Judicial Service Commission Interviews

5 October 2016 – Morning session

Gauteng Division of the High Court

Interview of Advocate N Davis SC

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Chief Justice Mogoeng: Good morning Advocate Davis

Advocate Davis: Good morning Chief Justice.

Mogoeng: What are your qualifications?

Davis: Chief Justice, I have a B Comm, LLB and an LLM

Mogoeng: What was your area of specialisation at LLM level?

Davis: Well currently I think I said 40% Constitutional law and then administrative law and then about the same Commercial law and then Insolvency, and when I started at the bar of course, also criminal trials. I was an attorney previously -

Mogoeng: No, carry on.

Davis: Well during the time of being an attorney, of course I was a junior attorney doing a very wide selection of work at the bar, this will be my 27th year at the bar. The work has progressed more to civil work, commercial work and civil litigation which then includes appeals, trial work and opposed motions.

Mogoeng: You had a fairly busy practice?

Davis: Yes Chief Justice, I have been fortunate

Mogoeng: And for how long in all have you acted as a judge?

Davis: Chief Justice, I tried to ascertain the specific dates of the years. For the initial years I was unable to do so. I was awarded silk in 2006. I started acting at that time, not started acting but from then on did acting stints initially, then as part of the collaboration between our bar and our Judge President, senior members of the bar assisting with the back log in criminal appeals. Those were pro bono acting stints. I'd seen one of the comments of the parties, they might have made a more accurate calculation, they estimated about 16 months. I think that might be an over exaggeration, it might be closer to 14 months if one adds all the different terms.

Mogoeng: And how did you find your acting stint?

Davis: Chief Justice in our division as you would know, we, that's particularly Pretoria - is the busiest division in the country - which means that of all the rolls, be it appeals, trials, unopposed motions, opposed motions,they are very congested and very busy, so it puts presure on the judicial officer to timeously perform the work and render judgments. I have always at all times diligently tried to do so, I don't have outstanding reserved judgments. I have compiled a list previously of my judgments. I haven't calculated, but I think on average, even if its reserved, the period of reservation would be a month or less. So I found it challenging but enjoyable and, and I believe I discharged my duties at every time I would act.

Mogoeng: Let me ask a question that I might not ask other candidates, just to take advantage of your presence here. I daringly agreed to a two hour radio interview recently and one of the practitioners in Pretoria called me, and this was the complaint. Papers are often in Afrikaans, I have to charge my clients more because it takes me longer as a person who doesn't understand Afrikaans to grasp the message communicated in those papers. Can't anything be done to use English as the language of record, and then of course a meeting was held and a resolution was passed that English was the language of record. What do you think could be done to encourage everybody to use the language that we know almost all practitioners understand?

Davis: Yes I agree Chief Justice, if English was not the first language it's the reasonably common second language to all the practitioners, and if that principle relates then to practicality, to speed, to easier access and usage of it then it should be enforced. There are judgments which say that a person is of course entitled to his language of choice even in his litigation, but then he should have the obligation to I think have his papers translated for the benefit

of the other who does not have that particular language as their first language and it should be universal. I think I've gone through my judgments again last night, well some of those, and I see I often start my judgment to say 'well the papers were in Afrikaans but the judgments were in English', then I proceed with the judgment in English. Or even if some of the papers were in Afrikaans and I proceed to render the judgement in English so that it is more readily accessible and understood to all the others and I think that should be the principle.

Mogoeng: How do you handle it sensitively in a manner that does not suggest to those that are passionate to the use of Afrikaans that there is some kind of an onslaught against their language? What would you suggest? How do you bring them on board for the speedy finalisation of cases without antagonising them unduly, in other words?

Davis: Well, as a litigant as they utilise the court they should realise that the court is not only there for them and that particular case, but for others, and then they should understand that if any others want to find out what happened in their case, or even it is a case of a principle and others might want to rely thereon, then as a litigant they should then acceed to – even having used their own language - that the judgment, or dealing with the case is in such a manner that it also benefits other users of the same court, the same access to justice rights. But having said that Chief Justice, that will apply to all languages. It should not apply only to Afrikaans, even those who do not have English as a first language, or not even Afrikaans as a remote language should also be treated with the same sensitivity to know that in courts to make it practical we are doing it in English. It does not mean we demean or detract anything from your choice, but that is how it works practically best for everyone.

Mogoeng: But to the best of my recollection only once or twice did a practitioner use Sepedi in court and once isiXhosa in court or in his pleadings, but otherwise people have generally been using English.

Davis: Yes Chief Justice but that does not mean sensitive to their language, they acceed to use English.

Mogeong: Everbody loves their language. JP?

Judge President Mlambo: The spread sheet in front of you, I think it is on the left, I don't know if you have it?

Davis: Yes, I have it.

Mlambo: It depicts what I think are the work areas you were deployed to when you were acting.

Davis: Yes JP, except the references, in recess -

Mlambo: That's the early part of your pro bono acting stint.

Davis: Yes.

Mlambo: I was not JP at the time but I try to go into the records. I hope that accurately reflects the pro bono work you say you did.

Davis: Not all of the first terms where it depicts recess work pro bono, some were not.

Mlambo: But, well it roughly depicts what you have done at least since I was JP from 2012 onwards?

Davis: Yes JP, I believe it does.

Mlambo: Now, you say in your application you do a fair amount of appearances, it's the predomiant part of your practice to appear in court?

Davis: Yes, chamber work being pleadings and rendering opinions also constitute a part of practice yes, but a lesser part.

Mlambo: You do a fair amount of drafting in terms of heads and pleadings, as you say?

Davis: Yes

Mlambo: Does, did that come in handy when it came to act to write judgments?

Davis: Yes, when one drafts heads of argument, it is to present a court not only with argument, but also to say to a court: 'this is my clients case, these are the facts, this is the law, this is how it should be treated, and in the end this is what the judgment should be, because this is the order my client seeks'. In dealing with the judgment, it also does the same, except it has to marry two competing sets of similar contentions, but it does.

Mlambo: You have done a fair amount of work in the unopposed court and the opposed court, and I see you also have a week in urgent court.

Davis: I think I had two weeks in the urgent court, it was a surprise.One was an allocation which wouldn't have been there, there was a late change in the roster and I ended up with a surprise second week in the urgent court. It was, I think, maybe it was in Johannesburg. I roughly had a look at the unopposed

court rolls, and I counted that I had presided over 23 rolls between our divisions – as you would know it equates between 50 or 60 matters per roll - which equates to over 1300 applications only the unopposed matters.

Mlambo: Now which of these courts do you regard as the most difficult, unopposed, opposed, trials, urgent court, or appeals?

Davis: JP, they each present individual challenges. The unopposed motion court in our division and to some extent in Johannesburg as well, poses a challenge of dealing with a large volume of matters in a reasonably short time, although one has a reading day prior to the day of hearing, one must really read carefully, diligently and at some speed to go through all the applications to know as much as each of the individual counsels do. That's the unopposed challenge, and then a ready knowledge of the law applicable. The opposed motion court, one has more time and one has the benefit of heads of argument, but it is challenging in the sense of opposed contentions sometimes on intricate issues of law, but then one has more time to deal with it. Appeals, one has the benefit of the record and two judges or more judges work together thereon, so that almost is a benefit although it is already sitting in appeal on another judicial officer's decision. Civil trials are almost in my mind the easiest because there is less of a pressure, there is less of a time constraint, and the matter developed as the witnesses present themselves as the cases do. And then one can still also at the end thereof call for heads of argument, written heads if counsel do not sufficiently address the argument. So those are the challenges I experienced in respect of each of the different branches of of of those applications. Urgent applications of course constitute almost a mixture of all four and, and has its own pressures. But but in the urgent court one was just handled as the matters come before you.

Mlambo: Coming to the list of judgments that you've provided, it provides a very varied exposure to areas to areas of law you were called upon to write.

Davis: Yes, JP.

Mlambo: Any comments about that, about the areas you've written judgments, has it prepared you for permanent judicial appointment?

Davis: Yes JP, I believe it does. One would, one should not be presumptious and say every time that you act it is easy, but every time that you act, you have the benefit of prior experience, and of course the wider the experience the better the benefit. So each of those are the areas, I dealt with them in the list from current to the oldest, I think reflects two things. I think it reflects the the variety of cases generally in courts, generally in our division. And secondly, it reflects the variety of matters in which a judge is called upon to to adjudicate, and then if he applies his mind, he can and as he should do give a judgment in different areas and not only deal with matters which sometimes

appear to happen procedurally by posponements etcetera, this should be a merit judgement.

Mlambo: I've counted a total of 112 judgements that you've written, I've just excluded the unopposed motion court weeks that you've reflected in your spreadsheet. Would that roughly accord with your own records?

Davis: Yes JP, these I think are 132 which I've extracted from my bench books. I went back to my bench books, and from those that my secretary has been able to produce which she has typed and from those written in my bench books and my notes, these were the judgments I could extract therefrom.

MEC Lesufi: I can see you have listed the case of the late Temba Nyati, MEC for Health in Gauteng, as one of the cases that according to you changed how state organs need to respond to some of the judgments that the bench passes, and you specifically indicated the issue of state liability, and in this matter, unfortunately by the time the case reached the Constitutional Court the applicant died -

Davis: Yes, he passed away

Lesufi: Is this, is it something that you feel needs to be attended to, where justice is delayed, wheels of justice grind slowly to the extent that people that tend to benefit out of judgement of courts unfortunately live and die before they receive any benefits?

Davis: Commissioner unfortunately, that appears not to be an isolated case. In my judgement – which went to the Constitutional Court – I relied on judgments in various other divisions, particularly the Eastern Cape where similar kinds of hardship were experienced by citizens who were entitled to even welfare or disability or pension payments, and the delays in – as you say wheels of of government – prejudiced them, and if they were then to come to court and say to enforce it and it then takes too long to enforce that their hardship is increased, not necessarily to the extent of the late Mr Nyati, but any hardship, then it is something that needs to be addressed. It is, it makes a government and us all more accountable if we cannot through our own processes protect the most vulnerable.

Lesufi: My interest, what made you to leave the law fraternity, I mean you were a candidate attorney 1985 and decided to join the army as a national serviceman?

Davis: I am sorry Commissioner I no choice in that.

Lesufi: Of conscription and that?

Davis: Yes.

Commissioner Ndoni: In your letter of nomination from the AFT, they indicate that in your capacity as a chair you initiated a meeting with the state attorney Pretoria to raise two issues, one the briefing patterns and secondly the late payment of fees for the juniors.

Davis: Yes.

Ndoni: When was that?

Davis: Justice I tried to, since last year when I was deputy chair, to initiate that as we couldn't get sufficient written responses. The meeting referred to in the AFT nomination was in March of this year.

Ndoni: Have you seen any progress on the matters that you raised with the State Attorney? Has there been improvement in the briefing parties or in the late payment of the fees?

Davis: Justice unfortunately not, or if there is any progress it is too little to be visible. Yesterday, before even coming here, two black female juniors of one year standing came into my office to say 'please can you do something about the following', and their complaints were exactly the same as those posted by me and the bar council. I can't claim sole credit or responsibilty for it to the State Attorney in March of this year. I have also had very unsatisfactory responses to letters enquiring as to progress, as to implementation of briefing patterns, as measures to pay particularly, my or the bar's juniors. And a meeting which was to happen this week has also been cancelled. So unfortunately, my answer is I have not seen sufficient response.

Commissioner Nyambi: Are you abe to speak any African language?

Davis: Unfortunately Commissioner, apart from greetings and picking up words when people speak, I am not fluent in any African language.

Nyambi: Are you involved in any attemps to improve with regard to that?

Davis: Yes, yes. I, every time when I meet my colleagues or when they have their own separate meeting of the AFT, or they start talking they start switching to English, but I'd like them to then carry on so I try to pick up, also I acquired language courses, but I must confess practice intervenes and I am not fluent in any of them yet.

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

Davis: Sorry how can language, race and gender legitimise confidence in the judiciary?

Nyambi: Yes.

Davis: Well, if one were to look at our history, and one were to have a single race, single language judiciary, then virtually everyone else who appears before such a bench, might say 'how can I be sure that I can get a fair trial when the person does not know me my language or my culture?' The more diverse the judiciary is, the more the perception and – more than a percepton – reality of a broader consideration of of issues appear, and the more anyone who can then appear can then say that I have now more confidence in the judiciary. That should relate to legitimacy, but on the other hand if there is a representative judiciary, - it should be legitimate in any event - and the manner in which it reaches its decisions and and judgments should give itself on merit legitimacy. Because the composition of the bench is not a guarantee that a Zulu person acting for a Tswana might not have the same perceptions as a Venda person appearing before a white person, so of course a transformed judiciary, and that's why I often use the word transformation as it does entail race and gender in its composition. A transformation should be more in the mind than openly in that representivity. I hope to have answered your question Commissioner.

Commissioner Didiza MP: In your questionnaire I just want to pick up two issues. One that relates to an article that you regard as the most significant which contributes to law, you did mention where the article was, but you didn't give motivation of what was the article about and what was its contribution to law.

Davis: I'm sorry Commissioner, was that about a publication?

Didiza: Yes.

Davis: That is when I started at the bar, or shortly after I started at the bar, and I saw how practitioners at the bar dealt with – in that instance – expert witnesses which was different from the experience which I had as an attorney, and the article was about being expert witnesses. Subsequent to that, however, at our bar in particular, we have developed training in workshops which we do for pupils particularly, but also for practitioners in dealing with expert witnesses, and we do those, those workshops annually. So I hadn't had an opportunity to carry on with that. But that was what the topic was.

Didiza: The second question relates to your contribution to the transformation of the Pretoria bar, which you cite in the questionnaire. If you can just briefly say what were the challenges that relates to transformatiion that you had to confront in the Pretoria bar?

Davis: Primarily two. The first one was, the bar was historically – as was other institutions in South Africa – mostly white and mostly male, both had to change. Its difficult to chang an institution which is voluntary, where people of their own accord come. So what one had to do was to make it - and that is still the mission statement which I formulated two week ago for the bar – is to make it not only a service provider of choice to attorneys, but a place of practice of choice of practitioners. So when I hade to encourage people of colour and more females as well to make the bar a career, and the Pretoria bar a place to practice. And we have– I would not say managed to do that because transformation is a progressive, continuous progress. But for example, initially there was no requirement on race or gender when pupils were accepted. We've changed that to progress from there, should be both should be factors. We've changed that over the years to say, the proposition was it should be 50/50 as we do with co- governance with AFT together with, Motimele SC was then chair or deputy chair, he and I changed that to say it should be not a 50/50, that should be the bare minimum of a 50%. We've increased that. I've done so for the past year – that was the proposition accepted by my bar council – to increase that to 60% of pupils which have then been admitted per year, to be then race compositions. This was changed to not less than 60% of our pupils are then judicially black, and then we add above that then the gender qualification. The position is to move that up to at least 75% within the next year. That is the one challenge starting at the bottom of the bar, the junior where people come to the bar. So the one transformation challenge was to change the bar as itself. The other challenge is - of course we're a referral profession – is to change those who give us work, or those who give the advocates work. And then we had to, one has to - it was a difficult thing to change the minds of those who give the bar work to say give it in a different manner, and that's how we get to briefing patterns and that's how I get to talking to the State Attorney to say 'you as a state institution are doing two things, you're prejudicing my transformation programme or the bar's transformation programme were we have transformed and we have new black juniors. For example you don't pay them and then they can't pay their own bills and thereby again prejudice transformation'. Those were the two challenges that we had to meet and which my bar council and the bar council, if I am appointed I'l leave behind, are to progress on on that path.

Didiza: That's the last question on that. On the gender dimension I hear you have put together race and gender minimums specifically there, but from a gender perspective, what would you say had been the challenges in terms of the transformation programme?

Davis: There is again more than one. Females, or gender transformation has been easier in the pupilage stage and the junior stage, but then unfortunately the retention of female advocates is a difficult thing to do, because of their

own personal reasons, family or otherwise, they leave the bar. The other more difficult thing is of those who remain at the bar. It's dificult to get them to apply for and progress for silk applications or senior status. I have been asked about this before by various people, but I can't force unfortunately women to apply for silk. And then it leaves the bar unfortunately with a low percentage of female silk or senior practitioners. I talk to the female practitioners on a daily basis, and I think now our exhorting them to do so have paid off to an extent, because in the next month there will be the consideration of the applications for silk next year and I think on a rough estimate – I can't recall correctly – the applications are closer to 50/50 on gender than ever before.

Acting President Maya: Thank you Chief Justice, Good morning Mr Adams.

Davis: Err, Davis

Maya: Did I say Adams, sorry, I am very sorry. I see that your practice has been quite diverse, but you do not appear to have any experience in criminal law, and it does not appear thatyou have done any work in that area in the High Court as well. Now I raise this question with you because it's a big concern for me. As you know, criminal law is an important component of court's work, all judges are expected to do it, and, I think in our push to get judges who are efficient in commercial law, in the, I'm saying the next areas of the law, the criminal law component often gets overlooked. Now, the concern is this, in those cases you have an eminent silk, for example, who is now a judge, who was an expert in shipping law, who did not do any criminal work at all, and you have this vulnerable need again who are often represented by lawyers from the legal aid board, pardon me JP Mlambo, who more often than not don't have much experience either. And at the end of the day you have judgments that are, well they show that the judge did not have the very fundamental principles in this area of the law, and they give judgments to the prejudice of the litigants. So that's why I'm raising this with you. Do you think your seeming lack of experience in this area might disadvantage you when you're presented with that kind of work, if appointed?

Davis: Justice firstly, it is only seemingly so. One of the first reported judgements that I appeared in was a criminal matter. When I started practice, apart from trials, during the phase when the Criminal Procedure Act was amended and thereafter during the interim Constitution, I was fortunate to appear in your court on 13 occasions in criminal matters. I have since not been in a reported criminal case, but I have done criminal work and on the stints that I have acted, - well, initially I started even helping with the backlog on criminal appeals – I've counted roughly, I think I have given 32 judgments in criminal matters. One of them included in my bundle was a judgement of a full bench, where I wrote the judgment and the other two judges agreed with it. It was also a criminal matter, it's the one of *Motau*, it is also in the bundle. Apart from the criminal appeals and the criminal judgments, one also deals

with in the High Court division, with reviews of criminal cases and then bail applications, one also deals with bail applications, bail appeals regularly. I think in my list of judgments there are at least two bail application judgments as well. So firstly, I don't think it is that much of a lack, I might also mention it, now it occurs to me, I recall that during the time I appeared in the SCA, in those 13 matters I was also busy with my Master's degree in one of the sections, and one of the sections required a choice, a small thesis, and I did mine on the death penalty as it then occurred. I had exposure to criminal work both as an attorney and as a counsel; I acted in trials, and reported in at least one a criminal matter. And I have been dealing with criminal matters then at least on the appeal as a judge. I do not think that I have any lack or understanding. I have not, in matters that I have dealt with, felt hampered or when, as you know two judges or three even sit together on an appeal, even in our division. So there's a roll of six criminal appeals per day, if three of those days in a week between the two of you, you debate the matters, the issues and in our debate I've never – or in our debates with various other sitting judges – never, without being presumptious, realised I have a shortage in my experience or a lack of understanding in criminal law or criminal procedure law.

Maya: I am satisfied Mr. Davis. I won't call you Adams again. Thank you.

Davis: I'm not sure who should be more upset, Mr Adams or myself.

Commissioner Malema MP: I heard the answer you gave on the military, that you had no choice.

Davis: Yes

Malema: You want to stick to that answer that you didn't have a choice?

Davis: It was the law at the time.

Malema: But you want to stick to the answer that you didn't have a choice? You didn't have a choice, is that the answer?

Davis: Well, apart from being a concsientious objector and then refusing, then leaving the country, I believe that at the time I didn't have a choice but to comply with the law.

Malema: But you had a chance, you had an option to defy the unjust law. You didn't have a chance? You had a chance. You had an option to defy that unjust law like many others did. Why didn't you do that?

Davis: I percieved at the time that the law if it is then to assist the country in protecting itself, that was a portion of the law that I could align myself with, and I did not otherwise deem that part of the law so unjust to refuse.

Malema: You percieved at that time that it was a correct law. Was it a correct law?

Davis: It was a correct law in the sense of getting a military force in the country. It was an unjust law in the way in which the law operated and in which it was part of the machinery of the state at the time. It was unjust in how we went outside our borders and committed all the things that was ordered to do.

Malema: was it a correct law?

Davis: In that sense then Commissioner, no.

Malema: No but you gave me two answers earlier. I want to know if that law was a correct law? Was it a correct law? Did you comply with it? The reason you complied with it, was it, it was a correct law right?

Davis: I said the law was correct in so far as it enabled the state to have a military force to protect itself. Its application in how that was utilised was incorrect.

Malema: I'm not asking the question whether it was applied correctly, so you're answering a question which was not asked. My question was, was the law correct?

Davis: As a general application, the law in itself yes.

Malema: Can we do the same law today?

Davis: No.

Malema: Why? It is the same law the correct law, it can't be correct in 1985 and wrong in 2016?

Davis: Because we've seen how that law was then incorrectly applied. There's still the law comprising of the military which defends the country, that does not currently though however contain a perscription of the citizens and does not currently allow those citizens to enforce unjust mechanism of state.

Malema: You have conducted a very good interview, you're just about to mess it up now. I regret why I came in because I should have just kept quiet. Maybe I would have saved you, but since we are here let's canvas this point. I

am still saying to you I am not talking about the application of the law. Was the law right – I'l come to the application – and your answer is yes, the law was right. Because it was a correct law, can we still pursue the same law today, since it was correct and then we subject your son to the same law? Can we do that?

Davis: No, we can't.

Malema: Why? 'Cos the law was not correct. That was a bad law, do you agree now? People must have a choice, they must not be forced into the military. They must choose to join the military.

Davis: That is correct.

Malema: So it was a wrong law. Do you agree it was not correct?

Davis: Yes Commissioner, I agree.

Malema: Now, why did you comply with the wrong law, when you had a choice to defy, take an AK 47 and defy the unjust law? Why didn't you do it? Madiba has done it. Slovo has done it. Ronnie Kasrils has done it. Why didn't you do it?

Mogoeng: Commissioner, you can still put your question, candidates are often intimidated before they even come in. Just put your question, and please don't raise your voice. Please?

Malema: I am not fighting CJ, we speak differently, all of us.

Mogoeng: I understand, but it may not register that way to the candidate who's only here to put his point across. The more forceful the voice, the more many candidates tend to be. And I would be failing in my duty if I don't intervene because it is going to look like I am not protecting the candidate. The next thing he doesn't perform in circumstances with a more moderate voice we would possibly have would peformed. That is all I am appealing for.

Malema: CJ I don't have a moderate voice that's who I am. You are asking me to be something I'm not. You are asking me to be something I'm not and I'm this with this candidate, unless there's something special about this candidate. That's how I've conducted myself since I arrived here.

Mogoeng: Well -

Malema: I don't have a moderate voice. I don't know what moderate means.

Mogoeng: Well, put your point across -

Malema: I've asked the question.

Davis: Commissioner, the portion of the law which then required someone to do his duty to protect his country, was what I responded to. I did not at that time perceive it to be necessary to break the law, to take up the arms you mentioned others have done so. History has however shown they were correct to do so. Those laws are fortunately not with us, and should never be with us again.

Malema: So you chose the wrong side of history and it's now catching up with you, see? It's of your own making.

Davis: Commissioner, history is what we had and what we dealt with. How we deal with our future is in our hands.

Malema: Now you were asked about the language. I am trying to be moderate you see.

Mogoeng: I think you are now.

Malema: You were asked about the language, and I want to just briefly converse that point. Which African language can you speak?

Davis: I can't speak any African language. I can at least greet people in isiZulu, in Sepedi, in Setswana, and I can ask how they are. I can do very little other than that.

Malema: Can you greet me in Sepedi?

Davis: Dumelang.

Malema: Oh ok. Now why are you having a difficulty knowing our African languages?

Davis: Why do I have a difficulty?

Malema: Mm.

Davis: I am working on that difficulty, I have language courses but I don't know why it does not come readily to me. Perhaps because of the diversity, because one does not sit with a specific language for a period of time.

Malema: No just one, I don't mean all of them. I would be very comfortable if you had to say to me at least speak one African language, 22 years into

democracy. You still can't express yourself in any African language. Is it because it's inferior? It's not important to you?

Davis: Commissioner Malema, and which one in Pretoria should I choose of all those colleagues or the practitioners or those in Pretoria?

Malema: No, I said any African language. The choice is yours. Why are you not even knowing one in African language, in Pretoria the dominant language is there Setswana, Sepedi, at least one. Have you taken classes?

Davis: Yes, and I am working on it, but I can't give you an answer why now I cant speak African language fluently. It is perhaps because the practitioners, or those I deal with, are better than me in that they speak English, or in Pretoria in Afrikaans.

Malema: Now, what is racism?

Davis: I'll have to think of my own definition, now to my mind it is any way of thinking or acting towards any other person based soley on his colour, culture or background, and if that is what defines how you act towards him, then you are being racist.

Malema: What is a white supremacist?

Davis: Commissioner, I think it means different things in different contexts. But supremacy will then be when any group of society racially constitues exercises power over any other part of society purely because of their colour or race. White or Black -

Malema: Not knowing our African languages, doesn't it border on white supremacy?

Davis: No, with respect not.

Malema: You don't think you are so superior that you don't even have to learn our languages because they are so inferior and not important?

Davis: No Commissioner, not at all.

Malema: So if they are not that inferior and less important, why do you know Afrikaans and English and not African languages? Because the people you are going to serve there, majority of them are those Africans. Many of whom, particularly in criminal cases, can't even express themselves in Afrikaans or English , 'no there is an intepretor', that's going to be your response. Sometimes the interpretor, the intepretation gets lost. You are given a wrong interpretation, and you make your judgment based on the wrong

interpretation, where is justice there? If indeed you have considered all of this, and your reason is not because of white supremacy, then why didn't you take effort to know our languages?

Davis: Comissioner, it is so intepretors make errors, and I have heard them translate incorrectly, and we all know that sometimes the – in a criminal matter for example - accused answers a question whole paragraph and all that the and then he says yes. We all know it's wrong, then one should explore that. But I've never had, I repeat that with the practitioners and the system of intepreters there's sufficient assistance to follow the proceedings and I hear what you're saying, but what if there is a fault, what if the interpreter inteprets incorrectly? Mr Commissioner, the same will apply 'what if it's a person of a smaller language isiVenda and the Judge is Zulu and he knows nothing of Venda? Then the same can happen.

Malema: After this discussion do you see any need to double your effort in knowing African languages?

Davis: Yes, of course.

Commissioner Ntlama: I just have two questions, because many of them have been canvassed already. In your Section 4 under general, you made reference to the Constitution as an Act of 108. Should we be very concerned about the reference to the Constitution as an Act? Because as an academic I'm concerned about how and what I write. And secondly, on page five under Section 5, you made reference to the publications outside the field of law, where you answered by responding to various presentations that you have made. What is the distinction between a publication and a presentation?

Davis: I will answer the first question quickly. I was here at an interview before this commission last year, and was asked about the Constitution. I think I gave a very short answer that's its still the same. That is, to me law is actually easy or the application of law is actually easy because you have the yardstick of the Constitution to measure it against. Whereas the application thereof, or conduct complained of, or the dispute before the judicial officer is another story. On the second question, publication I understood to mean a written publication in a widely disseminated journal such as academic publications, often are the De Jure, De Rebus or any other academic publications in a specific field of law, be it intellectual property, labour law and the like.The presentation is a powerpoint presentation. Although there is a hard copy, it is to a more limited audience. It is not of wider publication accessible to all.

Ntlama: In respect your response to the Constitution, should we be very concerned that we are going to lose the cases on a technicality because the Constitution had long been amended. It's no longer referred to as an Act

number 108, it is a Constitution 1996. Because if we are going to lose the cases on a technicality, so it means that the quality of access to justice will be compromised.

Davis: No one would be presumptious to say that there can never be errors or even administrative errors. And any judgment should be such that it should not be incorrect because of a technicality. Technicalities of the nature of a error or a typographical error or a patent error, are easily corrected in terms of Rule 42. Other issues or decisions, I think my judgments speak for themselves, have been reasoned and researched they haven't been floored due to technicalities or technical reasons. I do not think Commissioner that there should be that fear if I've at least rendered 112 judgments. I am aware of once where I was overuled on appeal. But again one should not say 'I could never be wrong', because everyone can. That's why there is a procedure for leave to appeal. That generally there is not a fear of the nature that you mentioned.

Ntlama: Your second response, that a presentation is not a publication. I'm concerned because I am an academic. A presentation is not a publication because a publication, if we define it broadly, it means it is something there for public consumption. Because if you come and present a particular topic on this commission, it is limited here.

Davis: Yes.

Ntlama: It is not going to become archived for the future as it happens with what we write in academia, with what you write as well in your judgments. Thank you.

Davis: Commissioner, Chief Justice, I'm not sure whether I should respond to that comment. Thank you Commissioner.

Commissioner Semenya: Constitutional litigation in the main probes state action. If if a general statement can be made what is your impression, how have the state parties been fairing in this area?

Davis: As a general observation?

Semenya: Yes.

Davis: Commissioner, if one has regard to the press, it seems that the state has not necessarily been faring very well. If one has regard however to law reports, then each and every instance where the state – wait, before I carry on with that answer, one should always be aware of the separation of those who make the laws, legislatiture, those who execute the laws and govern, the government, I undersand that's where the state comes in in your question,

and then judiciary should apply the law and test the actions or the legislation against the Constitution. If the state does not fare very well, then that is part of the corrective measure which the judiciary then exercises as that arm of government. It does not necessarily, on the general perception that the state might not be faring well, a bad thing, it might just be that the judiciary as corrective measure is operating well.

Semenya: Your general impression, how has the state parties been doing from your experience on the bench and as a practitioner?

Davis: It does appear that the state does not fare very well. But having said that, in each and evey instance one must not have that perception in your mind thatis why I referred to the law reports. If one has got to the law report there's a fair consideration of each and every instance, be it a transgression or a testing of a state exercise of power.

Semenya: No I accept that judgments must be what they are, fair to their issues and correct on law. What would you say are constraints on judicial power constitutionally?

Davis: Well, the separation is not a constraint that is a ring fencing of the exercise as a judicial power. If an Act for example is unconstitutional, a court should then decide whether it's the whole Act, or only a section, and if there is a section which is unconstitutional, the court should then not make the law but then give Parliament the opportunity to correct the law. So the court should not stray across the boundary into the realm of the executive or the legislature.

Semenya: And you'd accept as correct that judges can do no more than what the Constitution authorised them to do?

Davis: That is so, but if there is a striking down of a section for being unconstitutional – the Constitution also empowers the judges - then particularly in that matter before them to to grant appropriate relief. The *Nyathi* matter was an example where the relief was granted to *Nyathi,* but the other corrective measures as to how and when execution should be levied against the state was left untouched in my judgment for the realm of the legislature, and similarly the Constitutional Court did the same and granted the state at least two extensions to amend the Act.

Semenya: Yes, judges strike down executive legislative or any other action as inconsistent with the Constitution because the Constitution authorises them to do so. Am I right?

Davis: With respect to the question, it doesn't authorise a judge to do so, it obliges a judge to do so.

Semenya: Okay lets use your terminology ‘obliges them to do so’. Why do you want to become a judge?

Davis: I’ve wondered about this question myself since the previous interview, no nothing about the questions Commissioner, but there comes a time in your practice where you must consider that if you remain in law and passionate about law and justice as you then are, whether it is sufficient to continue a career only as a sole practitioner primarily, for your own account, or whether you can do more and should do more and participate in the administration of justice, which goes broader than yourself.

Minister Masutha: Advocate Davis, you touched on the issue of transformation of the profession and in particular the role of the State Attorney. I thought it would be remiss of me not to converse further given the interventions that you have apparently made to try to improve the situation. Let me start by acknowledging that indeed, I personally have that impression from practical experience that there are challenges in capacity and efficiency of the State Attorney’s Office. One of the challenges that I want you to address me on is the right of a client to choose who should represent them in the context of the role of the State Attorney. If a government department, if a particular executive functionary believes that a particular practitioner is best placed, and to maximise the prospect of success in litigation, and therefore insists that they would want to be represented by X, given the fact that certain practitioners have their reputation preceeding them – whether justifiably or otherwise –how do you feel the State Attorney should respond? What should be the policy of government, rather let me put it, that was because asking this question, because we are in the process indeed of reviewing policy governing state litigation, and we can benefit from the experiences of practitioners in this regard. Should we adopt a policy as government that is imposing on client department as to how the selection of representatives for them should be done? Or should we leave to the discretion of the client themselves?

Davis: Minister I’m not really sure how this impacts on my ability to sit on the bench, but if I might make the following observations. Firstly your name -

Masutha: You are entitled to say if you feel the question is unfair on you, but intended to really judge -

Davis: Firstly Minister, your name tag in front of you is misleading, and I was surprised (*laughing)* and secondly Minister, I’ll be as brief as possible, yes, a client should be entitled to to choose the counsel, to have his attorney brief a counsel to maximise his success. But certainly a client is entitled, as his access to justice rights, to have his attorney brief counsel of his choice to maximise his chances of success, however that is not the general perception of how the state departments as clients and the state attorney works. Often

matters are of a generic nature, which means that there are a number of counsel, and then in particular counsel of colour and female counsel who can equally do the job of counsel currently briefed by the state attorney for that department. And often, if it's not of a generic matter, there is insufficient consideration of our perception of those state clients in considering alternate counsel to those who they have been used to do briefing, which leads then to skewed briefing patterns, and those skewed briefing patterns we percieve are continuing by the state attorney despite having been pointed out, and despite the reports on the briefing pattern.I know there are statistics which say otherwise, but if one has regard to to what appears in court, our perception is still that a state department does not go and sit and say 'you know what, must I brief what counsel A or is there a equally competent black counsel, or what about a lady barrister female counsel'. State departments don't do that. They just say 'I want X and I've always X and I couldn't care less what you the state attorney or anyone else says.' That is not a proper exercise of a preference of a counsel to maximise result particularly not in our transformative requirement society.

Masutha: The second question, I must say my limied experience is that there's a bit of both. But be that as it may, the second question relates to the contribution that the organised profession can make in promoting transformation in this regard. Are there any, and I'm addressing you as a member of the profession and a particular professional body, are there any specific interventions or proposals that as professional bodies, you can make to the state given the effect that you are more privy on a day to day basis of what actually transpires in practice, that you'd want to see as to a better way of monitoring and enforcing inclusivity in briefing patterns and related matters?

Davis: Well Minister, firstly your question is from the state point of view, from the profession's point of view in transformation it should not be only limited to the state, it should be limited to all institutional bodies. Not only state and NGOs, but also big corporate institutions. It's difficult for advocates to enforce that which is actually impossible to enforce, but it is hopefully possible to influence, because we are a referral profession and the attorneys then refer the briefs. But if for example it could be that every large institution, or every banking institution, or every state department when it briefs counsel says to its attorney or the State Attorney or private attorney "when you brief counsel on generic matters, where there is not a real difference on who the counsel is - anyone can move an unopposed application – at least confirm to me that you've done the following : you've taken race and gender into consideration and and your end result relates quantitavely to a transformation of a briefing pack'. Secondly if it is then anything contentious –

Masutha: Sorry can I interupt just to clarify my question, I'm specifically asking the question as to whether you see any responsibility on the part of

professional bodies to make an intervention and if so, how do you see that occurring in order to influence a change in that situation?

Davis: I see the responsibility on professional bodies and I see the responsibility of the General Council of the Bar, each bar council to promote the transformation to the benefit of its own members, and if that means meeting with the State Attorney or with Directors - General of different departments in contact with them to convince them that their current practices are insufficient in transformation measures, and that is what must be done.

Masutha: My last question relates to the regulation of silk or the acquisition of silk status. Do you believe that the profession should self-regulate when it comes to setting norms and standards so as to promote in terms of ranking, or do you believe that the state should be responsible for setting norms and standards that should determine who rises to silk, for example? I'm asking this question just to give context in the light of concerns that have been raised that in practice, there appears to be a bias based on race and gender that continues to prevail in this regard.

Davis: At our bar - the Pretoria bar – if there is a bias its in favour of African practitioners and female practitioners. There is a bias, and our protocol is open to scrutiny, and we've circulated it to your department and to other bars as well to follow. The difficulty is the percrption unfortunately is, if one was to in a year consider, having regard to the ratio between seniors and juniors, say recommending 5 silks to the Judge President, and of the 10 who apply there's only one black applicant, then it makes it difficult to make the end list representitive. But I think there are sufficient checks and balances in the way to the Judge President and the Minister that those who know the practitioners better, should be allowed to sel-regulate unless there is in the self-regulation skewness or bias. It is much of a peer review system, and in my composition of the silk Committee, of course the race and gender in the peers who review the others are already catered for, and that peer review is something that the state can unfortunately not do, because the state is not close enough to the fire or battle to see which are the best warriors, if I might use that analogy.

Masutha: The very last question that I want to ask is, in your opinion and based on your experience, do you believe that the profession - stick to the bar if you feel the side bar is out of bounds for you, unless you want to venture into that as well – has created sufficient welcoming, supportive environment for young graduates, who are non-white, as well as females in particular, to find the profession welcoming to come in large numbers, so that we can begin to see a pool emerging from which we can then produce silks, as well as elevate people to judges.

Davis: Minister, the first part of my answer would be not yet. Because sufficiently means that one has already achieved a goal. We are not there yet,

as it is a work in progress. The second question is yes, the pool is not only growing, but is already sufficient to meet the needs of the state for example, if there is a need for briefs. It is increasingly done so, the General Counsel of the Bar has at a general meeting last week already increased the bursary amount for new pupils; I can't recall the number it stands now at, but it is increasingly increasing. The bars exempt the junior members – from first year to third, to fifth year - from bar fees to encourage a practice and thereby remain in the bar, to increase the pool of juniors, particularly then African and female practitioners. So the answer is there is a pool, it is there to be utiised sufficiently so, but the short answer is sufficient as in end goal not yet.

Commissioner Modise: Earlier in your response you referred to writing on behalf of your colleagues, and I am just curious as to whether you have any view on judicial dissent, and whether you think dissenting has any place negative or positive to the development of our jurisprudence?

Davis: Sorry Commissioner, what was that last word?

Modise: Whether in your view dissenting has any positive or negative impact on the development of our jurisprudence? Dissenting judgments.

Davis: Thank you Commissioner, of course it has a place. In the most recent law reports, like in September there was a decision of the Constitutional Court reported, and I think the Chief Justice gave the judgement and there was two dissenting judgements.The dissent then sometimes is a general dissent to say 'no, I would not have allowed the appeal' and sometimes the dissent is 'I would also also have allowed the appeal but for the following reason, for something that can and should be added'. So a dissenting judgement can not necessarily be saying the principle judgement is incorrect, but can actually add to the value of the principal judgement by either adding another ground, or it can even then assist in showing that although there is a different opinion, the principal judgement is the correct one. I agree that dissenting judgments can contribute to jurisprudence.

Modise: Have you ever given a dissenting judgement?

Davis: Yes.

Commissioner Schmidt MP: Advocate Davis, the initial impression that you lack experience in criminal law field seems to be partially created by your own questionnaire, where it indicates 0%, practice consists of 0% in the criminal law field. It sits at odds with your reply that you have appeared in certain cases in the SCA.

Davis: I noted that last night again, and that should be a reflection of the current composition of my practice.

Schmidt: Then secondly, the LLM, which law field was it conducted through?

Davis: In Criminal Law and Procedure.

Schmidt: You indicated that there was one judgment where your - that one judgment where you were overturned on appeal. Out of all 112 judgments.

Davis: Yes, of which I know. The judgment that I was overturned on has been included as the first one in the bundle – *MBD Securitisation*. The general principles of law, there was no overturning, it was just that the full bench in our division found that on the respondent's version of not having had knowledge of the service of the summons, he should have been found to be incorrect and therefore judgment should have been granted against him.

Mogoeng: Thank you Commissioner you're excused. Thank you Advocate Davis.

Davis: Thank you Chief Justice, thank you Commissioners.