opportunity. I really don't know why I should be chosen amongst other competent people other than that I have a passion for it, and will undertake to do it to the best of my ability.

Semenya: The country will be proud for it - thank you Chief Justice.

Commissioner Modise: The perceptions that the lives of South African women are actually cheaper in the eyes of the courts – what do you think of it?

Opperman: It's completely sad that there should be such a perception. It's completely wrong, and I think it's a sad day for our society that there is such a perception out there – that our courts view women in our communities as less worthy.

Modise: So you have not come across it – it's just sad? Have you done anything about it?

Opperman: I'm not sure that I understand your question correctly – are you saying that this is the counsel or...

Modise: No – I am saying over the years we have seen sentences been passed down by the different courts in this country, especially when it comes to the rapes of girls and women and the murder of women. The sometimes ridiculous sentences that are passed – the perceptions are out there in South Africa that women's lives are actually very cheap in the eyes of the courts. You were not aware?

Opperman: I'm aware there is a controversy in relation to that, but what I can say from my own experience, for example the one matter that I referred to, is that I consider the rape of women and children very seriously and the *S v Moyo* matter analyses the tendency to reduce life sentences to less than that. I'm very conscious of that feature, but all cases must be dealt with on their own merit, but as a general proposition it is completely unacceptable to operate from the general basis that the lives of women are somehow worth less.

Mogoeng: Do you understand the Commissioner's question? As I understand it, it's basically this: Do courts do enough to deal effectively with serious crimes that affect women like murder or rape? Am I misrepresenting your question Mme?

Modise: No, you are spot on.

Opperman: I think our courts are addressing it and I certainly in dealing with matters of this nature have addressed it. The matter I referred to analyses the tendency to reduce

life sentences, and it concluded that there is no general rule in reducing life sentences. In fact, children victims should be afforded extra protection by our courts. That was certainly the conclusion that I reached in that judgment. Insofar there is an authority out there with a different view, I certainly will not follow it.

Modise: I'll leave it at that CJ. My last question is – to take you just back to your response on the separation of powers – and I agree with you. You said that there is no arm that is completely separate from the other. What would you say to the assertion made by the legislative sector that in fact the overreach is often too much directed on the legislative sector rather than between the executive and the judiciary - that in fact the legislative sector never has an overreach into the courts or into the executive, but that the other two seem to have an overreach. Do you have any opinion on that?

Opperman: In respect of the legislature and the court's ability to intervene – I'm not sure that I'm in a position to compare the two interventions, other than to say that the judiciary must be very respectful – not timid – but be very cautious of intervening on the other legs.

Mogoeng: As I understand the Commissioner's question – it's because I've come across it before - don't you get a sense that in effect the judiciary and the executive have relegated Parliament to a junior arm of the state, and they are projecting themselves effectively as the two senior ones?

Opperman: It's clear to me what I should be answering, but I'm not in a position to do so.

Mogoeng: Did you find this environment welcoming or somewhat intimidating?

Opperman: I found it far more welcoming than I anticipated, except I was hyperventilating. It has nothing to do with the Commission, it is all internal.

Mogoeng: I was asking because I didn't see the Ingrid Opperman that I know. Thank you very much – you're excused.

Opperman: Thank you.

Mogoeng: I'm sorry. Commissioner Ntsebeza has a question.

Commissioner Ntsebeza: Advocate Opperman I will not detain you long now that you were off the hook. There was something that you mentioned earlier on about East Germany – what were you indicating?

Opperman: It was nothing, it was just a fact that my mom is German, and they fled during the Second World War from East Germany to West Germany, and then came to South Africa with a standard 6 education.

Ntsebeza: I just want to also ask you about your notions of transformation, especially the Bar. In my experience, and I don't know if it has been yours, when it comes to transferral skills, most practitioners had been looking at it that it is transferral skills from white practitioners to black practitioners. How has your experience been?

Opperman: I think certain parts of the profession have people hold onto so tightly, like intellectual property and construction work. I know there were two recent pilot projects initiated by my husband whilst he was on the Bar Council. What was clear was that people are being briefed that come through the ranks of the attorneys. It's certainly not transfer necessarily from white practitioners to black practitioners, but from a group of practitioners that hold the key to certain areas of law to practitioners who don't hold the key or have access to those parts of the law. I've seen transformation change over the years, and at the moment I think it is assisting junior practitioners and practitioners from historically disadvantaged backgrounds in building sustainable practices. The junior practitioners in our group that are from historically disadvantaged backgrounds can transfer skills to a senior practitioner, but it's really more about building sustainable practices.

Ntsebeza: Can I ask the question differently – has it not been the assumption by many that when we talk about transferral skills, we talk about white practitioners transferring skills to black practitioners?

Opperman: It has been.

Ntsebeza: To ask a further question, in your entire practice, have you had an opportunity to invite a black senior to lead you in any of the matters in which you were involved?

Opperman: I've not had the opportunity.

Ntsebeza: Were you in a position to ask to be led by a black practitioner? There must have been cases where you were briefed and you were to choose your own leader – from Semanya, Maleka, and Morrison to others. Where you had the opportunity to choose a leader, have you ever chosen a black silk?

Opperman: The opportunities have not been many, but I have not chosen a black silk.

Ntsebeza: A number of interviewees today and yesterday were asked about African languages they have learnt. What is your proficiency in any African language?

Opperman: I cannot speak an African language.

Ntsebeza: Do you have a reason?

Opperman: I don't have a reason.

Ntsebeza: I'm asking these questions because you are seeking elevation to the bench, and I want to ask you candidly whether part of the shortcomings of a transformative agenda that creates and perpetuates an impression that thought leadership comes from white practitioners – whether that perception will not affect you as a person sitting on the bench from inadvertently looking at who appears before you and assuming that better arguments will be coming from a white practitioner?

Opperman: Commissioner, I must confess that during this entire process I've been watching these interviews and I have been embarrassed by this question. It's been asked a number of times and more of an effort should be made. I think one is in a comfort zone when one assumes that the language being used in the courts, which is English, that there needn't be anything further done. But it is unacceptable and I was actually speaking to somebody outside to say that we need to learn other languages. I'm just not sure at my age how quickly that will happen.

Ntsebeza: I'm not even addressing language only Ms Opperman, at this stage. The entire question of it being an assumption that you can only get transferral skills from white practitioners to black practitioners, and that you are more likely to get sound legal advice from white practitioners - I'm asking the question because if we recommend you and we don't know what your view is, the likelihood might well be that when you sit as a judge, your kneejerk reaction might be that you are likely to get sound arguments from the white practitioner. We assume that the white practitioners are the thought leaders and black practitioners are the followers. I say so in light also of the resolution of the Johannesburg Bar that talked to the three-counsel rule, where the assumption was that it is inappropriate in a matter where three counsels are employed, for them not to be diverse. It has never been my experience that a 'Semenya' could lead an 'Opperman' and another – has that been your experience as well?

Opperman: I can't speak to perceptions of others, but I can say that I do not view any black counsel appearing before me as more or less inferior to the white counsel. I listen to the content of the argument, I read the heads of argument beforehand, and I know as a fact there are formidable black counsel out there. I can only speak to it from a personal level. I would hope that I do not have such a bias, and I know as a fact when I hear a matter I read the papers, I read the heads, I listen to the argument, and I do not assume that I would get a better argument from one party rather than the other.

Ntsebeza: Except you don't seem to be able to explain why it was business as usual that all your leaders had been anything but black leaders in your entire practice?

Opperman: I was in groups where there were very few black silks. I was in Maisels for more than 10 years, and one tends to get drawn in by people from your group. I moved across to a different group when I was recommended for silk at a time when I was not

drawing in silks, but leading matters. So my circumstances were such that I was not exposed to many black silks and I wish I had been drawn in.

Ntsebeza: At Thulamela you have leading silks who are black – have you ever invited them to lead you?

Opperman: Because I have attempted to do the leading myself. I have been recommended for silk and yes, that's been my trajectory, but it's not because of an inherent bias.

Ntsebeza: Chief Justice I won't take it any further. It's a debate we could have with Advocate Opperman, but for now it is ok.

Mogoeng: I think he's exploring unconscious bias – you don't know you have bias, and so you've got no problem to solve. I've picked up unconscious bias about myself in other areas.

Opperman: Absolutely, and it is for that reason that I mentioned the example of diversity and that one must interrogate these issues.

Commissioner Malema MP: How do people become racist?

Opperman: I think it's taught and it's a superiority thing. I don't think children are racist, and it's a taught bias.

Malema: You don't think you were taught bias? You don't think you were taught to be racist?

Opperman: I think children follow examples.

Malema: Are we talking you now? You were never taught to be racist?

Opperman: I grew up under the apartheid state – I was taught in a government school where there was segregation and lots of propaganda - so yes.

Malema: So you are a racist?

Opperman: I think as an adult I have insight into the wrongs I was taught, and the work that I did and the insight that I gained through the work I did pre-1994 - in our communities, in Hopetown where I saw economic oppression and children being killed by excessive police violence - and done the inquests, I realised the error of the ways. As an adult I had insight into this, and I'm still conscious of the scars.

Malema: The first step to dealing with a problem is to admit that I have a problem. You ought to admit that you are a racist in order to deal with that racism. Can we agree that you are a racist, because you were taught racism?

Opperman: I've distanced myself from those teachings, and as an adult I appreciated that those teachings were wrong. I've conducted myself in a manner which is different to that, and I object to being called a racist.

Malema: We are with the MEC of Education here who said to some professor or advocate that the first qualification this person got was a teaching qualification. He was reminded and congratulated on World Teachers Day, because he was taught to be a teacher. Whether he is a professor or an advocate, he is the thing he was taught. You answered the question before on why you don't speak any African language and your answer was "I don't know". And that might be subconsciousness that borders on racism that you've never seen any need to learn other people's languages, because they are so inferior, not so important, and that's why you can even still answer "I don't know why I can't speak these other languages". That's superiority – that's my observation, and am I correct to say you suffer from white supremacy? That's why you don't know why you don't know African languages. They are not important, because mine is superior – I am superior. It comes out of that problem of white supremacy, because even if you try to suppress it, you were taught that you are superior?

Mogoeng: Commissioner, I thought she responded. Do you want to respond?

Opperman: I don't want to respond, Chief Justice.

Malema: What was the response, CJ?

Mogoeng: I understood her response to be: I grew up in that environment, there was propaganda channelling us in the direction of racism. I became a grown-up and decided to distance myself from racism. That's how I understood her – she worked herself out of racism. Commissioners are here to correct me if I'm mistaken – I thought that was an answer to what you put to her. Thank you very much Ms Opperman, you are excused