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Judicial Service Commission Interviews

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KwaZulu-Natal Division of the High Court

Interview of Professor K Govender

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Deputy Chief Justice Nkabinde: Good morning Professor Govender.

Prof. Govender: Good morning Justice.

Nkabinde: You are most welcome. As we begin with our proceedings, let me just clear a few issues with you. You have been a professor for quite a number of years?

Govender: That is correct.

Nkabinde: And you have published a number of documents. You have been a chairperson presiding in certain institutions, and you have been an acting judge. It appears to me that overall, you have effectively acted for a period of slightly more than two months, given the fact that some of the acting positions were for two days, for one day, or three days, for you to complete what was outstanding during your acting positions. Is that so, sir?

Govender: Justice Nkabinde, I acted the first time for about six weeks I think, and there was one criminal trial that I had to complete. That took me about a month or so. In my second stint, I acted for five weeks the second time in 2015. That's the composite of the time I acted.

Nkabinde: Thank you Mr Govender. I have had a look at your scholarly judgments and I have recognised that you do write well, well-informed

decisions. I have had a look at the remarks by Black Lawyers' Organisation. They think that whilst you have written good judgments, you have not acted sufficiently for you to be considered favourably for today's purposes. Do you have a comment?

Govender: Yes, thank you. Justice Nkabinde, I think that clearly that is a criticism. I think though that this decision has to be made holistically, evaluating all the things that I have done over the last 20 odd years. And I think the process of judging involves the process and ability of conducting a trial in a courtroom properly and treating people with propriety and decorum. And then there's the substantive part of determining the dispute before you. I think that as a judge, there's an additional responsibility of developing the jurisprudence so that a constitutional democracy grows. And over the last 20 years, I have written quite extensively, being a senior advocate since 2012. There is a track record of my presiding over hearings. So while the criticism that I haven't acted enough is probably justified, I think if you look substantively at the requirements, I would argue that I do meet the requirements.

Nkabinde: If I am correct about your age, you are 56 years old now?

Govender: That is correct.

Nkabinde: Meaning that if your candidacy is favourable, you will be a judge for the next 13 years before you reach 70?

Govender: That's correct.

Judge President Jappie: The last time you were interviewed, you had not done any civil work, so to speak, in the High Court?

Govender: That's correct.

Jappie: Since then, you had an acting stint in Pietermaritzburg for a period of five weeks.

Govender: That's correct.

Jappie: Well, how did you find that?

Govender: I found it enjoyable. I found that I had to work harder than I normally worked, and I found that I was able to cope. I did, as most acting judges do when they are in that position, you have to perform at the level required by yourself as Judge President, by the people who use the court, and by the practitioners. I think I performed the responsibilities adequately and satisfactorily.

Jappie: Was there any difference in the experience of doing civil as opposed to criminal work, that you had done before?

Govender: Yes, there were serious and material differences. In civil work, you get new work coming all the time, you have to be aware of what is going on. You have to be able to research quickly, and I think you have to be able to write quickly as well. So I found the civil part of it more demanding than the criminal part, would be my assessment.

Jappie: You see, it is the writing quickly and coming to a decision quickly that I want to just press on for a moment. Your background is largely academic, is that correct?

Govender: That's correct.

Jappie: But you have done arbitrations before?

Govender: That's correct.

Jappie: But let's talk about your practical experience, not on the Bench, but as a person who appears before the courts or before tribunals. What sort of experience do you have in that regard?

Govender: I – when I started my career in law, I did not do criminal law. I hadn't done criminal law for many years except when I was on the Bench last. By and large, my practice has been administrative and constitutional law. When I was on the South African Human Rights Commission – I was a Commissioner for two terms – I did largely policy-related work for the South African Human Rights Commission. So that is constitutional. And so my emphasis over the last couple of years has been on administrative and constitutional law.

Jappie: If you should be appointed, what do you think you bring to the Kwa-Zulu Natal bench?

Govender: Judge President, for the last 21 years – because my job required it – I have had to think in-depth about the Constitution, how to improve it. I think I would bring all that thinking and reflection to the Bench. It will also mean a focus on administrative and constitutional law and other aspects will have to be supplemented, and I will ensure that I will be able to cope with that. But primarily, that would be the contribution I would bring to the Bench – the knowledge that I have acquired.

Premier Mchunu: I do not have a question at this stage.

Acting President Maya: Prof. Govender, can I just bring to the attention of the Commission that I had the brief pleasure of being tutored by you in the then University of Natal in 1988 – when I was much younger. I just wanted to ask

you further in relation to your experience in the area of criminal law. How many criminal law cases did you adjudicate during your acting phase?

Govender: Thank you for your wonderful affirmation. I think I handled about three or four matters. Then I handled a particularly long matter, which in the estimation of the Judge President would take two weeks. It actually took about six and half weeks to finish. I think I gave in total about four judgments in that period.

Maya: How did you find your experience? Did you struggle in dealing with those cases?

Govender: I think I was quite fortunate to have fairly competent counsel appearing before me. No, I did not struggle. With the way that I had to learn – I asked one day to continue with the hearing until 4 pm. I was told the next day that the prisoners didn't eat as a result of that, so we had to finish at 3pm. So there are many things I learn. But conceptually, it was not a struggle.

Commissioner Malema: Do you know Professor Makgoba?

Govender: Yes

Malema: Is there anything you took from him, since he was one of the leaders of the institution you work?

Govender: He was the head of the university. I interacted with him occasionally. My interaction with him was restricted largely to – I think I sat with him on a few committees and we chatted. So recently on the radio, he made a comment on something I said. My impression was that he is a highly intelligent person. He certainly controlled the meetings very effectively.

Malema: You are a professor of what?

Govender: Of law – Constitutional and [undecipherable].

Malema: What does it take to become a professor of law?

Govender: Err, it err – you will have to publish. You have to acquire qualifications. You have to teach properly; and then you apply for the post.

Malema: Let's deal with publications, one of the requirements. You have not written any seminal book alone as an individual.

Govender: I have contributed to three texts –

Malema: You have not written any seminal book alone.

Govender: I have written something called *The Educator and the Constitution*, which is published by the Human Rights Commission and the Department of Education of KZN.

Malema: Let me put it differently: Prof, have you written any seminal book alone?

Govender: I have written a book, Mr Malema. It is a textbook called *The Educator and the Constitution*.

Malema: When it comes to qualifications, what qualifications do you have?

Govender: I have an LLB [indecipherable] a masters, and professional qualifications from the United Kingdom.

Malema: So we agree that you don't have a PhD?

Govender: No, I don't.

Malema: It is very rare, especially in the University where you are for black persons, particularly Africans, to be professors without PhD.

Govender: It was not a requirement when I started employment at the university. But it is now a mandatory requirement.

Malema: Professor Makgoba then encouraged you guys to start getting those types of qualifications so that you are complete.

Govender: Yes.

Malema: When you were appointed a professor, the [KZN] Law School was under Professor Michael Cowling?

Govender: That's not correct. When I was appointed associate professor, the head of the law school was Professor David McQuoid-Mason.

Malema: And Michael Cowling?

Govender: He was there in 2002.

Malema: And when it was found that his qualifications were fraudulent, what role did you play?

Govender: I asked the university to give him an opportunity to respond to the allegations. I stated that in a meeting as a proposal.

Malema: Prof, would I be correct to say that you were part of the people who defended Michael Cowling when it was discovered that he had fraudulent qualifications?

Govender: The allegation was made that he had fraudulent qualifications. He was our dean at the time. My proposal at an open meeting of the law school was that he should be given an opportunity to respond properly. That is the proposal that was adopted. I can't – I did not defend him in the sense of saying 'I got information on time.' My response was 'give him some time to respond.' He then decided to leave the university.

Malema: When it was found that his qualifications was fraudulent, you still insisted that he was the right man?

Govender: No, I did not. What had happened was that we were not sure of what the true picture was. So the whole idea was to treat him procedurally fairly and give him an opportunity to respond. That was my only major input into that process.

Malema: So now me and you can agree that Cowling is a fraudster. Do you agree?

Govender: Err, he decided to take early retirement from the university, and to the best of my knowledge, he never provided proper information except on one of the charges.

Malema: But the university where he claimed he obtained those qualifications confirmed that they do not know those qualifications?

Govender: Yes; in respect of one of it, Mr Malema, the position was that that qualification, as I understand it, could have been upgraded through an administrative process [Min 19:57]. And I think in the time that he had, he may have actually went through that. In respect of the other issue, I think that the university did indicate that he didn't have the qualification.

Malema: And to claim that you have a qualification you don't have [means] you are a fraudster. Do you agree?

Govender: It is certainly a major issue as far as academics is concerned.

Malema: Michael Cowling is a fraudster. Do you agree?

Govender: Mr Malema, my – I am not sure. All I can say is that it should not have happened; it should not have happened at the university. My only role in the process was that he be given an opportunity to defend himself.

Malema: So a judge is unable to tell me that a person who was found not to have a qualification he claims to have – you are struggling to agree with me that he is a fraudster?

Govender: What I am struggling to agree with you is that I never heard him respond fully to that particular charge.

Malema: But the University [of Cambridge] said he doesn't have [it.] You defended him even when the university said he doesn't have a qualification.

Govender: I didn't defend him. I said all that should happen is that he should be treated procedurally fairly. He should be given an opportunity to respond.

Malema: Are you registered for a PhD now?

Govender: I am, yes.

Malema: Who is supervising you?

Govender: Professor [Managay] Reddi.

Malema: Who is Reddi to you?

Govender: She is the Dean of the [KZN] Law School.

Malema: Now how can a Dean of the Law School supervise you? You are his (sic) colleague.

Govender: Yes. The supervisor [merely] supervises you. But the dissertation is marked by an external examiner.

Malema: So you are supervised by your friend?

Govender: By a person who is the Dean of the Law School.

Malema: Are you friends with Reddi?

Govender: Yes; we are colleagues.

Malema: And you are supervised by your friend?

Govender: Yes.

Malema: Ok; thank you.

Nkabinde: Thank you Commissioner Malema. I recognise you, Commissioner Ntlama.

Commissioner Ntlama: Prof. Govender, good morning

Govender: Good morning.

Ntlama: Let me also acknowledge that Professor Govender is my boss. He actually signed my leave for being here. Prof, I have one question. Considering your other experiences, and the fact that I am from the academia and have huge interest to represent the academia, what makes you distinct as an academic – as opposed to senior counsel – for appointment to the Bench? Thanks.

Govender: Thank you Prof. Ntlama. I think the decision was made and was perhaps necessitated by the circumstances we found ourselves in – undesirable and problematic circumstances at the time – that the pool of judges would be drawn from outside the ranks of senior counsel. If you recall at the time in 1994 – bar one, all the judges were male, and bar one, all the judges were white. So it was necessary for there to be a bigger pool. But I think, I would argue that there are other important reasons for that, that people bring different life experiences. People bring broader spectrum of events into the adjudication process. And I think it is probably conventional now that the first constitutional court that comprised of practitioners, academics, and judges was a highly successful court. And I think the jurisprudence that emerged was informed, considerably, by the fact that it drew from various segments of society and various facets of the [legal] profession. So I think you will get a different experience from me. I will bring to the adjudication process the fact that I served as two times as a commissioner [in the South African Human Rights Commission]; the fact that I work as an academic; the fact that I worked as an arbitrator. I will bring all that experience and the fact that I have the privilege of having [brought up] a generation of law students coming through the law school.

Nkabinde: Thank you. I recognise Commissioner A. Ndoni.

Ndoni: Thank you, Deputy Chief Justice. Good morning Professor Govender.

Govender: Good morning.

Ndoni: In the last interviews, you were asked a question on whether you had had any motion court experience and your answer was no. You were also asked whether you had done civil court, and your answer was no. After that interview, have you had any opportunity to act again?

Govender: Yes; I was asked to act last year, and in that process, I conducted a motion court and I had several appeals during my process. So I acted in the last session of 2015. I was asked to come back for a session this year but because of issues at the university, I was unable to do so. But I did act last year.

Ndoni: Did you do civil appeals?

Govender: Yes, I had a civil appeal in that time.

Nkabinde: Thank you Commissioner Ndoni. I recognise Commissioner Hellens.

Commissioner Hellens: Professor, in your application, you annexed one criminal judgment, one civil judgment, and one arbitration. That's all?

Govender: I was asked for three judgments.

Hellens: That is the minimum.

Govender: Sorry I misunderstood. I could have hand in more.

Hellens: On a previous occasion, you handed down a rather lengthy judgment in a criminal matter that related to the criminal matter that you referred to.

Govender: That is correct.

Hellens: Is there any reason why you did not hand in this judgment?

Govender: I just thought it was too long.

Hellens: But you handed it in the first time?

Govender: That's correct. I decided not to hand it in this time because of the length.

Hellens: On that occasion, I believe it was myself that raised the context of that judgment, you remember?

Govender: I remember.

Hellens: Do you remember the criticism made against that judgment?

Govender: I think you asked me about the first line in the judgment when I said this was a judgment of the court.

Hellens: It was a unanimous judgment of the court sitting with two assessors?

Govender: That's correct. You must realise the legal issues were for me while the sentencing was for the assessors to determine.

Hellens: Well, in a conviction, there are two components. The first are findings of fact, which is very much for the complete court. The other is questions of law such as rulings on admissibility and admissions, correct?

Govender: Correct.

Hellens: Was it correct that the whole court was in agreement with your ruling on the admissibility of the confessions?

Govender: Yes, I dealt with the issues of law in the judgment. What I did was to debate the legal issues with the assessors, but the determination was mine.

Hellens: So in the decision-making process on matters of law, you involved the assessors who have no say in matters of law?

Govender: Yes, I debated with them the issues of law.

Hellens: Do you think that was the proper way?

Govender: I – the decision I made was a decision I knew I had to make. I heard the arguments; I heard the assessors' views, and I finally made the decision myself, which I justified in terms of my judgment.

Hellens: But you went further than that. You said that the whole judgment, including the rulings on law, were made by the whole court. That is legally not competent.

Govender: I am not sure I said that. I said 'this is a unanimous judgment of the court.'

Hellens: Yes, and in that unanimous judgment were legal rulings.

Govender: I am just clarifying the legal rulings – that I made the determination for the legal rulings.

Hellens: Thank you.

Singh: I and the Professor come from the same area. We bump into each other quite often. Prof, I just wanted to know: you appeared here on 8 October last year.

Govender: That's correct.

Singh: Then you had an acting stint towards the end of last year. And you did indicate in one of the answers that you would act again in 2016. Did you not think that serving in an acting capacity would put you in a good stead because

you knew you would be applying for this position rather than dealing with university matters at the time?

Govender: Thank you Mr Singh. I would have liked to have acted again. But because of I had certain position with the university – certain responsibilities – and there were issues which, unfortunately, I could not leave. It was a decision I had to make, and I understood the consequences, but I ultimately had responsibilities to the university.

Singh: You do not think this would be a general problem with academics? I know my Commissioner on the other side is concerned with academics. Do you not think this would be a general problem with academics wanting to get on the Bench?

Govender: It may well be. But these are difficult times. It will not be easy to say that this will be the norm, but certainly in my case, it was extremely difficult leaving my responsibilities.

Singh: I think the Chairperson in the meeting earlier on did indicate that it might be good to go by what was said the last time: 'The general view amongst the membership is that Mr Govender lacks sufficient practical experience; but he is hardworking and therefore has the ability to become a judge.' And I think the advocates' association also said something similar. But do you not believe that what I would call your quasi-judicial experience would stand you in good stead if you are elected to the bench?

Govender: Yes; and I think you said holistically – being an arbitrator since 1997 and senior counsel since 2002, Chair of Competitions Appeal Tribunal, and track record in all the awards and decisions I have given in the public domain – I would argue that since I have been involved in the process of adjudication for a long while

Singh: Two tough questions: Middle Temple UK, barrister and member. Is that a membership or did you practice as well in the UK?

Govender: You qualify as a barrister, and then you write a Bar examination; and then you join one of the Inns of court. I did not practice there. But it is not something you just apply. You have to have a qualifying examination.

Singh: Last question: In your questionnaire Item number 8: 'Please furnish particulars of your membership of any political organisation past and present' – and I am looking at the Honourable Premier there – you said name of organisation African National Congress. Position held 'Ordinary member,' and for period, you said six months. When was this? I think the idea of the question was when, not necessarily the time or months. When was this? Are you still a member?

Govender: This was round about 1995. I ceased to be a member.

Singh: Thank you.

Commissioner Malema: Professor Govender, are you able to speak any South African language?

Govender: No.

Malema: Don't you think it is important?

Govender: Yes; it is a shortcoming.

Malema: What have you done to improve this?

Govender: I have taken some classes; but I did not persevere in them.

Malema: What is your understanding of judicial independence?

Govender: I think it operates on a number of levels. At the basic level, judicial independence means no one has to tell the judge not to determine a case. But judicial independence has evolved more in terms of international best practices, and certainly in terms of our law as well, to include spirit of tenure, financial independence, and institutional independence as well. I think that all the steps we are now embarking on to provide institutional independence is key because, ultimately, an independent judiciary is required for a functioning democracy.

Malema: If you can take us through the process of financial accountability?

Govender: Yes. I think you are right to link the two concepts. I think a judge speaks through his or her judgments, and the logic or reasoning then becomes part of the public domain. You are then subject to scrutiny by academics like myself. You are subject to scrutiny by those that appear before you. I think that's on the one level – the level of competence. I also think that if the Constitution provides – if you act in a gross misconduct capacity, then there is a process for addressing that. I think that security of tenure requires that to be fairly discreet, so that the judge can carry out their duties without fear or favour.

Malema: Is it right for politicians to criticise judges?

Govender: I think it is correct. I think also that one has to understand – as someone said many years ago that judges possess neither the purse nor the sword – and that the level of criticism has to reflect that we are a developing constitutional democracy. The thing is that what judges have is the respect which they enjoy in the community. I think that if the criticism is such that it diminishes that respect, then it may, ultimately have an adverse impact on the

independence of the court. So I think I am not one of those who say every criticism should be permitted. I think the criticisms should have regard to the broader picture that we don't have a legacy or history as other countries have. So I think that while criticisms are permissible, politicians must have regard to the broader picture. So that's the long answer I can give.

Malema: What about judges criticising politicians?

Govender: I think that should not be gratuitous of judges criticising politicians. I think judges speak through their judgments and I think that the comments must be measured; it should flow from the issues, and I don't think it should go too far beyond the issues you are dealing with.

Malema: Thank you.

Schmidt: Professor, you seem to – on page 15 of your questionnaire – indicate your appearance four times in the Constitutional Court around the period of 1995, 1996, 1998. Then it seems to stream off. Then the next two cases you give is 2003, 2004. Then 2015 is your acting stint in the court. I am just trying to track where you are coming from. You seem to have made deliberate choices either at the Human Rights Commission, and wandered away from the practical side of law or to your academic career. Am I correct?

Govender: That's correct. When I was appointed into the Human Rights Commission – that was around 1996 – I had to deal with issues that came up before the Commission. So a lot of my private practice – I didn't engage in much private practice. I worked on the Human Rights Commission issues.

Schmidt: It was not due to a lack of instruction because you appeared in the First Certification Case and other cases. Can I just ask because what would, hopefully assist me is what – if you would like to embroider on the decision not to act a second time [as a judge]. You attach importance to certain sections, and if you can't indicate and if you can't indicate what the reasons are for not being prepared to act a second time since appearing in October 2015. Would you like to embroider on that decision?

Govender: It was simply because I had a position of responsibility at the University. The session came sometime during the examination period. I was responsible for ensuring that marks came out for the course I would receive. At the University I was in charge of Public Law courses. My responsibility was to ensure that exams were held in time and marks came out in time. If I had walked away, I would have had to get someone else to replace me at short notice.

Commissioner Notyesi: Thank you, Acting Chief Justice. Prof, from what I can see, most of your appearances was in the Constitutional Court.

Govender: In the Constitutional Court, yes. But I have appeared in other courts as well.

Notyesi: As correctly pointed out, you have had very little time for private practice in view of your subsequent appoint as a Commissioner. You have tended to focus on

Govender: Yes, that would be correct. I have tended to focus on Human Rights Commission issues and arbitration.

Notyesi: Would you agree with me that writing a judgment requires experience and skills in the writing? In view of what my fellow Commissioner said about writing criminal law judgments, would you say confidently that you are ready to be a judge in view of your limited acting experience and your limited experience in practice?

Govender: With respect, I would say so. The length of the judgment was dictated partly by the number of issues that I had to deal with. I have been writing in the public domain now for many years. And if you look at the judgments I have written, you could make a determination as to whether or not I can coherently and logically draft a judgment. I think that is one area I am experienced in and can write.

Notyesi: Lastly, the involvement of assessors in issues of law. Would you agree with me that that was occasioned by your lack of exposure in the practical side?

Govender: No; I won't agree with that, Commissioner. I think that what I wanted to do was to have a debate. It wasn't due to lack of experience. They were there, and I debated issues with them and I finally made decisions on my own.

Notyesi: Thank you.

Malema: What's your take on corruption, Prof?

Govender: I think it's a major issue for the state, for the public. It is something of great concern. It really can erode the fabric of our society and undermine some of the key notions on which a constitutional democracy is built.

Malema: Did your brother participate in the tender for the renovation of the law school where you are an employee and a friend of the Dean?

Govender: I had no idea what his company was up to. I have nothing to do with his company.

Malema: You have no idea that your brother's company got a tender to renovate some buildings in the law school where you are a senior staff member and a friend of the Dean?

Govender: The Law School itself – I am not sure how it makes such decisions; but I have certainly no link to his company and I had no part whatsoever in the decision. I think the university procurement processes are done centrally. I had no part in the process.

Commissioner Modise: Professor, you said with respect to the assessors that you just wanted to discuss. Do you want to discuss what you said earlier that you knew the ruling you were going to make? You are not sure of what you wanted to rule on?

Govender: That is obviously to have people that were available. As a judge, there are very few people you can talk to except other judges. I debated it with my assessors and then made the final decision. I just wanted to think about it with them and then make the decision.

Modise: What then is your take on judicial dissents?

Govender: I think dissents are important. I think that what dissents do is that they create an alternative view. And in time – I think it is important for the jurisprudence that there be dissents. It demonstrates a range of thoughts from different levels. And sometimes in our history, a dissenting judgment has gone on to become a majority judgment.

Modise: What's your take on the view that the court has a duty to avoid encroaching on the powers of the other spheres of government?

Govender: I think that the doctrine of separation of powers is a very important principle in our constitutional dispensation. The Constitutional Court in the case of *Mazibuko [Mazibuko and Others v. City of Johannesburg and Others (CCT 39/09) [2009] ZACC 28]* elaborated on this. One of the reasons for that is that you don't want to encumber the exercise of power between the executive, the legislature and the judiciary unnecessarily. Because ultimately, the electorate holds them accountable during elections. So the separation of powers is an important principle. Simultaneously, the court is also given the power in terms of section 172 of the Constitution to determine issues of inconsistency with the Constitution. So I think what a judge has to do is to be cognisant of the doctrine of separation of powers, but also to be aware of the responsibility to make a sober determination as to whether a particular law or conduct is consistent with the Constitution. And I think it is managing those sort of issues that call for a judicial determination. So the doctrine of separation of powers is a particularly important doctrine along with a number of doctrines in which judges have to exercise their judicial discretion.

Modise: But isn't discretion a very subjective phrase. When you teach law and you teach on the doctrine of separation of powers, how do you draw the line?

Govender: It is difficult. What you do is that you must have regard to the factual context of the case. You have to have regard to the contravention of the Constitution that you are dealing with. And you have to have regard of the terrain that the Constitution has afforded to the executive and the legislature. What you cannot say is that the doctrine of separation of powers trumps all other factors. It's a matter of having regard to all key constitutional concepts. And you must be particularly aware that the doctrine of separation of powers is about not trespassing on the terrain of another organ of the state. It's also about preventing an unhealthy exercise of power. It involves a series of factors. It is a bit of a theoretical answer but the concept is difficult and you have to have regard to a variety of issues before reaching a decision.

Nkabinde: Thank you very much. In the absence of any further questions – oh, beg your pardon Commissioner Nkosi-Thomas. I do recognise you.

Commissioner Nkosi-Thomas: Thank you Acting Chief Justice. Professor, you appeared before us on 8 October 2015 and certain questions were asked with regard to your practical skills. I will ask you one question: Between the interview of 8 October 2015 and that of today, did you serve as an acting judge in the Criminal Court or not?

Govender: Not in the criminal court; I did not.

Nkosi-Thomas: Which means therefore that what you are presenting here today as your experience, as far as criminal law practice is concerned is the same as what was presented the last year?

Govender: I think the criticism then –

Nkosi-Thomas: I was talking in terms of you getting exposure and experience over and above that presented by yourself on 8 October 2015.

Govender: Yes, I understand what you are saying. I had a further acting stint as I pointed out towards the end of 2015. So that was the material difference between that interview and this one.

Nkosi-Thomas: That experience, if I understand you correctly, has to do with motions or practice in civil affairs and nothing whatsoever to do with criminal matters.

Govender: I had a number of criminal appeals during that period.

Nkosi-Thomas: In terms of criminal trials?

Govender: The only criminal matters I had during that period was – I think I had about five or six criminal appeals.

Nkosi-Thomas: Very well, so when we assess your candidature and your qualifications or otherwise, we should take into considering those appeals in so far as criminal matters were involved?

Govender: Yes.

Nkosi-Thomas: Thank you.

Nkabinde: Thank you very much, Commissioner. Mr Govender, as a young lawyer, you were privileged to be a junior in a litigation pertaining to the establishment of our constitutional order. That is the Certification case [*Re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC)], in which the Constitutional Court reviewed the new text to ensure it was in line with our constitutional principles. You were also involved in cases such as *State vs Zuma* [1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC)], etc. What I found quite intriguing at that time is that as a junior lawyer, you decided not to proceed with that kind of career when the country needed people like yourself who were privileged to be there at that time when our constitutional order was being laid to assist in the development of our jurisprudence. I was quite intrigued by the fact that despite the opportunity and privilege, you decided not to pursue your career as a full time advocate to assist the country and the courts in developing our jurisprudence. Do you have a comment?

Govender: Thank you. You are correct that it was an immense privilege to be involved in those cases. I applied for a position in the South African Human Rights Commission at the time, and I spent 14 years as a part time commissioner. I would argue that I entered the SAHRC in order to make the sort of contribution that you pointed out. And I was part of the very first commissioners that were appointed and we set up the SAHRC. So it was for this reason and others that I did not pursue that path you mentioned.

Nkabinde: As a lawyer who was involved at that stage with defining the constitutional principles of the new texts, are there other aspects of the Constitution that you feel still have to be developed or properly interpreted in line with the interpretation in the First Certification case?

Govender: The interpretation of the Constitution is an ongoing thing. And if you look at the constitutions of most successful democracies in the world, they are those that have a whole bunch of jurisprudence on the constitution. What we have been doing over the last 20 years is actively thinking about key constitutional concepts and actively litigating. And I think that is absolutely crucial to our development as a constitutional democracy. So I think there are many things that will continue to be developed, whether it is with respect to the principle of legality; whether it is with respect to the development of the Bill of Rights, or issues regarding accountability with respect to the exercise of

public power, I think all those concepts would over time be developed. I think in the first few years, I think, with respect, that the Constitutional Court adopted an approach, which allowed for incremental development of the various rights. and I think what was needed is for each right to be developed independently and not to allow a generous or far too generous interpretation of one right to include another one. I think that a lot of what has been established now can continue to the next level. I think what we have been doing all these years, I take the view that the jurisprudence that has emerged is an enviable jurisprudence. It is quoted by courts throughout the world and I hope we continue doing so and realising the broader visions of our democracy.

Nkabinde: I think you are one of the few lawyers with the privilege that I spoke about. When you look back, you see the development of constitutional principle by the courts. In your view, which of those judgments do you think the [Constitutional] Court got wrong?

Govender: [*Laughingly*] All the judgments that I lost. I was hoping you would ask me which of the judgments the court actually got right. I have to think about it, Justice.

Nkabinde: If you can't think of any it is okay. From time to time, I tell the new clerks at the court that you need to review judgments critically. They may be something you can pick up.

Govender: If I am pushed, I would probably look as a case like Jordan [*S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae* (CCT31/01) [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117]. I am not entirely sure that the equality principle was well applied in the Jordan judgment. But I think the circumstances were difficult.

Nkabinde: Mr Govender, it doesn't appear that there is any other question. Is there any comment that you would like to say?

Govender: No. I am very grateful for this opportunity. Thank you.

Nkabinde: Thank you, sir, for making yourself available. You are excused.