



JUDGES MATTER

Judicial Service Commission Interviews

5 October 2016 – Afternoon session

Gauteng Division of the High Court

Interview of Mr E L Swartz

DISCLAIMER: These detailed unofficial transcripts were compiled to the best of the abilities of the monitor. However due to capacity constraints they have not been fully edited. We have therefore made the video recordings available that were taken during the interviews available. Those wishing to cite or quote from the transcript are encouraged to check accuracy with reference to the video file.

Chief Justice Mogoeng: Good evening Mr Swartz.

Mr Swartz: Good evening Chief Justice.

Mogoeng: We apologise for keeping you waiting so long. What are your qualifications?

Swartz: I've got a BProc.

Mogoeng: You've been practicing as an attorney?

Swartz: Yes, since I've been admitted in 1993.

Mogoeng: Did you appear, or did you spend most of your time in the office?

Swartz: No CJ. Even when I started serving articles, I was fortunate to be in a firm that exposed me to court work on a daily basis. When I started practicing for my own account, immediately after I was admitted in 1993, I used to do court work on a daily basis as well. When I got my Right of Appearance in 1997, as from that time up until now I have been appearing in the Magistrate's Court and the High Court, and in particular in the High Court, on a daily basis.

Mogoeng: In what kind of matters did you appear in the High Court?

Swartz: In the beginning of my career I did a lot of criminal defence work and I appeared on behalf of accused persons, and for the better part of my career, I appear for and on behalf of the Road Accident Fund in the defence of their matters.

Mogoeng: And obviously you've acted as a judge?

Swartz: Yes, I've been fortunate that the JP had invited me and since 2013, cumulatively, if I count in last week when I did service in the urgent court in Johannesburg, it's 55 weeks.

Judge President Mlambo: Mr Swartz you've added 6 weeks to the spreadsheet that I have in front of me, but that explains that I prepared it at some point in time.

Swartz: Yes.

Mlambo: I don't dispute what you are saying. You were in the Urgent Court last week, and that's because all the judges of the division had gone on a diversity workshop.

Swartz: Yes that's right.

Mlambo: I see you've done eight weeks in the unopposed court, as well as four weeks opposed motion, and that means you've done three weeks in the urgent court.

Swartz: Actually four weeks if I count last week, because I did two weeks in Johannesburg, one week in Pretoria during the recess and then again last week in Johannesburg.

Mlambo: You've acted quite a substantial amount of time?

Swartz: Yes I did JP.

Mlambo: Your practice in the last 10 years is predominantly third party litigation?

Swartz: That's right.

Mlambo: Third party work clogs our rolls. Any pointers as to how we can deal with this?

Swartz: Yes JP. I think the problem really is, from my personal experience, a lack of getting proper instructions from the client well in advance in an attempt to settle this matter. My experience is that if recommendations that have been made were followed up on and instructions were given to attorneys to settle these matters, these matters could settle well in advance without people having to come settle these matters on the doorsteps of the court.

Mlambo: So your experience would become very helpful in the judicial case management part of things, especially dealing with that kind of work?

Swartz: Yes indeed JP. I've also in Pretoria assisted the DJP in lightening the roll, because many of these matters do not deserve to be in court and could have been disposed of well in advance, before it got to court.

Mlambo: You've given us a list of the judgments you've written. The total is how much?

Swartz: About 70 judgments.

Mlambo: I've only come across one where it took you just under three months to write. All the others were less than that. How did you get it right?

Swartz: It's one of those matters where you know whoever is going to lose the case, is going to take you on appeal. Because it was not my particular area of expertise, I had to ensure that I digested the facts and digested the matter thoroughly. Counsel that appeared me before me invited me to advance law – enter into the area of new law. I reserved that judgment and read up on the law thoroughly, and lo and behold the party that lost did take me on appeal. The matter went to the SCA and the SCA judgment was delivered, and it was a reported judgment in the August 2016 law reports. The SCA found in essence that I was correct and the appeal was dismissed, and that is the judgment that took so long.

Mlambo: I see you've written judgments in a varied field. You've also written a judgment in intellectual property – that's a much specialised area?

Swartz: Yes it is, JP. I find it very helpful that one is given the files well in advance. The benefit in that is that you are able to digest the matters and the issues at large. So much so that by the time you get into court you are well aware of the issues, and sometimes you even find that you know the file better than counsel.

Mlambo: Let's just deal with one societal issue, Mr Swartz. I just need your insights on this. In the morning, we dealt with the reason why when you go to the roll call court you see black faces, and the things that go to that court always settle. Some should have settled long before it got there, but people come there so that they can get the first day fee, but it is black faces you see there. When you sit in the unopposed court you see white faces, because that is bank work. How do we deal with this? Are we blacks good enough to go and present settlement orders? Are we not good enough to deal with the involved areas of work?

Swartz: JP that is exactly my experience in this period that I had been acting. In the motion courts, especially the unopposed motion court, where it is predominantly foreclosures by the banks, my experience has been that all the counsel that appear

there are white people. In my experience as a practitioner and having been in, particularly the South Gauteng High Court on a daily basis for so many years, that court is clogged with black counsel, and 99% of the work is Road Accident Fund matters. The only reason they come to court is because they don't get instructions well in advance to settle these matter. That creates all sorts of problems and that is what I personally think is one of the reasons where such a lot of hassles and so much of wasted legal costs, because of practitioners not getting instructions timeously.

Mlambo: The acting stint you've done and the long years you've spent in practice have equipped you -

Swartz: Oh I'm ready. Yes, for sure.

Mlambo: I want to thank you, because sometimes I get stuck and I need an acting judge urgently, and you are always there to come and help.

Swartz: It has always been a pleasure and an honour to assist you JP. I found that despite the fact that I've been an attorney for so long, when I started acting and when I was called repetitively to act, it felt for the first time that I was actually doing something worthwhile, not for personal benefit, but for the benefit for the society at large.

Mogoeng: Just a quick one – we've worked hard with the Road Accident Fund and even tasked them to work with a judge experienced in that field to stop this practice of settling on the day of the hearing. Has the situation not improved?

Swartz: Not in my experience, CJ.

Mogoeng: Even in the past two, three months?

Swartz: Not in my experience, CJ.

Mogoeng: Then I know what to do thank you. MEC?

MEC Lesufi: You confessed to unprofessional or disgraceful conduct. And you are quite aware that society has taken a harsh stance against public representatives that are tainted one way or another. Why do you think you are able to be on the bench with this kind of conduct?

Swartz: There's a simple answer to that. As I disclosed in my papers, I was on the panel of attorneys with the Road Accident Fund, and now you had to instruct attorneys in the rural areas to enter an appearance to defend on a matter. The practice with the RAF, and any RAF practitioner will tell you that the RAF doesn't settle your account on a piecemeal basis. Your fees are paid at the end of the matter and it can sometimes take a long time for the matter to be finalised. With these rural attorneys, you give them instructions to please enter a defence on a matter for me. They enter the defence and

after a day or two after him having entered the defence he sends you a bill for R70. Then you say to him please serve a Rule 24(4) notice – he serves the notice and sends you a bill for another R40. Eventually, and this is how I explained it to the Law Society when I went for the disciplinary enquiry, I at some point said to them listen you can't send me bills for R40, R70 and R25 – hold your bill until the matter is finalised and when the matter is finalised, you send me one bill. We then take that bill together with our own bill and the RAF pays the bill at the end of a matter. It was a complaint from a rural attorney that this attorney is taking forever to pay my bill. It is true, and I pled guilty to that offence in terms of the rules of the law society. I must hasten to add that at the time I had many other attorneys in the office dealing with the Magistrates' Court matter, which I did not. The fact of the matter is the buck stopped with me, because it was my firm and that was why I had to take responsibility for it and not pass the buck to a junior PA in the firm. I took responsibility as the senior and the lead attorney in the firm. There was no dishonourable conduct, but it was unprofessional, because my colleague had to wait a long time for the payment of his fees.

Lesufi: What is the difference between an urban and a rural attorney?

Swartz: An attorney is an attorney, but the practice may be different. When I get instructed to do a matter in Johannesburg for instance, I don't need to instruct a correspondent attorney in the area in which that attorney practices for that attorney to go and serve papers and file papers in a particular court and on my opponent. That is the attorney that practices in the urban areas. We only instruct correspondent attorneys for attorneys we need to engage when I get an instruction for a matter that is adjudicated in Johannesburg, but the attorney is from a rural area.

Lesufi: But you emphasised the point of rural attorneys, so your understanding is that all rural attorneys across the country are not fit to practice or they got limitations.

Swartz: No, that is not what I said all. I never pass judgment on whether rural attorneys are fit to practice or not. All I said that an attorney who is out in the rural areas -

Lesufi: Mr Swartz, you blamed a rural attorney on the basis of this charge, so by extension therefore rural attorneys are unfit to execute their responsibilities.

Swartz: No not at all. If that's the impression I created then I withdraw it, because that was not what I meant. All I said, the reason for this charge laid against my firm, me in particular with the law society, was an attorney, let's call him a correspondent attorney if the word 'rural' attorney created the wrong impression. The correspondent attorney was dissatisfied with the late payments of his account.

Lesufi: My problem is that you are explaining the reasons, and when you were given a platform to explain those reasons so you must not be held responsible for this act, you

decided to plead guilty. Why can't you just accept there was a limitation and then we pass on this matter, rather than extend that blame to a rural attorney?

Swartz: I'm not sure I follow the question, but to try and answer you there. That is exactly why I pled guilty not to prolong issues, and in terms of the rules of the Law Society I did not pay the correspondent account on time.

Acting President Maya: The Law Society has expressed some concerns that there are certain audit requirements which you did not -

Swartz: Yes.

Maya: Has that question been asked?

Swartz: No.

Maya: Not yet, all right. Is that something that should worry us? Has it been sorted out?

Swartz: The Law Society wrote to me and said that the audit report was late, but the audit report has been furnished to the Law Society, and there is correspondence from the Law Society that says that the audit report has been received, and that the audit report was approved.

Maya: I have a letter dated 27 September 2016 that says: "Audit report for the period ending 29 February 2016 has not been received. The due date for submission was 31 August 2016." So you say it has been submitted?

Swartz: That's correct. The Law Society has written to me subsequent to that saying: 'Thank you, we received the report' and furthermore, 'the audit was approved'. I forwarded that correspondence received from the Law Society to the office of the JSC.

Maya: I don't have it in my bundle. Thank you.

Commissioner Ntsebeza: Thank you Chief Justice. This is a follow up question. Was it a question of you submitting it later than you should have done, or you were within time?

Swartz: The books were submitted to my auditors. The auditors sent an email to me sometime in the first week in September, asking me to sign some documents. Now I must hasten to add that the problem was mine, because at that point in time I was acting.

Ntsebeza: Mr Swartz, the question is a simple one. Was the audit report submitted later than it should have been?

Swartz: Yes it was.

Ntsebeza: Do you have a reason for that?

Swartz: Yes.

Ntsebeza: And the reason is?

Swartz: The auditors sent an email to me asking me to sign a particular form. I did not sign the form in time. I received an email from the Law Society, I think it was the 12th of September, saying to me that they haven't received your audit report. I then did the necessary immediately to ensure that the audit report was submitted, and the audit report was submitted and the audit report was approved.

Ntsebeza: We've been asking several candidates here about their proficiency in African languages. What is your proficiency in any African language?

Swartz: I admit Commissioner, shamefully that I do not speak any African languages and only speak English and Afrikaans.

Ntsebeza: You are a South African?

Swartz: Indeed.

Ntsebeza: In the area in which you grew up and where you live, what are the spoken African languages?

Swartz: I grew up in Eldorado Park and the African languages predominantly, from my experience, are Sotho and Zulu.

Ntsebeza: And you are not speaking any?

Swartz: No.

Ntsebeza: Do you have a reason?

Swartz: No, I cannot advance any reason.

Ntsebeza: Have you made any attempt to -

Swartz: Look, I will not profess to speak it fluently, understand it fluently, read it or write it. There is no excuse for me not being able to do this.

Ntsebeza: Do you appreciate that it is something that would put you in a better position when you are a judicial officer if you...

Swartz: Yes indeed.

Ntsebeza: What efforts have you made or what efforts would you make to obtain some measure of proficiency in an African language?

Swartz: As I said CJ, it is an area in which I shamefully lack and I will obviously have to do something about it. I cannot take it further at this point in time other than saying I admit.

Commissioner Nyambi MP: Maybe you can share with us what you think you'll do to deal with this issue of language?

Swartz: Me in person?

Nyambi: Yes – the rural language.

Swartz: I'll obviously have to brush up on it, as I readily admitted it's an area in which I lack, and there's just no excuse for this.

Nyambi: The manner in which you dealt with that question of that rural attorney that cost you to end up paying the fine – do you think that response of referring to that rural attorney was appropriate?

Swartz: What I meant by rural as I said earlier, I should have used the word correspondent attorney, because that is the proper term to have used. What I meant by rural attorney is an attorney situated in the rural areas which we have to use as a correspondent attorney in order to do the service for us. Again, as I hastened to add with the question by Mr Lesufi, there was no derogatory intent by using the word 'rural' attorney.

Nyambi: Do you think judges have a role to play to make our communities understand the role and function of our courts?

Swartz: Yes, in the pronouncement of the judgments and in the writing of judgments. I think judgments need to be written in a fashion, especially so that the parties appearing before you can understand it.

Nyambi: If you can take us through your understanding of the doctrine of separation of powers?

Swartz: As far as I'm concerned, because we live in a constitutional democracy, separation of powers is vital for the survival of our constitutional democracy, because it guarantees checks and balances.

Nyambi: Do judges make law?

Swartz: No. Judges do not make the law, they pronounce on the law.

Commissioner Singh MP: I'm just hoping Mr Swartz you do not blame a rural auditor for not having submitted your audit reports on time. In terms of the PFMA, even with government departments, they are obliged to submit by the 31st of August and if they do not, they have to inform the Speaker. You did say to us you received a letter on the 12th of September from the Law Society?

Swartz: Yes.

Singh: But yet two weeks later, on the 27th of September you still had not submitted this audit report. We see electronic records now that it has been submitted. I don't think a mere signature could have been the problem.

Swartz: Well, I assure you that a mere signature was the problem and that mere signature was mine. I was acting at that moment, but I do not want to blame my acting in court for the reason it was not done, because the responsibility was mine to ensure that it was done. I did do it eventually, but I should have done it in time.

Singh: The JP has spoken and your CV speaks to your technical expertise, what are the other characteristics that make a good judge?

Swartz: I think a good judge should listen carefully. I think a good judge should treat all litigants who come before him, irrespective of who they are, with respect, and a judge should hand down his judgments as soon as possible. In my experience, coming into court is unfamiliar territory for most people, and an unpleasant experience for many people. I do not think it is right to prolong the agony by having people wait forever for a judgment. This should be done as expeditious as possible, but still bearing in mind that the judge should apply his mind to the matter he has to deal with.

Commissioner Notyesi: You seem to be taking calling attorneys 'rural' very slightly. Can you withdraw calling attorneys 'rural'?

Mogoeng: Commissioner, he apologised and said 'let me rather say correspondent attorneys'.

Notyesi: Yes he must withdraw, because he can't call attorneys 'rural'.

Mogoeng: But he has acknowledged that. He apologised and said 'let me rather call them correspondent attorneys', and he has not said it.

Notyesi: I do understand Chief Justice, but from where I'm standing, who are these rural attorneys. This was a serious transgression hence he was fined. He continued to call someone he has treated unfairly a rural person.

Mogoeng: It's time for questions, not for comments.

Notyesi: Thank you Chief Justice. With regard to your audit that was submitted late, do you know that late submission of an audit is a transgression in terms of the Law Society rules?

Swartz: Yes I do.

Notyesi: And you know you can be charged for that?

Swartz: Yes I do.

Notyesi: As of now, what has the response been other than you having submitted the report?

Swartz: Nothing at all.

Notyesi: So it will be up to the Law Society to decide on that. Lastly, assuming you are sitting in a review of executive functions, what is the test that is used when you are reviewing executive decisions?

Swartz: I'm sorry the question is very vague.

Notyesi: You are sitting as a judge in a review application, reviewing an executive decision. What is the test that you use to determine reasonableness and rationality? What is the test that the court must use?

Swartz: Well, I fail to understand the question and I'm having difficulty understanding the question. I've been involved in many review proceedings, in particular in criminal matters, especially in Pretoria. The test on these matters basically is whether the Magistrate or the lower court had heard in coming to its conclusions.

Commissioner Malema MP: That issue of the characteristics of a judge, where you define how a judge must carry himself. Do you think you are fitting in there?

Swartz: I should like to think so.

Malema: Just repeat them for me. What makes a good judge?

Swartz: As I said, you should be able to listen and treat litigants with respect. You should try and pronounce your judgements, after having applied your mind, as soon as possible.

Malema: What is your first language?

Swartz: My home language is Afrikaans. I grew up in Eldorado Park speaking Afrikaans.

Malema: So English is your second language?

Swartz: Yes.

Malema: Sometimes trying to communicate we always try to look for better ways to describe certain things.

Swartz: Yes.

Malema: That's what happened to you when you referred to an attorney as a 'rural attorney'.

Swartz: Yes.

Mogoeng: Thank you very. Mr Swartz, you're excused.