



JUDGES
MATTER

Judicial Service Commission Interviews

5 October 2016 – Afternoon session

Gauteng Division of the High Court

Interview of Ms N T Y Siwendu

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Chief Justice Mogoeng: Good evening Ms Siwendu.

Ms Siwendu: Good evening Chief Justice.

Mogoeng: Sorry to keep you waiting for this long.

Siwendu: I hope it's worth the while.

Mogoeng: You started off as a social worker – did you?

Siwendu: I qualified as a social worker, but I didn't practice as one.

Mogoeng: And for how long have you been a practicing lawyer?

Siwendu: I was admitted in 1995, so that makes it 21 years, Chief Justice.

Mogoeng: Which fields of the law did you focus on primarily?

Siwendu: Well after completing my LLB I was employed as a fellow at the Centre for Applied Legal Studies, where we conducted research in a number of areas. I was working in the labour area, and assisted teams who were looking at drafting and

negotiating aspects of the then interim Constitution. Subsequent thereto I served articles at Cheadle Thompson & Haysom, and worked primarily in labour and human rights law, and thereafter I started my own practice in 1996. My practice was primarily a commercial law practice in Durban.

Mogoeng: And did you get to appear in court, or did you often brief advocates to appear on behalf of your clients?

Siwendu: In the beginning when I was conducting labour law matters, I did my own appearances in the then Industrial Court. After establishing my practice I would do intermittent appearances, especially when there were urgent matters, and in most instances thereafter as the practice grew, I would brief counsel as and when the matter requires.

Mogoeng: Did you subsequently appear in court more regularly, so that you can gain some practical experience?

Siwendu: Well I wasn't the kind of attorney who handed over their briefs to counsel – I prepared my matters, and I would go to counsel for specific advice, and in most instances I would attend with counsel in court, even though I wasn't appearing before the judge myself, but I would be involved in the matters.

Mogoeng: Can I take it that you wouldn't have come here had you not believed that you are ready to be appointed to the High Court?

Siwendu: It has taken me a while but yes, I would say I am ready to be appointed, Chief Justice.

Judge President Mlambo: I just want to deal with your exposure in the High Court, just for the Commission to know what you did as an acting judge and how you found the experience. But perhaps let me start where we met. You are a rare breed in the sense that you ran your own practice, and then you were in a large commercial practice and that's when I got to know of you and invited you to come and act. I say rare breed in the sense that it is very difficult to find a black woman situated like that, who are there and available. What is it that you did to be in that space?

Siwendu: You mean to make myself available or to get myself ready to be here?

Mlambo: No - yes.

Siwendu: I think my CV demonstrates that I started practicing many years ago, and when I left Cheadle Thompson & Haysom I was exposed to very interesting commercial work, as trade unions then were diversifying into investments, which really gave me the courage to pursue commercial work. We were very optimistic then about the changes

that would come to bear in the country, and I saw a gap that there weren't a number of black commercial lawyers. There were a few examples here and there, and therefore I pursued that angle by seeking opportunities that enabled me to work as a commercial lawyer. It's been a long way to here for me, and it has required a lot of sacrifice and hard work.

Mlambo: I understand, and I don't want to venture there. I know the sacrifices that you have made. Your acting stints in the High Court have had their toll on your practice?

Siwendu: What happened was that my firm met with Cliff Decker Hofmeyr well before I was invited by you to act. My remit within the firm was to establish a corporate governance practice – something which I had loved for a long time and sought to establish. I had my successes in doing so, and also I had my lessons in doing so. The opportunity that was offered enabled me to come back to accepting that at the heart of it I was always a lawyer committed to the law and committed to constitutional justice, and the opportunity also enabled me to reinvigorate my sense of understanding my own intellectual abilities and affirming that given time and opportunity, one is able.

Mlambo: You've acted in the opposed motion court predominantly, and can you tell the Commission what your experience was acting in the opposed motion court – I counted six weeks here?

Siwendu: Yes. I enjoyed it tremendously, because of the variety of matters that come before one. I enjoyed the fast pace and the level of preparation that is required, even though in some instances there would be administrative glitches – one doesn't cry about that, and you work with what you've got. I enjoyed seeking opportunities to develop our jurisprudence, and honouring parties that appear before one by proper preparation.

Mlambo: Just before I forget this aspect, when you were acting and you had issues back at the firm, and I think the issue of supporting acting judges who have practices cropped up this morning. Can you tell the Commission something about that?

Siwendu: Yes, certainly. Depending on where one is there is an incredible honour and social contribution that one gains in order to come before the court and act, but there is sometimes a non-recognition of that contribution, and an expectation that one would keep their practice going and one would make their financial contribution, notwithstanding that one is not necessarily in practice. For me, the legal profession needs to accept that by making attorneys available to the courts is not necessarily a loss, but its part of the broader contribution that one has to make. One had to grapple with the tension of not being at work earning fees based on billable hours, but yet make a viable and valuable contribution to the broader society.

Mlambo: And you've had those instances where during your acting stint you had to request that I release you for short periods, because you were required at your firm and my door was not shut for that purpose.

Siwendu: Yes, and I thank you for that.

Mlambo: In terms of appeals, you've done eight weeks of appeals in total. In our discussions, you did say the criminal appeals really challenged you, because it was not an area you practiced a lot in, but you had no problem writing those judgments?

Siwendu: I had no problems and it reminded me that I had a good degree, in the sense that I didn't rest on my laurels at law school, I worked hard, so it reminded me of some of the work one was taught and it was quite interesting work.

Mlambo: In terms of acting in the High Court, am I correct that you were located within a circle of judges who were there to support you in case you needed any support?

Siwendu: Yes, and I am very grateful for that encouragement and support, because for a long time I had been working as a lone ranger as it were, and it made such a huge difference and it was such an encouragement for me to be able to sit here today.

Mlambo: Your practice and your exposure as an acting judge has equipped you to raise your hand, say you are ready to be appointed permanently?

Siwendu: I would like to think so, JP.

Mogoeng: Before I forget, what is the reason you think for people coming here, impress, get appointed and now we are battling having them finalise their judgments? What is your experience as you work with some of these people, because some of them come from where you acted? What is the problem? Why can't people get their jobs done?

Siwendu: It's quite difficult to answer, and it is a matter that concerns one deeply because it is a matter that affects the integrity, accountability and reliability of the profession. It's difficult to answer for others. I could certainly if there were shortcomings in my instance, account for them hopefully reasonably.

Mogoeng: And quite disappointingly, a good number of them are who we perceived as transformation agents – isn't it?

Siwendu: It is.

Mogoeng: MEC?

MEC Lesufi: I'm covered here Honourable Chair.

Minister Masutha: You, together with Adv Kgomotso Moroka were the two woman practitioners I appointed to the Legal Practice Forum, to increase the total number of the composition of that forum of women practitioners from four to six of 21. In circumstances where one would have hoped the profession itself would have taken the initiative to ensure, given the role of that structure, an attempt had been made by the profession itself to address the issue at gender representivity at that opportunity. Why do you think there is still this difficulty of the profession itself taking steps to ensure that women are afforded an opportunity to occupy leadership positions?

Siwendu: I think it's a mindset that shouldn't be looked at outside the problems of the country as we face them. It's a mindset of a non-committal to the Constitution, which is a social contract we committed ourselves to. In some instances, my own experience has been that money and the desire not to lose what one has are at the centre of that. It's a multitude of those factors, in my view.

Masutha: Sticking with the question of transformation, having practiced as long as you have and having observed on the ground some of the nuances and anecdotes out there, what is it that can be done to ensure that the profession transforms from within?

Siwendu: I don't think regulation on its own is sufficient. I think we need to work harder at thinking together about unlocking economic opportunities to enable practitioners to grow. If I may venture into saying, I think one of our major shortcomings is that we forget that we are a developing country and that we need to tailor our services accordingly. There are only so many JSE listed companies available to give mandates, and there are only so many state-owned enterprises available to give mandates. There is a whole segment of un-serviced communities, whether it is small business enterprises and the like that are yearning for accessible legal services – we need to unlock those opportunities.

Acting President Maya: I must first disclose that we know each other quite well, having worked together at the Law Commission, and that I'm one of the people who twisted your arm to leave the lucrative world of commercial practice and come here today. I'm not going to ask you any questions on your work in the legal practice and in the High Court – your CV speaks for itself. I just want you to tell us briefly what the nature and role of the South African Law Reform Commission is, very briefly and your specific role there, because many people, even in the legal field, do not know what it does and that it actually plays a very important role in the development of our law - just very briefly.

Siwendu: Thank you Judge Maya. The South African Law Reform Commission is a statutory body created in order to look at law reform broadly in society. Most of its work has been devoted to ensuring that all the legislation that is obsolete or not consistent with the Constitution has been revised, and that has been put to bed. The Law Reform

Commission is approached by parties who have specific issues where there is perhaps underdevelopment in the law or legislative lacunae, and they conduct intensive research in various areas in order to reform the development of legislation. Part of it passes through Parliament, and the most exciting bit of that work right now is that the regulatory model is starting to look also at socio-economic impacts of regulation and legislation, which is what we are working on right now.

Commissioner Singh MP: Just looking at the information you have provided, I'm just trying to establish domicilium. I see you were born in the Eastern Cape which is something where we have to accept where we are born. Your first degree was in UCT, LLB in Natal, you've got Durban contact details on your form and you're residing in Morningside in Sandton.

Siwendu: Well, I'm a South African citizen.

Singh: The question was domicilium.

Siwendu: I was born in the Eastern Cape and I've lived in most parts of the country. In 1994 my family moved from Johannesburg to Durban, and I have two boys whom I had to decide whether to relocate to Johannesburg. There are obviously deep family emotional reasons why I will not move from my home in Durban, because I need to ensure that notwithstanding my pursuit of my career, I still establish a home for my boys in Durban. Durban is now my home, however from a professional point of view I have been in Johannesburg, living in Johannesburg since 2012. You will notice on my form I had been registered with the Law Society of the Northern Province since 2000, because most of my work was coming out of Johannesburg, even though my base home is in Durban.

Singh: Thank you for that. I'm very proud to know that you're from Durban. When I look in detail at what you submitted, you've given reasons for two outstanding judgments from October 2015, which is almost a year, and I think this is a matter possibly for the Chief Justice to look at as well. Maybe we need to look 9.2 on page 15, and if you can just expand on this particular issue here, because earlier we heard the term 'justice delayed is justice denied'. How do you feel about this personally, and what do you think can be done to assist you in this matter so it doesn't become a mark or a blemish against your judgment?

Siwendu: I did struggle with 9.2, because it's not something that accords with my own personal values to serve, and this matter was elevated to the JP for assistance, and I have not rested on my laurels about it - almost every term I have been engaged in trying to extract this judgment out of the senior judge, and I have not been successful. I believe the JP has taken up the matter on my behalf at my urging. It is disappointing.

Singh: I asked that question Chief Justice and certainly it is a matter that we need to take up as the JSC, because like I said it is a possible blot against Ms Siwendu's name, but we need to investigate.

Mogoeng: For the record Commissioner Singh, the JP has the responsibility and does as a matter of course - in fact they submit to me on a three-monthly basis, all of them, judgments that have been reserved for more than three months, and they know when it hits the eighth month they must report that person to the JSC, and that is the responsibility of the JP to do that. Have you finished Commissioner?

Singh: Yes. The JP says he has done it, but we can talk about it later.

Mogoeng: The JCC will take care of it. Thank you. Commissioner Notyesi?

Commissioner Notyesi: Thank you Chief Justice. Mine is also not a question on this particular matter and I know the frustration on the issues of these reserved judgments, but I understand your commitment on transformation and you've been involved in all the structures of the Law Society. Currently you are in the National Forum – can you briefly tell us what you do in the National Forum?

Siwendu: I was favoured with an opportunity to be one of the ministerial designates in the National Forum looking at transformation of the legal profession. I participated in that capacity in the Rules and Governance Committee and the newly constituted Transformation Committee. We are seized with helping the profession transition in establishing a regulator that is going to oversee accountability, access and all of the other aspects provided for under the new Act.

Commissioner Semanya: It seems to me the duty of a judge is to determine issues based on the evidence and law, and therefore gender is irrelevant in enabling somebody to determine an outcome of a dispute applying the evidence and the law – am I right?

Siwendu: My experience differs somewhat. I will use an example of a matter I was seized with very recently which is about to be reported I believe. This is a matter of *Volks NO v Robinson and Others [(CCT12/04) [2005] ZACC 2; 2005 (5) BCLR 446 (CC)]* which came before the Constitutional Court to determine the issue of the rights of a surviving spouse in terms of the Maintenance Act. When I read this judgment there were two dissenting judgments by Judge Mokgoro together with Judge Kate O'Regan, and one by Judge Sachs. I saw that in the reasoning of this judgment they took a contextual approach in determining the interpretation clause and the provisions involved. The majority court, which was male, took a contract law based interpretation to the provisions which said a lot to me about what gender as a factor, not a sole factor, brings into the awareness of the judicial process. This is not to say that this consciousness does not exist in male judges, it just depends on their orientation.

Semenya: Well let me cast these facts to help at least me appreciate the content of my question. South Africa has 242 judges, only 86 of them are women. That must be a problem because the function of a judge, or the ability to be a good judge, has nothing to do with gender – wouldn't you say?

Siwendu: I would agree, yes.

Semenya: And this Commission would be remiss of its own constitutional obligation if it does not make good of this distortion.

Siwendu: That is correct.

Mogoeng: And that extends to the Bar and the Attorneys Profession.

Siwendu: Yes indeed.

Commissioner Ntsebeza: Ms Siwendu, if you had to be recommended for appointment, pretty much in line with what Commissioner was suggesting in his question, what would be your position in the National Forum. Would it affect you being able to continue your services in the National Forum?

Siwendu: Yes Chief Justice, it would. The provisions of the Act prohibit a sitting judge from sitting as a member of the Forum.

Ntsebeza: Chief Justice, I don't know whether I should wish her to be recommended her for judicial appointment because of the role she plays in the National Forum.

Mogoeng: Thank very much, you are excused.

Siwendu. Thank you to the Commission.