



# JUDGES MATTER

## Judicial Service Commission Interviews

6 October 2016, Morning session

Gauteng Division of the High Court

Interview of Mr S A Thobane

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**Chief Justice Mogoeng:** Good morning Mr Thobane.

**Mr Thobane:** Good morning Chief Justice and honourable commissioners.

**Mogoeng:** So you studied at Turfloop, as it then was?

**Thobane:** Indeed I did Chief Justice.

**Mogoeng:** Yes. That's where you got your BProc degree?

**Thobane:** Correct.

**Mogoeng:** What have you been doing over the years?

**Thobane:** Over the years I have practiced primarily at Mpumalanga, I had a modest practice there and I have from time to time down work in major cities, but I have been based there throughout.

**Mogoeng:** Did you like many of us start with criminal work and maybe divorce, or was there something else maybe that you were doing, primarily?

**Thobane:** It is true Chief Justice, that is how you start out in the - the type of practice that you do your articles, if it is a criminal practice, an NPA practice, you follow that line and as soon as you get admitted and you venture on your own you also assume - life of sorts and it was like that with me as well.

**Mogoeng:** You've been in practice for 20 years now, am I right?

**Thobane:** Yes, correct, in July 20<sup>th</sup>.

**Mogoeng:** You've acted as a judge, and you've obviously enjoyed it or you would not have come here, am I right?

**Thobane:** It is so, it's true.

**Mogoeng:** Yes. What are the challenges that you encountered as an acting judge? Very briefly. What is it that you would suggest should be done differently to improve the environment? We have already been told is welcoming, what more could possibly be done?

**Thobane:** I think that as a prerequisite every acting judge who gets an opportunity to be called up must undergo introductory training, because the environment is different and if you had not been exposed to training you may struggle. But by and large my experience has been a good one, and I think the environment is helpful to someone who comes in without any experience.

**Mogoeng:** We do offer training under the auspices of the South African Judicial Education Institute but the attorneys hardly make themselves available, do you know any reason why? They used to attend while we offered them something, now that we cannot pay them anything at all, they do not make themselves available. Is there anything that could be done to help them take advantage of that opportunity?

**Thobane:** Chief Justice I believe that most practitioners are keen to attend. I was under the impression that there is limited space for the uptake, but I stand corrected.

**Mogoeng:** No, there is no limited space.

**Judge President Mlambo:** Mr Thobane, my role as the JP of the division is to allow you an opportunity to tell the Commission what you have done in your acting stints, what work areas you were involved in, what judgments you wrote and any other issues relating to your acting stints. In a nutshell, it is for you through my leading to tell the

Commission that when you say you are ready to be appointed, this is why. The first part I start with is the spreadsheet in front of you. In your application you said you spent about 69 weeks, is that correct?

**Thobane:** That is indeed.

**Mlambo:** It was this past term that you've acted for the whole term, am I correct?

**Thobane:** That's true, yes.

**Mlambo:** You - when the CJ led you, you explained that when you serve articles you follow the patterns or the work areas that the firm offers. You've done 16 weeks, it could be more with the 9 weeks added, of unopposed applications. What was your experience when you first acted in that court?

**Thobane:** Judge President, I think the first thing that strikes you is the complexion, for lack of a better word, of counsel who get to handle matters in that court. Africans are in limited numbers and whenever you hand out a matter or gets called up you find that its matters, you know normal procedural matters where there is an application to compel or this and that, but not something of substance. So that was the first impression that I got, and I'm afraid since having been on acting stints since 2013 that hasn't seemed to improve. That's the first impression I have JP.

**Mlambo:** But I'm asking of yourself about being able to deal with the work. You have done most of your acting stints in Pretoria as opposed to Johannesburg?

**Thobane:** Right.

**Mlambo:** What were some of your experiences with the volumes and complexity of the work?

**Thobane:** Well at first it was a challenge, but when you are willing to exert yourself and as for guidance at the start, as the environment is different when you come in for the first time, but over time I have gained experience. I have handled matters on all areas of the law. I think my exposure was rather broad

**Mlambo:** Maybe you can remind me, I don't recall me and you having had a fight about any "own goals" you might have scored in that court?

**Thobane:** It is right JP, it is not how I was raised to pick fights with elders, but I try to exert myself so as not to be on the wrong side of doing things.

**Mlambo:** My spreadsheet suggests that you did a third court matter in the third term. Tell the Commission what your third court matter is?

**Thobane:** There were two matters I did in the third court. One such matter involved the Tshwane Municipality. And another one related to a fight between litigants about custody and liquidations.

**Mlambo:** These are matters that are opposed motions, but don't get put in the opposed matters roll.

**Thobane:** That is true. Those are matters that involve senior counsel. You must give them the attention they deserve.

**Mlambo:** How long did it take you to hand down those judgments after hearing?

**Thobane:** Well at the end of the – I think one judgment was a matter of days, maybe two days. The other was longer maybe a week, but when I left the court I had delivered my judgments.

**Mlambo:** But now, your practice was varied, but you have been able to handle the work allocated to you in Pretoria, and I have counted something like 45 or 46 judgments you have written. And I think you were the second candidate who has done criminal trial work during their acting stint, and you have done the most, about 14 weeks in total. Is there anything else you want to tell us about your readiness to be appointed?

**Thobane:** I would like to believe, Judge President, that I have been exposed to all areas of the law and I have exerted myself on all fronts and I am ready and capable to take up the appointment. The judgments I prepared should go a way to speaking for themselves and I am ready to be appointed for judicial office.

**MEC Lesufi:** Good morning. I can see you studied during turbulent times at the University of the North, and you remained apolitical ever since, is that a correct observation?

**Thobane:** At Turfloop you could not be apolitical, you had to be political. Perhaps where the difference is would be where you do not put your colour to the mast, so to speak. I was involved in politics at school, yes.

**Lesufi:** And politics outside school?

**Thobane:** Politics outside school I have always kept it within my professional realm, ever since I was admitted as an attorney I belonged to NADEL. And anyone in NADEL

would say that NADEL is the political home of progressive lawyers, so whatever contributions that one would make, there were structures to address these.

**MEC:** But you represented some of the victims of the TRC. What were your experiences, and the kind of assistance that you provided?

**Thobane:** The assistance we gave was supportive in nature, we prepared witnesses and statements and more senior practitioners would then do the presentation and so forth, but I was a junior at the time.

**Lesufi:** I know you are a South African, and I have heard the experience that our Judge President alluded to in some of the cases that you presided over in Gauteng, What is your experience in Gauteng compared with Mpumalanga?

**Thobane:** There is no difference. I think Gauteng is - particularly the division I have been exposed to, Pretoria largely, I have also done matters in Jo'burg, but I believe the kind of experiences that one comes across in Gauteng is largely the same as would be experienced in other provinces.

**Commissioner Malema:** What is your take on racism?

**Thobane:** Good morning Commissioner.

**Commissioner Malema:** Let's start like this, what is racism?

**Thobane:** Well racism I believe is a system or a thinking that seeks to advance the narrative that someone of a different race is superior and that someone from another race is inferior.

**Malema:** What is sexism?

**Thobane:** Equally, sexism would take similar kind of narrative; it is when one believes that a particular sex is superior to another, and another is inferior.

**Malema:** What is ageism?

**Thobane:** Well the three questions are related in a way. Ageism is, I would like to explain, when someone of a particular age would not meet certain qualities because of their age.

**Malema:** Do you subscribe to any of those "isms"?

**Thobane:** No, I do not.

**Malema:** So what do you meant you cannot fight an elder?

**Thobane:** It goes back to how one was brought up firstly, and secondly it goes to the environment in which we work. The context of fighting an elder was in the context of the JP having said there was nothing that can be defined as a fight in our relationship.

**Malema:** So it doesn't matter how irresponsible this elder is, because you were taught not to fight an elder? So an irresponsible JP, who happens to be older than you, you will never fight this person because he is old?

**Thobane:** Well I guess it then depends on how one defines a fight.

**Malema:** But is that not ageism?

**Thobane:** I don't believe it is.

**Malema:** Here is an irresponsible leader, as old as he can be, one who doesn't comply with the Constitution, does not comply to the oaths of office, and all those things you would expect from an elder. But because I am brought up not to fight an elder I will not do anything; is that not a phenomenon of ageism?

**Thobane:** Well I would like to believe, taking that example further, that there would be structures, and there are current structures within the judiciary that would seek to address those failings on the part of the JP as described. It would not necessarily be up to me to pick up a fight, if there is a need for me to participate to bring to the fore what my experience has been, I would obviously participate, but within those bounds and with the respect and decorum I think it deserves.

**Malema:** Those kids who were fighting in 1976 went to the extent of defying their parents, others went into exile without the permission of their parents, others went to disrupt the activities of elders, kicking bottles and turning tables around. Mandela himself disrupted meetings of communist parties and turned tables around. So he was not properly brought up, because he fought old people?

**Thobane:** I wouldn't say so, I am sure they have their own personalities, everyone has their own personalities, and they have their own way of doing things. I would not necessarily label them as having not been brought up properly. I do not judge them, I do not label them.

**Malema:** So any judge that is scared to confront old people because they were old even though they were do wrong would mean that judge would be suffering from ageism, is it not? They would be unfit to be a judge because we do not want a judge who suffers from ageism.

**Thobane:** Well, if you choose not to challenge someone because of their age.

**Malema:** My worry is that the judiciary is constituted by a lot of old people, and you are going to have to fight with them, and among them your JP. You were brought up not to fight with old people. Is that not cowardice for a judge?

**Thobane:** No, it is not. The fight that has brought about this discussion is not a fight in the true sense of a fight, it is an engagement and as a colleague and an equal, if one is called upon to engage your senior, obviously you would engage, you do not refrain from engaging because someone is an elder. But I would not go as far as calling that a fight.

**Malema:** Thobane, you are the one that talked about a fight and we know the context which you were referring to. I am not talking about boxing or *Musangwe* in Venda; I am talking about what you and the JP were talking about. Do not bring in any other definition other than the one that you were talking about. You are the one who said you were brought up not to fight an elder because of what JP said. I am saying, in that context, if the JP was to engage in a conduct that would be unacceptable and would request you to take that up, would you be prepared to take up that fight?

**Thobane:** Again I repeat, there are structures within the judiciary that are meant to address such issues, and if I need to play a role in participating in those structures, I would play a role in that structure in the manner prescribed. I would not necessarily call that a fight.

**Malema:** Remember you are being called upon as a leader to take up a position of leadership as a judge, there is no structure called a judge, you are a judge, and you are being called up to confront things. So because of how you were brought up you were going to have to comply, because of how you were brought up. Because the comment was about your professional conduct. So when you find yourself in a similar position where you have to fight with him because of a professional related matter, but you were brought up not to do that, so what would happen?

**Thobane:** The example that you have actually given has assisted me. If I were to be given an unlawful instruction, I am duty bound to raise it with him and not to obey an unlawful instruction.

**Malema:** Therefore the story that I am brought up not to fight old people falls off?

**Thobane:** Well, it remains.

**Malema:** How does it remain when you have to fight with him about the issue which is illegal and he wants you to do it, so you are bound to fight with him?

**Thobane:** Well what remains is the following, firstly I still say that I respect my elders, I respect my JP, in answer to his question I indicated that I was not brought up in a manner where I was taught to fight my elders, we park that one. In a professional engagement, if circumstances would arise which would call upon me to utilise the structures that have been put in place within the judiciary, to challenge that which I do not agree with, then I would do so in that realm.

**Malema:** The question was about your professional conduct. You brought up the issue because you wanted to patronize the JP.

**Thobane:** Well I do not believe so. If that is the situation I created then I would like to correct that, because that is not what I meant.

**Commissioner Singh MP:** Thank you very much Sir, good morning Thobane. I think the work is “ukuhlonipha” in Zulu, but I agree that one can respectfully disagree. Mr Thobane, I see the Law Society of the Northern Province has sent the JSC a letter dated 27 September 2016 which relates to your audit reports for not one but two years. These were for the financial year ending 28 February 2015 and should have been submitted by 31 August 2015, but these were only sent in 10 months later, 22 June 2016. It seemed you have not learned from that because even this year your audit report which was due in August has still not been received. What credible explanation can you give the JSC on these two issues?

**Thobane:** Thank you Commissioner. The explanation that I can give is the following. Firstly with regard to the first issue, the one that has queries on them, let me explain the nature of those two queries. The first one relates to the calculation of interest on my trust account. Interest is collected monthly by the Law Society, in preparing the report for the Law Society my auditor realised that the interest collected did not tally with what the Law Society had in its audit report, so that was the first query that was raised. The second query relates to the audit report which my auditor filed electronically, having filed it electronically he did not sign in at the bottom. I have therefore engaged with him on those two issues to ensure that the calculation of interest on the part of the auditor does tally with that of the Law Society and to ensure compliance with the signing of the audit report. On the first audit report there was ongoing engagement between me, the Law Society and the auditor with a view to correct that. The second query on the outstanding audit report which is admittedly late; the auditor I am using I have been using him for more than 10 years and he just delayed and has not filed my audit reports timeously. I am embarrassed, but that is just how it is. Even on that one I have opened a direct line between him and the Law Society to expedite the filing of that audit report.

**Singh:** You are aware of the Public Finance Management Act, and you do realise that not submitting your audit reports on time without any credible explanation is serious

transgression of that particular Act? This borders on financial mismanagement. Are you aware of this?

**Thobane:** I am aware.

**Singh:** You did say that you have a modest practice, I take it that with your modest practice you have an accountant or a book keeper? One is surprised that you have an auditor for 10 years and suddenly they were not in a position to audit your books timeously and orderly, is there not more to it than what meets the eye in terms of your reports?

**Thobane:** Not at all, it was just a mere hiccup; it has nothing to do with whether my books were in order.

**Singh:** But one would imagine that the law society would be demanding that financial records be handed in on time?

**Thobane:** That is true, and this is why I have been saying to them, I have a challenge with my auditors, engaging with them on all fronts.

**Singh:** So now you are leaving it up to the Law Society to help you out in dealing with your auditor because you said you have asked the Law Society to contact your auditor to expedite the audit? Is that how it is going to be, and we will all have to wait?

**Thobane:** No, it is my responsibility to ensure that there is compliance, once there has been no compliance the Law Society informs you, and you must give some kind of answer as to why there has been a delay. But the responsibility rests on my shoulders, by involving the Law Society I was simply answering the question that it is not like I have sat back and not done anything. I have involved the regulator and I am attending to it.

**Singh:** Finally, hypothetically you are presiding on a matter where the Law Society or somebody takes an attorney to court for failing to submit audit reports on time, and the kind of explanation they give to the JSC is the kind of explanation you have given here; how would you deal with the matter?

**Thobane:** Well each and every is dealt with in its own facts; I would have to deal with the matter based on the facts that would be put before me at the time.

**Singh:** But we have the facts, the facts are that it is hypothetical and are those which you have given us here today.

**Thobane:** Perhaps you must just repeat, I am not sure exactly what the question was.

**Singh:** The question is you are presiding over a case, you are the judge, and a case is before you about an attorney, who has not submitted their audit reports, and it's a transgression of the law, and you have to deal with that particular matter. The facts are those which you have just presented to the Commission, how would you deal with that matter as a judge?

**Thobane:** So who has brought the attorney to court?

**Singh:** Let us assume the Law Society has brought the charges for unlawful conduct and mismanagement by an attorney as a result of these audit reports not being submitted on time. How would you react?

**Thobane:** A matter would go to court once an investigation has been completed, and ordinarily the Law Society would have a system of dealing with particular types of complaints and I would imagine they would not go to court on a matter such as this, they would refer it to their disciplinary party to deal with it, if established that there was something wrong with the attorney they would obviously go to court. So on the postulation that you have presented, I do not think that the matter would go to court.

**Commissioner Nyambi MP:** What are the attributes of an effective and efficient judge?

**Thobane:** Well, firstly to keep an open mind, not to be judgmental. Secondly to be decisive and firm, to be courteous and to apply the law, without fear, favor or prejudice. I'd say those are the underlying attributes.

**Nyambi:** In your questionnaire you reflected that you studied in the University of Limpopo, now University of the North; your comment on that?

**Thobane:** It was the University of the North then, now it is the University of Limpopo.

**Nyambi:** No I am telling you about what is here in your questionnaire. You said you studied at the University of Limpopo, now the University of the North, your comment on that?

**Thobane:** I am sure it is a typo because that is not factual.

**Nyambi:** What are the essential consequences of a delayed judgment to the parties?

**Thobane:** It is simply a delay in justice. If you delay delivering your judgments you are delaying delivering justice to parties. Parties want expedited resolution of their issues, therefore you are harming their expectations in delaying delivering your judgments.

**Nyambi:** My last question; if you attend a funeral and see an elderly that is arriving and a young boy or a young lady decides to give a chair to that person who is old, how can you interpret that situation for us?

**Mogoeng:** Commissioner, remember I said I am going to be strict. Suitability to be a judge? It's one thing if you pose a question to ask how you treat elderly people, then it is closer to the matter at hand.

**Nyambi:** I was addressing the issue of respect Chair; the issue that was addressed with the JP.

**Mogoeng:** I understand that, but what are you, but how does that impact on suitability to be a judge? You could put a question to him designed to test the way he treats people and by extension the way he treats people who appear before him, but that one is a bit far removed.

**Nyambi:** I won't mind to leave it there.

**Commissioner Schmidt:** You have indicated quite a few leadership roles, two of which I would like you to extend more information. The first one is that of your position of Trustee to the Attorney's Fidelity Fund, I would imagine there would be a lot of trust placed in you; could you just start by telling us what your role is in that position? Secondly, you're a Trustee of the Ukuthula Advice Center in 2013, an NGO. What was your role in that?

**Thobane:** The Attorney's Fidelity Fund is attached to the attorney's profession, funded by the interests that accrued in the trust account, those funds are then deposited in the Attorney's Fidelity Fund. In the event of theft of money by an attorney, a member of the public approaches the fund with a point of view to make good that which the member of the public would have suffered. The Attorney's Fidelity Fund has a board; a constituency from other law societies, the board meets once a month, it operates by way of committees which need to decide and make recommendations to the board. It is also involved in the training of attorneys, which it does by granting law schools for resources such as libraries and other resources. My role initially as a member of the board was just a Trustee, I then became the Vice Chairperson at some point, however my commitments did not allow me to stay longer and eventually I tendered my resignation. Ukuthula Advice Center is a community-based non-governmental organisation established by members of the public. Its role was to support members of the public, I was part of the board. It was chaired by the Ndebele King Makhosoke Mabhena, our role as lawyers within the trust was that we could go and provide free legal advice to members of the public in events.

**Commissioner Magadzi:** In your acting capacity I can see that you never had an opportunity of presiding or giving a judgment on customary law matters. But I assume that in your practice you have come across customary related issues. What is your take on matters which actually have to do with customary law?

**Thobane:** Well in the areas where I am from in Mpumalanga, customary law is practiced, so to speak. My role at Ukuthula Advice Center, one of the roles I play is to write a paper after the recognition of the Customary Law Marriages Act came on board. We prepared a road show and went around educating people and encouraging them to register their customary marriages. Customary law is an area of the law that is not receiving a lot of attention and it can still grow. It needs legal practitioners to ensure that it gets the attention it deserves and that it is developed like any other area of law. In my practice after the Act came through we always make it a point to register customary marriages, it is surely an area of the law that should be given more attention so it can develop.

**Magadzi:** Do our women make use of the tools that are available such as the road show you mentioned? Language is one of the barriers that come up in courts because indigenous languages are still not developed, what is your take on that?

**Thobane:** Firstly I believe that it is not only a problem faced by women, understanding customary marriages is a societal problem. Customary marriages are not given the attention they deserve within the society and that should be a starting point, and perhaps we as practitioners can play a better role in assisting our people in understanding that customary marriage is as good as any other marriage that is recognised by our Constitution.

**Advocate Ntsebeza:** Mr Thobane I think you didn't seem to grasp what Commissioner Singh was trying to get at, and it was not for you to give him technical replies. The question is, in light of the evidence presented, would you be satisfied as a judge that the story that has been put to you about your audit reports? I am posing a question to you: do you feel that you have given the Commission a satisfactory response about why you did not submit your audit reports timeously, and secondly what your status is today about your audit reports?

**Thobane:** My answer Commissioner is an emphatic yes. I think I have accounted satisfactory.

**Ntsebeza:** Have you accounted satisfactory to why you did not submit timeously?

**Thobane:** Yes I have.

**Ntsebeza:** And are you satisfied that the reasons you have given are satisfactory?

**Thobane:** I believe that I am satisfied. Prior to me accepting my nomination for judicial appointment and prior to the letter of good-standing from the Law Society, it was something that would have been considered, and the Law Society also in the letter indicated what the issues are in that letter and that they do recommend me for judicial appointment.

**Ntsebeza:** Which raises another question. You are sole proprietor in your practice, and only you who appears. Do you have any person who is assisting you in running the practice now and or if you get appointed as a judge?

**Thobane:** I have been acting on an on-and-off basis, and I employ the services of a professional assistant, who are at the practice fulltime and act on my capacity in my absence.

**Ntsebeza:** When you are away you employ a professional assistant? How long has this person been in practice?

**Thobane:** She was admitted in 2013 if I am not mistaken.

**Ntsebeza:** Less than three years? Do you have a candidate attorney working for you?

**Thobane:** Yes I do.

**Ntsebeza:** And when you are working who takes care of the candidate attorney?

**Thobane:** Well, the candidate attorney who was assisting me has finished and is just waiting to write exams. So there is not really a candidate attorney per se in terms of going to court. If someone has been seconded by a colleague to my practice, there are people to assist even though it is a small practice.

**Ntsebenza:** You are not answering the question: when you are acting, who would be responsible for the candidate attorney?

**Thobane:** The professional assistant at my practice.

**Ntsebeza:** The one who has been in practice for less than three years?

**Thobane:** Yes.

**Ntsebeza:** Is that in line with the requirements of the Attorney's Act?

**Thobane:** Well as I have indicated, this person has finished the period of articles and they are just waiting to write exams.

**Ntsebeza:** Are you satisfied that you have given us a satisfactory answer to the question?

**Thobane:** Yes I am.

**Ntsebeza:** Last question; do you have a Ndebele name?

**Thobane:** No, I do not.

**Ntsebenza:** You never had any?

**Thobane:** No, never had any.

**Ntsebeza:** Do you have any African name?

**Thobane:** No, I do not.

**Ntsebeza:** Your names are all colonial English names?

**Mogoeng:** You can't blame him Commissioner, he did not give birth to himself Commissioner.

**Ntsebeza:** As the CJ pleases. Thank you CJ.

**Commissioner Hellens:** In your questionnaire you indicated that you have one reserved judgment, is it still reserved?

**Thobane:** That judgment has been delivered ,but I have been picked up on other reserved judgments from while I was acting judge.

**Hellens:** How many do you have?

**Thobane:** I have five reserved judgments. At the time I finished the first part of my acting in Pretoria I then had to make myself available at the South High Court in Gauteng, I was placed on recess duty where I did urgent duties, unfortunately I could not shake off the reserve judgments I took on after that one judgment.

**Hellens:** You have a case on page five; Ramatata [?] versus the State, you have neither date of hearing nor a date of judgment; is it still outstanding still?

**Thobane:** That judgment was delivered a long time ago, in 2015, I just do not have the exact dates here. All the judgments that appear on that schedule have all been delivered.

**Commissioner Ntlama:** My question is a follow up on Commissioner Magadzi's question; what is the status of customary law? The reason why I am asking is that as a judge there will be instances of how people misinterpret customary law. If we give you the opportunity, how are you going to deal with the criticisms that arise on how the courts deal with issues of customary law? It has been a long discussion about whether the courts are qualified to deal with issues of customary law; it has been argued that courts import common law principles in addressing the issues that emanate from customary law.

**Thobane:** Well customary law is as good as any other type of law, and it deserves its place in our judicial landscape, it has to be there, and it has to be given the attention it deserves. I think some criticism is warranted, perhaps a restraint on the part of the judiciary is they only deal with the cases as they are presented to them, they do not go out to look for these cases, they deal with the facts before them. So you are constrained in a way when you are presented with a case on customary law. But there is a responsibility to develop our law, and that responsibility extends to customary law as well. As someone who has seen the importance of customary law from where I practice, if given an opportunity and there are matters that come before me, I will have a responsibility to ensure that customary law is developed in line with other law.

**Ntlama:** How, Judge? How are you going to ensure that development is happening because we are agreeing that customary law is not being given the status it deserves, even though that status is constitutionally recognized, so how are you going to ensure that?

**Thobane:** Like I indicated, as a judge you deal with that which is before you. For as long as there isn't broader litigation from our system on customary law, the development of customary law will not be progressive, it will stagnate. So you unfortunately need an environment which encourages such matters to be brought before a court and the judiciary is able to apply its knowledge to the customary law cases that are before them, while ensuring the development of that law.

**Commissioner Notyesi:** Chief Justice, I must disclose I know Mr Thobane we have served together in the NEC of that organization. Mr Thobane, on the issue of the audit. If you submit your audit reports late, am I correct to say that the effects are that you will not be issued your certificate for the year; is it correct to say that? Is there any instance a person would be struck off the roll just because of this?

**Thobane:** No.

**Notyesi:** What are some of the other implications to you not submitting your audit reports on time?

**Thobane:** The Law Society has a levy fee system for late audit reports, so whenever your report is late they invoice your membership with a fee.

**Notyesi:** In other words this would result in an administrative fine?

**Thobane:** Yes.

**Notyesi:** Now will regard to the candidate attorney in your office, what does the Act require with regards to the supervision of candidate attorney's?

**Thobane:** It requires that they be supervised.

**Notyesi:** And if a candidate attorney is not contracted to you, finished his term, do you have any obligation to supervise as per the provisions of the Act?

**Thobane:** No, not as per the Act, just as an employer who oversees their functions.

**Notyesi:** Mr Thobane, both as a member of the society and the profession you have been a part of your transformation process; what has been your contribution to our transformation?

**Thobane:** Mr Commissioner as I have indicated I have served in the profession for 20 years, and ever since I was admitted as an attorney in 1996 I have been a member of NADEL; I was there when the Legal Practice Act was discussed and when it came into law, I served as a chairperson of the Mpumalanga Attorney's Council for many years, during my time in that position noting the non-participation of our women colleagues, I introduced an award; the Women of the Year Attorney's Award was created with the purpose of forcing colleagues to identify women practitioners and bring them to the fold so that they receive due recognition. However there were a lot of women practitioners who were doing a lot of good work and we needed to go out identify them and work with them. Those were some of the achievements.

**Minister Masutha:** I get the impression that you run the practice as a sole proprietorship, a decision that you made during your term. Is it a phenomenon or is it a norm, according to your own experiences?

**Thobane:** Running a single practice? Unfortunately, it is a sad reality of our society and our profession because colleagues are somehow reluctant to come together and form

partnerships. However, the reality of a particular environment dictates how the practice would be run; it is a legacy of our past and a legacy that we should seek to correct going forward.

**Masutha:** [Speaks in Sesotho] [Laughter] My apologies to those who don't understand Sesotho, I understand all the languages in South Africa at least. What is it that could be done to encourage historically marginalized practitioners to organize themselves differently, such that they are able to create an environment that puts them in a better standing to take up more and better work?

**Thobane:** It is a difficult one; the solution lies in small firms coming together; there were efforts in the past to do so, because as your approach Corporates and institutions as a single practitioner, issues of capacity get brought up from time to time. So with capacity and adequate human resources, firms could be better positioned to tackle better work. Secondly, the state is the biggest client so to speak, if the state were to ensure that a bulk of its work goes to black or single practitioners that would encourage them to form partnerships and tackle work they would otherwise not be exposed to.

**Masutha:** Are there any efforts by the profession to strive to organize itself to engage the state in such matters, or is that just an idea of engagement?

**Thobane:** Well not within the organized profession in the strict sense, but bodies such as the BLA have always been at the forefront of seeking to have this imbalance addressed. However nothing is going to happen if it is left to the profession to correct it.

**Masutha:** What I am seeking clarity on is that firms need to organize themselves in a collective manner; has the professional body tried to get assistance?

**Thobane:** Bodies such as BLA and NADEL are the only ones I can think of in the forefront; the organized profession on its own has its own interests, as many practitioners are benefitting from the status quo.

**Masutha:** I want to separate two issues; the issue of disputes arising out of the practice of custom from the question of infusion of customary law principles of universal application in our mainstream jurisprudence. For example, Ubuntu – which was applied not solely in order to resolve a customary law dispute but was infused into the mainstream legal philosophy as a way of indigenizing it. Do you believe that is a necessary step our jurisprudence should be taking 20 years into democracy, and if so how do you propose that should be achieved?

**Thobane:** Well it is never too late to start, and just as much as we would like to have a judiciary that is transformed, is growing and respects the Constitution and what the

Constitution stands for. In matters where one realizing that there are gaps, you may introduce training. Training can be one avenue which can be used to inculcate within the judiciary that sense that our customary law and principles are woven into the mainstream and become part of our legal system.

**Masutha:** And finally, is this what our Constitution promotes and requires, or is it just a good idea but not necessarily what the Constitution requires?

**Thobane:** The Constitution demands, directs that this should happen. And I am the one to say it must.

**Acting President Maya:** Any other questions? You have run 13 Comrades' and many other long distance races?

**Thobane:** Yes, Chair that is how I stay sane.

**Maya:** I know it takes tremendous strength and determination to do that. Is there anything else you would like to say to the Commission before you are excused?

**Thobane:** No ma'am. Thank you Commissioners.