Judicial Service Commission Interviews

5 October 2016 – Morning session

Gauteng Division of the High Court

Interview of Advocate D C Fisher SC

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Chief Justice Mogoeng: Going back to the early days of your practise in 1989 and '90, my observation was that women generally, regardless of colour, were not given the same quality of work as men. Were you one of the exceptions?

Advocate Fisher: I don't believe that I was an exception. When I started off at the Bar, I really was given very few opportunities to act in matters which were of some substance, I also didn't get very many junior briefs, which I think is something that was of concern to me, because I believe that a primary mentorship position. If one can get a lot of junior work with a silk who one respects, one can learn, and I didn't get a lot of that, and I think it was because of my gender. As my career at the Bar progressed, I think things did start to change somewhat, in the late 80s early 90s it was I think particularly bad, and prior to that even worse. There's definitely been a movement forward in relation to gender inclusivity, and long may it may last and progress and get stronger and stronger, because it something that has served the profession.

Mogoeng: And what is your observation about race, the briefing patterns, the instruction giving patterns, in that regard. Is there some improvement, is it significant or virtually insignificant?

Fisher: I think there has been an improvement, I don't believe that it has been significant enough. I think that the fact that steps have to be taken as the recent three junior rule that has been taken at the Johannesburg Bar, I think it's lamentable that that sort of artificial approach needs to be put in place. It's a regrettable state of affairs that the firms and the counsel, that is silks who are bringing juniors in, are not moving to the kind of pace that they should be moving at, and that they have to have these measures enforced on them. But to the extent that one has to do it, one must do it, we are moving too slowly, but there is a movement.

Mogoeng: The last quick question on fees, what must be done to regulate fees? And I'll tell you why, last night a colleague called me to say that somebody who was acting on

behalf of client on a contingency basis billed client for about R1.2 million for a day's appearance, that's the Constitutional Court. What have you to say to what can be done to arrest this, because for me even R250 000 for one day's appearance, it's a lot of money, but R1.2 million? That's, I think a High Court [judge's] yearly salary, if I'm not mistaken.

Fisher: Well, it's obscene, it's obscene that people should be put to having to pay those amounts of money, and there should be constraints put in place. The Bar does put in place fee parameters, but I don't know how regularly they are visited, and I don't know whether there is any real policing that takes place, because its only when one of the attorneys or the client is unhappy about the amount that they have been charged, that it ever really comes to the fore, under any scrutiny. So I do believe that there is a lot of overreaching that goes on, which is under the radar and unnoticed, and it is particularly iniquitous when one is dealing, not with the big corporates, that's bad enough, and perhaps they don't mind paying a million rand because it just goes into the wash, but somebody who is unable to afford it, somebody who's whole life may come to a standstill cause they get a legal bill of that nature, it just makes justice inaccessible, and at that level particularly, it's got to be policed.

Mogoeng: And of course even if you are acting on a contingency basis and client has won some millions, that can't be justification to dig so deep into what is due to client?

Fisher: Not at all, one gets the contingency arrangements that one has seen in the RAF environment, and they've been quite contentious, because we know they've been abused by unscrupulous practitioners, but I think, you know that's being done on a grand scale and its legislated. When one looks at contingency arrangements in a different clime, where people are getting together in boardrooms and making those sort of determinations, I think that it's bad for the profession, it's bad for the country –

Mogoeng: Access to justice.

Fisher: If people are being paid R1 million for one day's work.

Mlambo: Thank you Chief Justice, good morning Advocate Fisher. You've acted a number of times in the High Court?

Fisher: Yes

Mlambo: I think there a spreadsheet in front of you, you've said you have acted in a total of nineteen weeks. I seem to have an extra week there, that's why it's 20, but I will settle with your 19 weeks. In that period where you've given time to act, you've solely acted in I think unopposed and opposed motions, the urgent court and some appeals.

Fisher: Yes.

Mlambo: Do you think that was enough to say to you, you are ready to raise your hand and be interviewed to become a judge?

Fisher: I have acted since 2011, I do believe that I have grown significantly from the first acting stint that I did, over time. The fact that I am a busy practitioner and that I ply my

trade in the courts, in the motion courts, from the other side, and in trial court, has meant that I have quite a wide knowledge of the law, and I can draw on it when I'm on the bench, and I can apply it. And having acted for a time, one goes back to practise, having used different muscles on the bench, when you go in to practise, you try to get a sense of how things are unfolding from both sides, you have that perspective automatically. So I believe that I have garnered the experience that I need. I run a tight court, I am good administrator, and I feel very comfortable on the bench.

Mlambo: You've done quite a substantial number of weeks in the unopposed court, and other candidates have testified to the fact that that's a difficult court, because of the number of files one gets and the varied areas of the law involved. And you have done quite a fair number of weeks in the opposed motion court. I just want to stick to the opposed motion court briefly. The opposed motion court practise in Johannesburg changed in the last three years, and you were caught in the middle of it. Now the previous practise was, a matter would be enrolled on the Thursday and a judge must hit the ground running the next Tuesday. Now, when that practise was changed there was resistance from the Johannesburg Bar. Do you remember that?

Fisher: Yes, I do.

Mlambo: In what way were you instrumental in helping a change of attitude in embracing the new system, where a judge now has two full weeks to read the file and be ready?

Fisher: I had acted in Pretoria, and the manner in which the roll ran in Pretoria was similar to the change that came about, and I had acted in Johannesburg as well, in the motion court, and the change was astonishing, in the sense that, when one was in Pretoria, you get the file before, you could sit, you could read it, you could digest it. In Johannesburg under the old dispensation, it was a free for all as far as the putting down of matters on the roll. So it served counsel quite well, because they got their matters heard. There were times when as counsel I was in a motion court and I had five matters in one week, in the opposed motion court. That obviously worked for counsel, it worked for attorneys. But when I became a judge and I worked under that dispensation, in Johannesburg, it was virtually impossible to get the papers read, and I'm generally very fastidious about making sure that I read the papers, because I don't think you can give a proper hearing if you haven't. To read and be given on Thursday, twelve matters that you need to sit and read, and then a further twelve come in mid-week, it's impossible to keep yourself abreast of the facts, and its impossible for you to give the kind of hearing that you would like to give.

Mlambo: So what you're trying to say is that as judges were most often led by counsel through the papers, rather than them having been prepared?

Fisher: Yes, which is not the best way for hearing to take place, it makes it longer, and it also perhaps gives an unfair advantage to the person who is standing up first. Ultimately it is about the rule of law, if you cannot get a proper hearing because papers have not been

read, because the judges are simply overworked, you are dealing at the very rock face of a judge's function. So whilst, had I not acted, I might have been at one with the Johannesburg Bar, and the Committee which was saying that we don't want to go onto a new system which is going to slow down the progression of justice, etc etc. I was able to talk to the Committee and say, it is impossible for judges to give a proper account of their positions with the kind of work load in Johannesburg. And I was very pleased to see that the transition was quite smooth ultimately.

Mlambo: It has resulted in counsel placing less matters on the roll.

Fisher: Yes.

Mlambo: But at least now judges have time to prepare and be ready for their matters.

Fisher: You have a sense of what you are going to do in a matter when you have read the papers, you can ask the relevant questions and be incisive, you can't be incisive when you are in a muddle. It is a system that works, and I think that the Johannesburg Bar now understands that they get better judges, they get better hearings, and they get a better result.

Mlambo: You've also sat in the urgent court, right? In your appeal stints, you wrote some criminal appeals?

Fisher: Yes.

Mlambo: Alright. Just moving over to the list of judgements that you have written, you have put almost all of them there, and you've put the *Mbana* judgment there, the man who says you don't have the judicial temperament to be appointed. Just before we get to him, I see a total of about 41 judgments, that's spanning all the time you've acted?

Fisher: Yes, those are my written judgments, I've also handed down ex-temp judgements, about 40.

Mlambo: That's when you sit in the criminal appeal courts?

Fisher: No, I have done it in the motion court, because when one has the time to read the papers and it is a simple matter it is often best to just give it that day, so people can know what their position is.

Mlambo: The period from when the matter was heard and when judgement was heard it is roughly a month, up to two months, but it's mostly a month. There is only one judgment, I think number 24, the matter of *Leonard Dube v The RAF*, which was reserved in November and was handed down in March. Was there anything particular about that one? Because it stands out as an exception to your record.

Fisher: It is exceptional, it's exceptional for two reasons. Firstly, it was an important matter for the RAF court, because what had been happening, and I had discussed the matter with the DJP, what had been happening was that there was no real set process in relation to what would happen when a minor child got a significant amount of money as an RAF payment. So very often, one would find that it simply went into an attorney's trust account, and was then given over to the plaintiff who would have generally been a parent or guardian, as and when it was needed. In fact in this instance the plaintiff was able to give an instruction that the full R3 million just be paid over to him. And I believe that it is necessary for some sort of constraint to be put in place. So I gave a judgment in relation to the fact that a trust was preferable, the matter then was postponed, and came back to me, because the attorney had to go away and find a trust structure. I then drew as part of my judgment, it doesn't appear in the law report, the trust deed, and I also set out in the judgment the kind of limitations that should be put in place on the type of trust deed where you have trustees looking after a minor's funds. And I gave a judgment that says, very often, parents of children are not qualified to invest the money, to look after it for the child, and thus a trustee, a board of trustees, including the parent, is generally a proper approach.

MEC Lesufi: You are known for your interest in mentoring young advocates and promotion of training in particular, and have been in various countries, including Zimbabwe. Your observation?

Fisher: When I first came to the Bar, there was no training programme in place, and although one comes to the Bar with an academic qualification, very often you've hardly even been in a court. The Bar then started a training programme, approximately 20 years ago, and I was part of the beginning phases of that training programme, and I've trained as an active advocacy trainer for nearly 20 years. It's very important for the Bar, because without that training, one doesn't have a - counsel cannot equip themselves properly in court. They need more than just academics, they need to know how to stand up, they need to know how to persuade. There used to be this somewhat highbrow approach to advocacy training, and people would say well, you can't train somebody to be an advocate, you're either born an advocate or you're not. Well I can tell you, that's not true, you can enhance people's skills significantly by training them in accordance with the method that we've built up over the years. And it's quite astonishing to see people at the start of the programme and at the end of it, the way that they have progressed. As far as Zimbabwe was concerned, there was no training provided in Zimbabwe. I was asked to go with Johan Kriegler, and others from the UK Bar, to Zimbabwe to do the sort of training that we do here. What we did is, we trained people to be trainers, so that they could start they own training programmes, and its worked very well, I'm told by people like Tino Bhele that its really worked well, and they've gone from strength to strength.

Lesufi: You are also known for your anti-death penalty stance, that you took many years ago. Do you still hold that view?

Fisher: Yes, very very strongly.

Lesufi: Please substantiate.

Fisher: It's about human life and dignity, it's about the dignity of the country. Living in a country where the law stoops to kill its citizens is pre-historic, it shows no development, it shows no appreciation of the most fundamental and basic human right. When I started off at the Bar I did a lot of capital crimes, and I heard that I never got a death penalty for anybody, in fact I was very successful on that score. But even hearing it being passed, it's a chilling thing, it's a momentous thing, and I am very glad that it was the first matter that our Constitutional Court put right.

Commissioner Hellens: Fisher, can you give us an explanation of what you believe your judicial philosophy is?

Fisher: My philosophy is that everything boils down to a protection of the rule of law, that has got to be central to any philosophy of the law. If one looks at our Constitution, one has got to be cautious to look at it from the perspective of looking backwards, and from the perspective of looking forwards. From a looking backwards point of view, it's a stark remainder of the fact that the people in this country had no access to the rule of law, no access to basic human rights. So the Constitution is there from that perspective, to put right what happened in the past, and it creates parameters for that to be done. From a looking forward perspective, it creates opportunities to build on the philosophies that are espoused in the Constitution, and I think that central to any judge's philosophy has got to be that rehabilitative aspect, and that formative aspect. Does that – is that a -

Hellens: Your answer is your answer. Can you explain to us your understanding of the doctrine of the separation of powers?

Fisher: The separation of powers means that the various arms have their separate duties, so when one looks at the judiciary and one looks at the judicial function in that context, it's often been called into question how far the judiciary can tread into the area of power of the legislature, of the executive. And I think that one must be cautious to shrink from comment as a judiciary, I think to say well that's not my turf, so to speak, so I am not prepared to go where angels fear to tread. If think that one must obviously be cautious to apply the law, but one should do as much as one possibly can to make sure that the decision makers, and the people that carry out the legislation are doing so in the reasonable, rational and proper way, as the arm that safeguards the rights under the constitution.

Hellens: For how long did you reserve your longest reserved judgment?

Fisher: I think that was the *Dube* judgment. You'll see that I generally give the judgements in the same week, I think my longest reserved judgement was the *Dube* judgement, that

was from November to March, but as I explained there was an interposing hearing when I dealt with the trust deed and the setting up of the trust, because I didn't want to just leave it to the attorney, and to chance essentially, I thought that the judgment should include that process.

Hellens: Perhaps a final question, what is the central evil or wrong in lengthy delayed reserved judgments?

Fisher: I think that it goes to the very foundation of justice and the rule of law. Because if you are not giving people a prompt result, then they are unable to regulate their affairs, and that can have varying degrees of injustice in it. If you're for an example dealing with a prisoner who is incarcerated, and you don't give your judgment on appeal for a lengthy period of time, that hits at very heart of the Constitution, the right to freedom. If you are dealing with a commercial matter, the ability of people to regulate their affairs is very important. People need to know whether they have a roof over their head, and how long they've got to do what they need to do, if they may not. It goes to the very heart of the rule of law, if one delays. And I'm very, as you see from my record, I'm very cautious to give my judgments as soon as I possibly can.

Commissioner Singh MP: Firstly let me say I agree with what Constitution says about the death penalty at the moment, and you also have strong views, but there is also a view out there in the public. Somebody walks in here with a fire arm and guns us all down,-

Mogoeng: Commissioner, in line with our agreement, would you like to put a question?

Singh: Yes. What would you say to the victims of the injured parties which would be all of our families here if somebody walks in unprovoked and guns us down in terms of the application of the death penalty? Second question, in your questionnaire Advocate Fisher, item 9 section 2.2 and 6.3, when it comes to particulars of community and other organisations, you say 'none', and when it comes to publications you say 'not applicable', and when it comes to which cases you have appeared and you would regard as the most significant and why you say 'none stand out as overly significant. Could you kindly explain further on those 3 questions.

Fisher: You see, obviously one would feel differently if one is a family member of somebody who is hurt or murdered, one feels a level of retribution being required and that is perhaps not commensurate with the way in which the law should weigh up and view the particular offence. The law has got to take into account the various balancing aspects, the law has got to be merciful. You can't be merciful – and the law is enjoined to do that in sentencing. You can't be merciful if you feel a measure of your own sense of loss. So that's the first thing. When one compares it to the kind of fervour that a family member might feel, it is not a proper comparison. And secondly, in relation to whether the death penalty is ever appropriate, the State has got to be an example to people. I don't know whether one can ever teach people that killing is wrong if the state itself bloodlessly kills.

In relation to my publications and community experience, I have been a very busy practitioner. I have worked, at times, sixteen hour days, that was when I had two children under the age of two to care for. I have at time been a sole breadwinner, and it is just been a matter of time in relation to be able to sit down and formulate publications. I would like it very much to have been able to write, but I really didn't have the time and the space to do that. As far as the community aspect is concerned, I've always been active in my community' and I've always tried to be an active participant in community events. But again, as a working mother with a very busy practise and the kind of committee obligations that I took on, I saw that as my primary function. The fact that I sat on the pupillage committee, the fact that I sat on the advocacy training committee, I also drew the harassment policy for the Bar. I also drew the diversity and equality policy for the Bar. So I absorbed an educative role within the context of my profession, in mentoring young people, in taking on juniors that I felt showed great promise, that is where I felt my energies where best placed. As far as my judgments are concerned, my practice has been broad, and very little fanfare to it, it's just been insolvency, the kind of thing one gets at the rock face. I've never been briefed in big and important political matters or anything of that nature, and I think it may be a hallmark of having been a woman that I never got very important big work. But the work that I got was big, it was important to me, and it gave me the experience.

Commissioner Nkosi-Thomas: I would like to put a question to you, Ms Fisher, and I am not allowed to make a preamble but I will make it quickly, purely to afford you an opportunity to deal with this matter. A complaint has been directed to the commission, it's actually an objection against your appointment, you probably are aware of that, and it has to do with the matter over which you presided, I think between Sivubo and the Development Bank of South Africa, it was a construction matter it would appear. The gist of the complaint is that you lack judicial temperament, and there was also a complaint about how you arrived at the cost order, because it would appear you ordered the attorney to pay *be bonis propris*. So would you like to explain the circumstances, what are we to make of this complaint?

Fisher: This was a matter where judgment had been handed down, so it was really an interlocutory matter. What had occurred, is that there had been an application for leave to appeal delivered in the matter, now it's a trite principle of law that when that happens, and it's in enacted in section 18, there can be no execution levied in the matter. Notwithstanding the fact that this notice of application for leave to appeal had been filed, the attorney who is the objector in the matter, persisted with execution, he seemed to have an incorrect understanding initially of the law, and the attorneys on the other side sent a number of e-mails imploring him to desist from the course that he had taken in relation to the warrant, but he refused to withdraw the warrant, and that resulted in an urgent application unfortunately. So because the principle was so trite, and because the recalcitrance on the part of the attorney was so marked, I thought that it was a proper matter for me to mark the court's disapproval, and to grant *de bonis propris* costs against

the attorney, because it really was a trite matter. And one doesn't do that sort of thing lightly. The attorney is obviously very cross, that he's had this costs order against him, and he's attempted to appeal it. I sat on the leave to appeal, and he's also complained in relation to the leave to appeal. When I received the complaint, I sent a copy of both of my judgments to the commission, just in case they want to see my reasoning. In my estimation, the judgments are correct, it's a proper exercise of my discretion. One's got to be cautious, but there is no reason why clients should be mulcted in costs, and a *de bonis propris* costs order has got two consequences. Firstly, it's a mark of the court displeasure. Secondly it protects the client of the attorney from having to pay fees, that they would ordinarily have had to pay in the matter, So I see that the attorney concerned makes the comment that I didn't take into account his client's rights, well that's simply not true because his client's rights are protected. In relation to my judicial temperament, the attorney was not in court on either the appearances. I see that on the second appearance he quotes a portion from the record, which he seems to suggest in some way shows that I was intemperate. In fact on the contrary, if one reads that, one sees that I was being very cautious to make sure that he was properly represented in the matter. That is what comes through, and I specifically asked his counsel, who was the counsel for the plaintiff in the matter, I specifically asked him to tell me whether he represented both the attorney and the client, because I didn't want to deal with the matter if the attorney was not represented. He then went outside to take a telephonic instruction and came back to say that he indeed represented the attorney. I think that the comments are not well placed in relation to the judgment, and they're regrettable, but I think they come from a place of hurt.

Nkosi-Thomas: Has this matter been reported to the bar council, do you know?

Fisher: No, it's not been reported to the bar council.

Commissioner Ntsebeza: The death penalty is outlawed in the country, the Con Court having held that, amongst other things, its inhuman treatment. Now, the consequence of course has been sentences like two death sentences and hundreds of years in jail, life imprisonment, where people conceive life to mean life. I just wanted to get your ideas about whether those kind of sentences themselves are not cruel and inhuman treatment, and how one balances philosophically, the one extreme of imposing an endless period in jail, when there is an anticipation that in a normal and democratic society there is provision for rehabilitation or a possibility for rehabilitation?

Fisher: I think that's, with respect to you, a very good question because as I said one of the things that one needs to do is temper punishment with mercy, so when one is faced with heinous crimes, I think that one has got to shy away from having emotional reactions to it, and on has got to look, take into account the rehabilitative aspect which is an important aspect in the imposition of sentencing. Because I think that if a person is put into prison under circumstances where there is no respite, and there is no ability for him to enter into any, or her, any rehabilitative process, one loses one's sense of aspiration, one loses one's ability to progress as a human being, and I think one needs to be cautious

about life meaning life under those circumstances. I think life should only mean life when the protective aspect is something which comes to the fore, because there may be certain circumstances where somebody is not able to be rehabilitated, and society has obviously got to be protected, but the rights of the prisoner have also got to be regarded as just as important in the weighing exercise.

Commissioner Stock: I know in your earlier responses you have indicated that you are very passionate about the mentorship and training of the young advocates. Could you please kindly share with us some of the challenges you may have come across, and any good success stories briefly?

Fisher: I think there are very real challenges that are facing the Bar in relation to pupillage, and one of the major bars to entry into the profession is poverty. I've heard stories of young pupil advocates having to sleep in their master's chambers the night before a trial, and wash out their shirts in the basin at chambers, and try to dry it on the radiator, so that they can be able to be at chambers because they didn't have the taxi fare to get in, to go to court. These are not isolated incidents, it's all very well when one comes to the Bar and one has a measure support, familial support or you've been working and then put some money away, because you don't make any money at the Bar and you probably not going to earn very much once you qualify. Broader than the Bar, commercial enterprise, government, needs to be mindful of the fact that there are people who are not able to become advocates because of their personal circumstances, because they are not able to escape the cycle of poverty that they find themselves in. And I do think that there have got to be programmes put in place, there is a bursary system and I can tell you it is not enough. More is needed. I know some of the groups do give bursaries aside from the Bar's bursary, but people need to be helped because it's the only way we are going to get a properly representative Bar. So those are some of the main challenges.

Stock: Thank you Advocate Fisher, my last question to you would be with regard to the principle of gender transformation, what's your view on it? Do you believe that it should only be applied on the basis of merit and capacity, or do you believe that it should be applied across the board?

Fisher: I think that there must be application of the principle on the basis of, obviously when one is looking at judges one wants competent judges, but I also think in relation to potential, it should be applied, because the bench, I have found, to be a very nurturing environment. The people that run the Johannesburg and Pretoria court have been careful to make sure that judges are given some on the ground training experience. I was asked by one of the senior judges, for example, to allow three judges who were going to become acting judges to shadow me in my court. That sort of programme allows for a growth in relation to people who have potential. So whilst one wants qualifications, and judges have got various attributes, its not only about being clever, you have to be compassionate, you have to have some experience on the ground. So I think that merit is one thing, but we need black woman in positions of authority and power, and to the extent that they need

mentoring, they should be given that mentoring, and they should be given the opportunity to take the office in the context of gaining experience and being mentored.

Mogoeng: Thank Advocate Fisher, you are excused.