



JUDGES MATTER

Judicial Service Commission interviews
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President: Supreme Court of Appeal
Interview of Acting President M M Maya

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Justice Maya: Just after my first year, what is the SABC today started opening the indigenous registrations across the country and the IsiXhosa one was established in Grahamstown. And apparently my father was tired of teaching, so he left teaching and we moved to Grahamstown and we did not stay long there because whilst we were in Grahamstown - it was called Radio Bantu - it was a building in King William's Town where it would later become established and operate from. So I spent the first 12 years of my life in King William's Town. Then I left King William's Town after the 1976 ructions because my parents wanted me to continue with my schooling and there was no schooling going on in that part of the country and the Bantustan – the Transkei Bantustan had its firm grip on things and it was not allowing any protests, so I was sent there at the age of thirteen

Chief Justice Mogoeng: One three?

Maya: Yes, thirteen.

I went to boarding school and that is where I matriculated. So I was raised between King William's Town and Umtata for the better part of my childhood.

Mogoeng: I don't know about you, but when I attended the first class of the first year law students at the University, our Dean came to address us and lamented the fact that there were so many women in that class. What was your attitude at the time? In fact, he said in advance that at least half of them would have failed by the time we come back for the second semester.

Maya: Well there have always been lots of women in any educational institution, be it law or other disciplines. It was the same case for our university, the then University of Transkei. But I think we were fortunate, we had mature and sophisticated teachers who did their best to ensure all the students got equal treatment. No-one discouraged us and we managed to excel.

Mogoeng: Why Law? What interested you in this area? Why did you want pursue law?

Maya: That was actually a belated choice. You know, if you were clever as a young child, everyone would say this one is going to be a doctor. So I always thought I was going to be a doctor. Then just before I was about to register I happened to see a text book of forensic medicine and what I saw in that book just put me off. And I discussed my problem with my parents and it turned out that my father had always seen a lawyer in me, because I was very argumentative and rebellious as child. So we started talking in that direction and that is where I ended.

Mogoeng: Is it the post-mortem examinations and the opening up of dead people that killed your interest?

Maya: Yes exactly that, which ironically I had to do in my LLB class for the forensic medicine course, so I went through that experience anyway.

Mogoeng: You went to hospital, I forgot the name of the doctor - at the University of Natal we used to go with that doctor and we just opened people as if they were not human beings.

Maya: Yes, and you just got used to it.

Mogoeng: Now not everybody - in fact there are very few people who go to Duke University and that is because it is certainly among the world's top 15 Universities if not top seven universities. How did you manage to gain access into that university?

Maya: I was awarded a Fulbright scholarship, and they would choose their universities according to the availability for their fellows, and luck of the draw I ended up there.

Mogoeng: How does one qualify for a Fulbright scholarship?

Maya: Good grades, Chief Justice.

Mogoeng: And you had wonderful grades, that's why! And have you been back to Duke Law School ever since you qualified, or you had your Masters degree conferred on you?

Maya: Actually I haven't, but I will be going back in a few weeks to attend my daughter's commencement they call it there, graduation ceremony. By a coincidence of coincidences, she was awarded a scholarship that sent her to my alma mater. So I will be going back for the first time in almost 26 years.

Mogoeng: And as a lecturer what is it that you were lecturing in?

Maya: Almost everything. Wherever there was no lecturer. When we were young one did not have a specific department, so you would be shoved around because you would not complain. I taught a lot of law courses in private law, law of evidence, interpretation of statutes and others. I even taught an LLB

class in advanced law of contract where all the students were older than me, but fortunately they accorded me the respect I think I commanded.

Mogoeng: Now you were a High Court judge for five years before you elevated to the Supreme Court of Appeal. Am I right?

Maya: Yes, Chief Justice.

Mogoeng: And you have a Justice of the Supreme Court of Appeal for 11 years?

Maya: Yes.

Mogoeng: And if we include you acting stint as Deputy President then you have been in that leadership for some 21 months?

Maya: Yes, this board interviewed me for the position in July 2015, but I had acted in the position for two terms before that.

Mogoeng: Oh July 2015? I see that you were appointed in May 2016?

Maya: Well I was here in July 2015. Mr Chiloane will bear me out actually because my letter of appointment only came only in May 2016 after I had asked and asked for it.

Chief Justice: Oh, so that is why your questionnaire reflects May 2016?

Maya: That was a mistake.

Mogoeng: Oh, I was surprised because I thought you have been in the position for much longer.

Maya: Yes I am sorry, I should have remembered to go back to my form to amend that. I apologise to the Commission.

Mogoeng: And you have been acting as President for the Supreme Court of Appeal for six months now?

Maya: Yes Chief Justice, since the 1st of October 2016.

Mogoeng: Now I know and it is also reflected in your answers to the questionnaire that one of the organisations you belong to is the South African chapter of the International Women Judges Association.

Maya: Yes.

Mogoeng: Not everyone woman judge is a member of that association. Why did you join?

Maya: I was one of the founding members of that association, and I think all the women judges at the time joined it because we saw the need for a body that would give us a platform to get together to discuss and find ways of addressing the problems that women face in the judiciary. And that body represented exactly that. But over time I have to be honest, some of the judges, women judges, lost interest because there was a lot of tussle about this and the other, and they left. So that a majority of the members now are magistrates. But I have stayed on because I see its value, and I am hoping that all women judges ultimately will go back and we can all participate and enrich it with our respective experiences

Mogoeng: The majority of magistrates and judges who are former magistrates?

Maya: Yes. But some judges who are not former magistrates as well.

Mogoeng: Now you continue to be a member of their association.

Maya: I do.

Mogoeng: Before I move on, I see that you received an award from them. Tell us about it - it is time to brag now.

Maya: I did not receive an award just from them. SAWLA - it is the South African Women's Law Association, Chief Justice - I suppose they honoured me because of the role they believe I have played in the judiciary, encouraging women to join this difficult profession, and assisting them once they are inside in carrying out their judicial functions by mentoring them and just supporting them. So pretty much that was the rationale.

Mogoeng: Now you know that the judiciary has for a long time been grappling with gender representation. What could be done to attract women - in fact, let me start much earlier - to prepare women and even black practitioners for elevation to the judiciary, and to prepare those who are already in the judiciary for positions such as the one you have been nominated for. Just take your time and tell us what vision you have, what you believe are the problems, what should be done more, what should be done differently, what is it that you believe not enough emphasis has been laid on.

Maya: You know I was just remembering that I was asked this very same question in my last interview, and I pointed out then that my first interview with this august body was in 2000, and I have been back many times thereafter, and each time this question arises and it is 2017, seventeen years later and we are still asking them very same question. And it is very worrisome. Where do I begin? I think in the judiciary what we can do in the short term, because there is a shortage of women judges in the High Court, in the SCA in the Constitutional Court and in the specialist courts, and I think I gave the same answer last time. There is no shortage of magistrates who are judicial officers right at the coal face of disputes. There are women academics, and I think that we have not tapped enough into those pools which are there waiting for us to plunder, so to speak. And I know there have always been reservations that magistrates most of the time deal with criminal cases - they have not been exposed to civil work and academics know nothing about it, they have never seen the door of a court room. What do they know about the practice and

procedure of the law? And I think there is an easy way around those perceived difficulties - you prepare them. We had a woman minister some years ago, Miss Brigitte Mabandla, who had a few ideas that I thought were good that were implemented during her tenure as Minister. I remember when I was still in the High Court in Umtata, we had practitioners, I am not sure if there was a magistrate in that group but we had practitioners, I think there was a magistrate actually, who would be brought in, given acting appointments but would shadow a judge for some period and would sit there and I remember some colleagues who would laugh at this arrangement, which I thought was actually a very good thing to do. For that person to just, from a psychological standpoint, to feel what it is like to sit on the judicial bench, and then observe what happens in court and work together with this experienced judge, and thereafter – or having undergone what we call today, and it is run under the auspices of the South African Judicial Education Institute, an aspirant judge's course, you would have undergone that for a spell and then be taken to High Court, shadow a judge, then once it was felt that you were able to somewhat stand on your two feet you would be let off into court, with the judge you are shadowing, still supervising you, right in court.

But then Minister Mabandla left, administrations change and that whole project died. I think that is one thing we can do. The South African Judicial Education Institute, which I have mentioned is doing a good job. It runs this course. But I think a week here or two weeks there can't really achieve anything. We need to extend the training duration of those courses and beef them up. Your magistrates and your academics would be put through that process. In the senior courts, at the SCA there is always a complaint that yes, this woman judge has been a judge for some years, but what does she know about maritime law, about intellectual property law, and all these niche aspects of the law. And I think that is just an excuse. I wrote my first judgment in maritime law only last year, I think. I had been a judge for seventeen years at the time. Because it was not up to me to allocate matters, it was not up to me to allocate judgments. That is the prerogative of the presiding judge and the head of court who draws the roll. Now, how you empower a High Court judge who does not have any experience in these areas of the law, is to put them in those cases with the

experienced judges in the court who are experts in these fields - which is what we are doing at the SCA now – and make them write the judgments under the supervision of the experienced judges, and that is how we learn. As I said, I wrote my first maritime law case only months ago. It was not easy but I was able to produce a good judgment and I am sure when I get an opportunity next time to write in that area of the law it will be much easier, and that is how you empower people. The same would apply for, well the Constitutional Court I suppose.

That is just the short-term concerns, the judges who are already in the system. How do we get more women in the system? I think we would have been able to identify where the real problem lies by now. We have all identified that there is no shortage of young women law graduates who leave our institutions every year. There is no shortage of young women lawyers who join the profession to do articles of clerkship, to serve pupillage, but something happens once they get into the professions to practice and they fall through the cracks, and that is where we should be looking. Fortunately, if what one reads in the legal magazines and other publications about what the professions are trying to do, the measures they are trying to put in place. For example, I have heard that, in the case of a pregnant woman, group fees in one or two societies, advocates' societies, may be deferred - measures like that. But that is just one aspect. I think the primary responsibility of empowering women lawyers lies with the State. Government is probably the biggest litigator in this country. A lot of cases launched by them and against them find their way into our courts but it is very rare to see, in my court now today, you just need to go to our courts on any given day to see the profile of who appears in front of judges. In the senior courts it's really bad. I have hardly ever seen black counsel at the SCA. You know, my heart literally jumps for joy on the rare occasions that I see them. And the women practitioners are even more rare, so the state, the government departments, our SOEs must, in fact I must confess that I saw in the legal brief this morning, a report on the actions that some group that have released statistics on this very subject which the Chief Justice endorses – I mean those findings, and has made a call for our government to empower our women and black practitioners as well because most of them still don't get enough work.

So that is where I would place the responsibility - at government's door. They have the opportunity, for many years a call has been made to state attorneys to implement affirmative briefing patterns, and you would hear that yes there are efforts made to do that, but when it actually comes to really looking at what is happening on the ground, you don't really see that at all.

Mogoeng: You know Acting President Maya, complacency is something to be rejected all the time, but I am sure you are as aware as I am that worldwide there are very few countries that compare to South Africa in terms of transformation.

Maya: I agree.

Mogoeng: If you count, there can't be more than five, all over the world. In terms of gender representation, in terms of transformation in general. But South Africa has proven to be determined to be a trend setter, so we can't say that because we are better than many we should be happy with the little that we have been able to achieve. Can I, without putting you on the spot, as a fellow member in the Council of the South African Educational Judicial Institute, quite frankly I had forgotten that were even a lecturer before, can I count on you as that, and secondly also if appointed you will be the most senior woman to be a leader in the Judiciary of South Africa, the entire history of South Africa, can I count on you to chair a committee that will focus solely on ensuring that whatever needs to be done in the area of gender representation is pursued? Just opening up everybody's eyes to say 'Guys this is what could be done, this was what could be done.' And assure that all the support that you need would be made available for you. Can I count on you for that? And you are free to take your time and say no. I will come back to you on that.

Maya: Chief Justice no I don't need a second to make a decision on that one. I would be honoured to play that role, depending of course on whether I am appointed, whether or not a recommendation for my appointment is made this afternoon.

Mogoeng: And also I am going to need you, because I have been trying to get money for that Minister Mabandla programme. It's all about money. Remember they were paid some R19 000 each back then? That fund had dried up. We depend only on the SAJE aspirant judges' programme.

Now let's talk a bit about case allocation in the SCA. How does it work? I'll tell you why I raise it, quite apart from other things. There are people whose judgment we rarely come across. Who allocates? How is the allocation done? Is there something that you need to do differently about case allocation at the SCA?

Maya: Case allocation at the SCA Chief Justice, is one of the key targets of my vision for the court if I am appointed, if I may call it that. It is what I have been doing in any event for the almost past two years. As I mentioned before, you can't blame colleagues for not producing judgments because that is the preserve of the presiding judge, who writes the judgment in a matter is decided by the most senior judge in that panel.

Mogoeng: No!

Maya: Yes. That is the case Chief Justice. And the roll is drawn, it is the responsibility of the head of court who may delegate it to the Deputy President of the court. Because I believe it starts with the manner in which you set up your panel. For example, my maritime law judgment example, if you have that kind of case you will ensure that you get your most experienced judges or experts to sit in that case, then you should, if you want to effect transfer of skills you should ensure that junior judges who have not had an opportunity to sit in that in cases of that area of the law, sit in that case as well.

Mogoeng: To give them exposure.

Maya: To give them exposure, and more than that, it is one thing to sit in a case and contribute by asking questions in court and at conference and concurring or dissenting against the judgment that will emerge, give them an opportunity to write the judgments. And that is one of the big things I have tried to work on

since I got into a leadership position. I allocate - I set up my panels strategically to make sure that this exposure to transfer of skills I am talking about it possible. And then I will prevail on the presiding judges to give the junior judges a chance to write. I have done that and for the first time - you know I am sorry - I am maybe seeing it as hanging our dirty linen in public but these things have to be said to be changed. It would happen over the years that there would be colleagues who ultimately, the roll is drawn, then it's sent out to the senior colleagues to decide who will write the judgment in the matter over which they are going to preside, and then it would happen frequently that when that roll came back to the head of the court some colleagues had no judgment to write and you had colleagues who had as many as five or six judgments in one time. So those are one of the things that one has to guard against. You set your panel in such a way that you create an environment of infusion and transfer of skills and experience and then you ensure that all the colleagues will get a chance to write a judgment.

Now, for the first time since I was in that court, because I know over the years there would always be these problems, and the head of court would have to go and prevail on senior colleagues to surrender some of their judgments so that the junior colleagues at least had something to show at the end of the term. In the last term of 2016 it was not a struggle at all, and all the judges, senior and junior except for one each had two judgments to write. And it was not a difficult thing to achieve at all, and that made me realise that it means that what I am trying to do is taking root, people understand what we are trying to do. And maybe the colleagues who previously did not try to allocate judges to others did not do that out of malice. Judges are very hard-working people and we can be possessive about work and all that, and I thought that maybe people were giving themselves more work when others did not have work just out of sheer enthusiasm. They wanted to ensure the work gets done and gets done timeously.

Mogoeng: So Acting President, some of these judges I have said, one hardly ever sees their judgments, it is because they have not written any judgment s?

Maya: It is not their fault and not all the judges write judgments that are reportable. But this judgment it ends up in the web so it will be reported. So if you do not see anything there then it means that they have not written anything. But I doubt very much that this is quite accurate.

Mogoeng: No, no - that is why I am asking, because I don't know why we hardly ever see other colleague's judgments, whether on appeal or anything of the sort. Isn't it possible, and I am not intruding, you know the courts are very much independent in terms of case allocation, isn't it possible for the leadership – the President, the Deputy President – to consider assuming the role of allocating cases to judges so that they are satisfied everybody will get the opportunity to write the judgment even on meaningful points of the law. Is it something that could be considered or would it be too radical a change at the SCA?

Maya: But it is exactly what we are doing Chief Justice. We have been doing it for the past three or four terms now.

Mogoeng: Yes - very well. I think I will give other commissioners a chance to put questions. I will come to other things later. Colleagues? Commissioner Motshekga, I think that you are the first.

Commissioner Motshekga: Good evening Judge Maya, it is good to see you again. You know my experience in interaction with the women revealed that actually women are just as capable as men. On my left here I have Honourable Didiza, we worked together from the '80s. But any time when she was elevated even above me I never thought it was affirmative action, I just thought that she was qualified more than I did. I was advisor to Queen Modjadji V and VI and now the VII. And Queen Modjadji V had only gone to school up to Standard Two. But she used to overrule my advices. I never thought that she was out of order or irrational. So I think South Africa is making a mistake, that we think that the elevation of women must be based on quantity rather than quality. I think that women need to be affirmed not because they are inferior to men but because of the social obstacles to their growth and their performance, so that rather what we need to do is create conducive circumstances to make women

compete as equals. Similarly, I believe there is nothing inherently different between black and white but that black people – lawyers – are not able to rise because for instance now, black lawyers don't get briefs even by Government. It would seem Government is suffering from an inferiority complex. They don't believe that black lawyers can perform as well as white lawyers. And then we end up blaming whites for dominating the market, whereas it is the black government who feels inferior that creates that situation. Now, would you agree that it will be wrong that we put women simply because they are women? That we should put women because they qualify and if we don't have enough candidates that we must create conducive conditions for them to rise? Because you know I am a Professor of Law - I have just been appointed Professor of Law again at Nelson Mandela University.

Maya: Congratulations.

Motshekga: And when I listened to you, if I were to compete with you I would surrender before time and say she's better. So would you agree that we shouldn't be saying "we want fifty women and fifty men" for the sake of it. Because we can end up creating a situation where we lower the standards, not because women are not qualified, because we do not remove the obstacles which make them seem as if they are not as qualified as men, and similarly with the black and white situation. Do you agree with that?

Maya: I agree with everything you have said Dr Motshekga. All women want is an opportunity to gain the relevant skills and experience. And the same, as you as you have pointed it out, in the case of different races. Just give people an opportunity to gain experience in the relevant area, whatever it may be. And they will show you that people are equally gifted. No-one is better than the other on the ground of race or gender or any other ground.

Motshekga: There was a time when Greek was the lingua franca. The present day European language were regarded as barbaric languages and at the next stage it was Latin. English and all these things were barbaric languages. But these European nations went back and started by translating the Bible into their

own languages, and today those languages are international languages. Now we are in South Africa. Now we find that the departments of African languages at our universities are closed and then we produce lawyers, including judges, prosecutors and everybody, who don't know a single African language or who have not passed a single African language. Now when we are in a court in [indistinct] or in Nongoma, the court is English-speaking but everybody from the magistrate downwards, they are Sepedi speaking or Zulu speaking. Doesn't that create a barrier to access to justice? And if so, would it be unreasonable to say no student must receive a law degree unless they have passed one or the other African language. Secondly, no judge or no lawyer must be admitted unless they have studied customary law. Why? Because we have three customary laws - Roman Dutch customary law, English customary law and African customary law. And the Constitution says they are all equal. Why do we teach English and Roman Dutch customary laws and not the African customary law in an African country?

Lastly Chief Justice, when I did law at UNISA I had not done Latin anywhere in Matric or at any level. I was forced to take Latin in one year and then I was forced to start Afrikaans, I had to study English to qualify. So my view is that from next year, firstly we must re-establish the departments of African languages, secondly, no law students must get a law degree without passing African Customary law and one indigenous language. Would I be irrational or out of order to make such a suggestion?

Mogoeng: Maybe before you answer, are you comfortable Acting President Maya in terms of cold or whatever, I saw you looking backwards, I thought maybe you needed something.

Maya: I was looking for someone to lend me a pen then I remembered that I have in my bag.

Mogoeng: Okay, but are you comfortable?

Maya: Yes I am thank you Chief Justice.

Mogoeng: Thank you.

Maya: Dr Motshekga it would not be unreasonable to set up those requirements at all. I think that one of the greatest tragedies of our time is the death of our languages and it is heartbreaking to hear that the departments in our universities that offer indigenous languages are closing down because there are simply not enough students who are interested in learning our languages. Language as we all know is intertwined with one's culture and if the language dies then the culture dies. It has been a requirement to pass Afrikaans and English as a language since I can remember to acquire a law degree. I had to study Special Latin I, II and Latin I over a three-year period when I was doing my B Proc degree. A language that I was totally unfamiliar to me, and which I encountered only at university level, and all of us in our classes were able to pass the course. And I don't see any insurmountable hurdles in the way of for example an English-speaking student having to learn IsiPedi at university for the very same reason that we are able to learn Latin for example, and some of us Afrikaans. Customary Law as you have pointed out is a very important branch of our law that affects a huge majority of our people. And all lawyers should, we are taught Roman Dutch law, that is the root of our law but it deserves equal status in our society as the branches of the law. I can't say anything more than that.

Chief Justice: Doctor, have you finished? I made a terrible mistake for which I apologise most profusely, because I am used to Acting President Maya sitting here, I didn't ask for the Acting President of the Supreme Court of Appeal to be the first to put questions. I followed the same procedure as before. I apologise to you most profusely - please put questions if any. I apologise to you.

Maya: I did wonder about that Chief Justice.

Chief Justice: I am sure you know I meant no disrespect.

Acting Deputy President Shongwe: No I do. And your apology is accepted. Thank you Chief Justice. I thought perhaps because of the discussion that we had, the one who would be prejudiced more is myself more than any other person, in continuing to ask questions. But I understand. Well Acting President, what I want to deal with is in connection with leadership. You have indicated the positions that you have occupied as a leader in different spheres. I am reminded of a diversity training or discussion that we had recently at the SCA. I wanted you to inform the commissioners and the world, what you would say about the state of affairs of the relationship that you have with other colleagues, and to what extent did this diversity discussion prevail in terms of its success as far as the relationship is concerned.

Maya: Thank you DP Shongwe. Thank you so much for asking this question because it touches upon a very important aspect of what I am trying with the help of my colleagues of course, to achieve at the SCA. I think it is an open secret that, one - our court - it tends to be too robust in the manner it deals with legal practitioners who supply their services in our court. And we have been confronted on a number of occasions about that. And our notoriety - we are notorious - sorry it is late in the day. We have gained notoriety for ill-treating, if I may just use that word, for ill-treating counsel sometimes, and not giving them a fair hearing. And then there is the other problem, relations among the judges themselves. And then - it is an open secret that we are not the most collegial of courts. So one of my targets one of the things I would like to change, is setting my sights on changing, on improving in that court is in that area - collegiality among the colleagues, and just softening the face of the court. Not that we are going to stop being robust with counsel, but just creating an environment in which it will be possible for counsel to have been given a rough time but still leaving Bloemfontein with a feeling that, yes they gave me a rough time but I was given a hearing, I was able to ventilate my case properly and represent my client.

Now, in respect of collegiality, immediately I got onto that seat, the first thing I arranged was a diversity seminar, which by the way you would be aware, we had been informed about by the SAJEI, last year that they had been conducting

a diversity seminars for all the courts across the country. And our erstwhile head had circulated a note amongst senior colleagues saying “look there is this opportunity, is this something you would like participate in?”, and he had been met with vociferous resistance. And only two of us, I will not name the other colleague, had actually seen the benefit in that, and I had written very strongly that if any court actually needs diversity training, it is our court, because we simply don’t get along. So we managed to persuade one another. I was literally begging colleagues to make themselves available for this seminar and they agreed. An overwhelming majority of them agreed. And we held it at the beginning of the first term of 2017, over two days. And that experience was precious, it was cathartic. Colleagues, especially junior colleagues were able for the first time to look at one another and just say exactly what it is that had been bothering all of us. About the way we do things at court – for the first time. By the end of that seminar, everybody who had attended was converted, and we were so enthusiastic about its success that we agreed upon having a follow-up seminar shortly in the next few months, so that we don’t lose this momentum, that were able to achieve miraculously. I will mention this, we had the seminar on the 13th and 14th of February and the term was going to start on the 15th. At 11am on the 15th I come from court and I go to our tea room, and what I saw there shocked me. I have been at the SCA since February 2005, and for the first time in my time at that court I walked in and saw judges sitting, mixing. You found a white judge sitting next to a black judge, next to a coloured judge - we don’t do that. Many people know that black judges will sit in that end of the tea room, white judges will sit in this end of the tea room, it is a fact. We were able over two days to change just one thing, it was not a little thing it was a big thing, we were able to change that, just like that. And one can only hope from that that, things can only improve going forward. And of course there are bigger problems that we still need to iron out among ourselves, and this platform has given us - it has opened the door to the possibility of us to being able to get along better with one another. And we will be able on that platform, to address the manner in which we relate to the people who come to our court, I hope. So that is what it has achieved, Justice Shongwe.

Shongwe: And I will confirm too that it was a success. And I wanted to say that as much as you thought about that idea of the diversity course, the problem that had been raised about who writes a judgment, if you implement the strategy that you have thought of and I have noticed that it is filtering through as to who will write a judgment, I am sure the suggestion that was made by the Chief Justice may work. It is worth considering. What do you think about that?

Maya: I agree, I agree Justice Shongwe.

Commissioner Nyambi: Thank you Chief Justice. Good evening Judge Maya.

Maya: Good evening Commissioner Nyambi. I am sorry I am being a bit sluggish, it has been a long day waiting in my hotel room, anxious.

Nyambi: No don't worry. I will ask you just nineteen questions. That was just on a lighter note. No it is just going to be a few. If you can share with us your understanding of judicial accountability?

Maya: The Judiciary, as are the other arms of Government are accountable to the public we serve. And judges account to society through the judgments that they write - you can't simply make decision and not explain why you made that decision. There is another way of accounting, I suppose judges are subject to disciplinary procedures in case they err in one respect or the other, so they are not untouchable. But the main way in which they account is through their judgments which must be produced speedily.

Nyambi: What's your view of a topical a topical issue in the country and a judge getting into that space and writing an opinion for a newspaper?

Maya: I hope I got your question correctly but I will answer you and then you can tell me if I missed it.

I am old school as you young ones would say. I am more conservative about a lot of things. And one of those is the role a judge may play in the public space. I was brought up through the ranks to believe that judges may speak only

through their judgments, but that cannot be entirely correct. First, judges have the same rights, they are ordinary citizens like everybody else. They enjoy the same rights the Constitution vests in us, one being freedom of speech. So I suppose one has that right. But because you are a judge you have to be very circumspect in exercising it, if you must. Now, because as I have said, judges enjoy freedom of speech, I can only speak for myself. I believe that judges have a role to play beyond producing judgments, but that role can only go as far as enhancing the image of the courts in the eyes of the public. Educating the public about what it is the courts actually do in a democratic government. Beyond that, judges teach. I think they should teach at universities. That is transfer of skills. Judges are asked to speak to students all the time. And I see nothing wrong with it, I do it on occasion when I can find the time. Just to encourage the young ones.

Nyambi: Thanks. As you are familiar with the Code of Judicial Conduct, do you think that there are some aspects that be improved as is or is it fine as is?

Maya: I think it is actually fine as it is, if it is implemented. I am trying to find a tactful way of answering that. Let me just say it is fine as it is.

Nyambi: Thank you but, indicate CJ, that I am humble when you refer to me as a “young one” because I am looking at your CV at your age and my age and it means I am taking care of myself.

Mogoeng: It’s a compliment!

The other professor now. Should I say the junior prof?

Professor Ntlama: I just wanted to find out - are you are a woman or are you a judge?

Maya: I am both Commissioner Ntlama, and I am a woman first. I must make that declaration. I am a woman first, a wife and mother, then a judge.

Ntlama: Then, how do you strike a balance between being a woman and also being a judge?

Maya: I think that question does not apply only to judges. It applies to all working moms, wherever you may find them. It is extremely difficult to juggle the two roles, for any working woman who has a family. It can never be perfect, and I am only learning only now, that what we say that women are very good at multi-tasking and juggling. It is actually a myth. We are not. You can't do it first alone without a tremendous amount of support from those around you, your family being the obvious source of support. It is doable but, I am sure speak for all the mothers in this room, you have to sacrifice something along the way and usually, I am looking at all of you here, you are away from your homes for this whole week and you probably have other engagements that are going take you elsewhere away from home thereafter. So as I say, only with support can you do it. And I have been very lucky in that regard because I have a very supportive husband who I never acknowledge.

Ntlama: Okay. So as a woman judge, what challenges have you been faced within the judiciary?

Maya: Look, the first hurdle, not just in the judiciary as a woman, in any setting, especially male-dominated setting, the first hurdle would be to get your male compatriots to recognize you, that you have something to offer. That is a reality. You have to work very hard to prove that, whilst you are woman, you are as able as them to actually get the work done. And as an advocate, on the bench, in academia, that was the challenge I always met. But if you can show your colleagues that you can produce as well as they can or even better, then they start respecting you. But it is not that easy. It takes time and a lot of hard work, and you just keep chipping away. Now I was just chatting to some colleagues not so long ago, narrating an instance - something happened just this past term, where I sat in court with three other women judges. I was presiding and there was this male colleague, a white male colleague. And throughout the proceedings, one counsel did not look once at us, did not see us. He was looking at this male colleague on the bench. So things like that, those are the things you just need to watch out for and keep working on. Of course I did bring

it to his attention at the end of the proceedings, that what he had done was unacceptable, and he gave an explanation and apologised. At least we know that the counsel who were in court that won't do that again. Things like that Commissioner Ntlama.

But there are many challenges. Then there are the challenges that women judges who are mothers, we face in the High Court, having to go away on circuit for weeks on end, away from your family. Having children on the bench, I had my last child, I was the first judge to fall pregnant on the bench and I had my baby, I had to deliver a judgment, to impose life imprisonment in a criminal matter on the 9th of January 2002, and go and give birth. I had to arrange to induce the birth of that child. You know, because it was difficult to take time off, and the department had never dealt with this problem. They did not know what to do with me. Things like that that can only happen to a woman. I could fill a book. But over time, because the more women you get on the bench, and very importantly if you get women in leadership positions they know about these problems that are peculiar to women, then they will make sure that other women don't suffer the indignities that they suffered to get where they are. So setting more women in the pool, getting women in leadership positions, I think is the answer. Then the male colleagues will get used to having women around them.

Commissioner Motimele: Thanks Chief Justice. I had two questions on cordiality and allocation and both between you and the Acting President have been covered. Thanks, I pass.

Minister Muthambi: How does it feel to be on the other side than being this side?

Maya: Well fortunately I have only been on that side a few times so I am not used to it yet.

Muthambi: Okay. Mine was the question that was raised by Professor. I was looking at your CV on page 2. In particular, item 3.

Maya: Sorry... which part of my CV?

Muthambi: Your CV on page two. On the back page. I think it is the questions that you have to respond to, the questionnaire.

Maya: Yes I found it Minister.

Muthambi: Ja, page 2. And then you say you are married then you said you have got children. It is just an add-on to what Professor has just asked to you. Normally you find women complaining, saying that because they have children to take care of, husbands to look after and then hence maybe they can't do what you have just done. I was just looking on the number of judgments that you have delivered, being a mother, being a wife, to say maybe, what are you doing to also mentor your fellow women judges, because the other time I attended a conference of women judges, they were complaining that the conditions that are there, there must be some special conditions for them as women so that they will be able to deliver judgments or write to that effect. So what are you doing given the achievements that you have done despite you being a mother? As you said there were times where you had to induce a baby, for the love of your work. So what do you do to encourage your fellow judges to that effect?

Maya: Well at this level, in my court, it's a senior court, so the judges you get there are mature women who are past child bearing and even rearing. I had a late lamb so I am an exception. But there are many small things Minister than can be done to accommodate women's special needs, and I would direct my focus especially to the high courts, you know... speaking from my own experiences. I had to do circuit duty. Maybe for two weeks at a time, I had young children, and even when I had a baby I would have to maybe go and sit in Bizana, which is four hours away from my home base in Umtata. And in that instance I would take my baby with me with a domestic worker, and I would ask my Judge President, who was fortunately understanding, just ask for permission to take my domestic worker along because I was breast feeding and I could not leave my baby at home. And then I built up my courage to actually

ask him not to send me on circuit duty that would cause me to travel miles and miles. So he agreed again, and I ended up doing circuit duty in nearby towns where I would not travel maybe longer than an hour and I would be able to commute on a daily basis. Now that is one thing heads of court could implement. Judges by and large are on a flexitime so I could not imagine that there would a head of court who would say no to a judge who wants for example to go pick their child if they make the necessary arrangements or go home and work from home so that they can be around their family. It all depends on the flexibility of the head of court to understand that this person actually has special needs and just find what can be done to accommodate those needs without disrupting the work of the court. It is possible, it is doable. Measures such as those.

Muthambi: Okay. On the 29th of April 2016, as the convener of JSC committee on the investigative report on the Commission for Gender Equality, you signed off the JSC comment with regard to the issue of lack of gender transformation in the judiciary.

Maya: Yes.

Muthambi: And then here paying attention to the detail in your letter that you wrote to the Commission, you have noted some glaring errors that were made by the report and issues were in, they were not informed of the position, that the position that you put clear. And interesting enough when the report was finally released in December 2016, almost most of the recommendations of the report were those that you proposed in terms of your letter. So then putting things into perspective, I presume you are still the chair of the committee, so how are you going to ensure that being a woman and then also you are going to be the first woman in the Supreme Court of Appeal, that is history in the making of our country as well, how are you going to make sure that all the issues you have raised with the Commission for Gender Equality, with regard to the lack of gender transformation in the judiciary, get implemented, as a woman judge activist?

Maya: Let me just hasten to point out Minister, that those were not my proposals. I just chaired the committee that was ad hoc. And the proposals we came up with were as a result of a collaborative effort. What ideas do I have as a prospective Head of Court to improve gender equity at the SCA - is that the question?

Muthambi: Yes.

Maya: I have acted as a head of that court for three terms now, and before that, I was in the leadership. First as the Acting Deputy, then as Deputy. But once I was appointed as Deputy, my predecessor Justice Mpati mostly left the business of selecting acting judges to me. Because on a daily basis he made a point that he did not want to leave us, his time had come to end and he wanted to give us a chance to build our own legacies. So he would not make decisions that would, he wanted to give me a chance to implement whatever ideas I had, so to speak. Now between that time, in the past six terms I think now, we have managed to have eight women judges act in that court, across the colour lines. And by the time we advertised, because we have vacancies now, we will have had nine competent women judges act in that court. And this body is going to be spoilt for choice. That is the one thing one can do, it is just to give our women judges an opportunity to come and act in the court.

And when they get there to support them. And that is what I have been working very hard on, to support them. Emotional support, even if it means because these little things are as important as the big ones, checking on them in their chambers regularly, that is very reassuring in a strange place. Helping them when they produce their judgments, because our court writes differently from the High Court. The standards are more rigorous. Looking at those judgments and helping them improve them. Not writing them for them, but just giving them pointers as to how to produce a good judgment. Which is help that was also given to me when I started out in Cape Town, a very difficult court, by another woman judge, Jeanette Traverso who was really, really good to me. Actually, were it not for her support I think I would just have run back to practice, but the support she gave me and the mentorship she gave me just made it possible for

me to stay on and here I am today. So it is about giving them an opportunity to come and work in the court. They are out there, we must just find them. Give them a chance, and when they do come to the court, support them.

Commissioner Didiza: Maybe taking you a little bit away from the gender issue, going back to the issue raised earlier by Dr Motshekga, regarding the issue of language. Would you agree with me that, even though I heard your answer that you don't think it would be difficult, that you might need to progressively introduce African languages or indigenous languages into the curricula, given the fact that for a number of years there had not been development of African languages fully, and sometimes there has been borrowing from even English or Afrikaans language, and therefore when it comes to concepts, I was just wondering, how do you say jurisprudence in IsiZulu? Or isiPedi? So I am saying that while I agree that it is important, but maybe what one could say is that we need to look at the progressive realisation of that ideal, which must be accompanied as well by the development of the library, building of a lecturing team that would be able and willing, so that you don't introduce IsiZulu of [unknown], but isiZulu of the Zulu speakers and of the Zulu literature, you know developers, because as we all know, that at university when you look at grammar, it's grammar written by [unknown] and I sometimes wonder maybe that is why we ended up with Umese [?] instead of Umukua [?], referring to a knife. Because [unknown] might not have known Umukua, that there is a language in isiZulu called "a wedge for a knife". So for me the progressive realisation of this ideal would have to be accompanied by a number of things into the curricula. And you could just express your view given that you have been in academia before.

But also given the work that you have done in terms of the transformation of the Judiciary, wouldn't you say, one of the things that we might even look at doing at an academic level would be to introduce some of the modules maybe that relate to gender. So that it's not an issue that we deal with after, but rather you introduce into the curricula so that the building of consciousness for both men and women students, you know starts at that level so that it never becomes an issue after the fact when they have qualified for them to be conscientised

about the importance of representativity particularly in respect of gender. Thank you very much.

Maya: Thank you very much Commissioner. I agree with you on both fronts. Of course, on the language issue that is something that could never be achieved overnight. And all the suggestions you make, make sense to me. I agree. And similarly, in introducing gender courses at earlier stages of our education, it should actually start much earlier than that, at school level, at home when our little boys and little girls are young children, which is how I was raised actually and I think that is one of the things that have made me very strong. Because all of us boys and girls, there was no girls' work or boys' work. We were taught from a very young age that we could do anything and everything equally. And then filters all the way up as you grow older. That we are all equal.

Commissioner Schmidt: Judge, you became a judge at the age of 36?

Maya: 35, thereabouts.

Schmidt: 35, even better because I am trying to formulate an argument here. But a lot has been said about experience, and many candidates refer to experience, there aren't experienced women candidates, but I think you are the best example to show that experience on its own is not a sine qua non, if I can put it that way, for being appointed. In fact someone once said hire for passion and trained for skill. So it shows you need the passion, you know you could be an experienced uninspiring judge, you can be an experienced judge without the skills or the ability, even worse without the temperament. So it's a balancing up of those factors, but I would nearly go as far as to say that experience in itself is not a sine qua non, you can, what's the correct word? You can supplement experience on the basis that you have a supporting structure, if I follow your argument. Is that a fair argument to hold, to say listen you don't need to be a judge or a senior counsel for twenty years before you can be appointed? Especially if you don't find women senior counsel who have been around for twenty years.

Maya: I am a living example of that Commissioner Schmidt. There was no pretense in my day, because there would not have been any black women who had the necessary experience, the long tenure at the bar or at the side bar and so on. So what was done was to identify talented people, who showed potential, and then that potential was built up. And I would like, without bragging Chief Justice, I would like think that I am living proof that if you get that kind of candidate, and you give them enough support then they can -

Schmidt: Provided the passion, the ability and the willingness and the eagerness?

Maya: Yes.

Commissioner Msomi: Just a few questions Justice Maya. One question relates to, and I think you have already touched on it, and that relates to what I believe is a good story that you have told. But in your own words, that would you say are the qualities that you possess that you think will contribute to your success in this position?

Maya: I am independent-minded, which I think is the most important quality in a judge. I fully ascribe to the values that are set out in our Constitution. I am hard working. I would like to think that I am an able and competent lawyer. I have the relevant experience to lead those who come after me. I have very strong morals, those who know me will vouch for that. I am honest and I have integrity. And those are the values, I think are the best thing about me. I know my court intimately. I have been there since February 2005. We have 64 staff members today and 24 other judges, well 22 now because two have just retired. And I know each and every one of those people very well. They trust me, well most of them, they have confidence in me, and they have told me so and they show that on a daily basis. I have acted in that position for the past six months now, alone without an acting DP, which has almost killed me because I have been working so hard. And I would like to think that, in those six months, I have served the court, I have led the court well. And I think this is also a very important part of who I am, a very important aspect that this body should also

look at. That I am a woman - a black woman. And that court that was established in 1910, has never had a woman in its leadership before. So this is the moment to make history, to make a statement to our society, that our Judiciary can be led women as well. Women can participate at the highest level of this very important arm of government. I think we have earned that opportunity Commissioner Msomi.

Msomi: The second question relates to what most people regard as the tendency of the Supreme Court of Appeal to exercise judicial restraint vis-à-vis what I would call judiciary activism. And there are a lot of cases that get quoted around that. What is your thinking around judicial activism vis-à-vis judicial restraint? The pros and cons and so on.

Maya: There is also really nothing wrong with showing judicial deference to those who are better qualified than the judges when the occasion calls for it and I am not sure whether that is fair criticism actually. I don't know - are you criticising us that we have not shown any judicial activism?

Msomi: That seems to be the thinking –

Maya: No, I would beg to disagree with that thinking. Where there has been need to develop the common law for example as the Constitution allows us to, we have done that in a number of cases. I have said for example, I have got one case that I can remember now. *S v F* in which I found that a police officer who was off duty and gave a lift to a young girl and then proceeded to rape her, and I was able to reason my way towards holding the state vicariously liable for that act. And on the facts of that case, he had actually placed himself in the position of an on-duty police officer and that the state had to face the music and I was subsequently confirmed by the highest court in the land, the Constitutional Court. And there are many cases of the SCA where we have -

Msomi: Exercised judicial activism

Maya: Yes.

Msomi: And what in your view is the role of Judiciary in a developmental state? And are you able to refer us to any of your judgments where you seem to have given effect to that ethos?

Maya: I am sorry I can't refer to any, I don't think I have written a judgment in that regard. But the role of the judiciary in a constitutional democracy or did you say developmental state?

Msomi: Developmental state. I mean the cases that come to mind, for example from the Constitution would be your Grootboom case, but I just want your views in relation to your -

Maya: Our situation, there, I am just trying to find a crisp way of answering your question. Our courts, you will tell me if it's not enough - the traditional roles of the three arms of government, we know under the doctrine of the separation of powers, you know is legislative, judicial, executive authority vest in these three arms respectively. But, in a modern state such as ours, those boundaries are bound to get blurred. The Executive in carrying out their public administration duties, oftentimes have to make delegated legislation for example. And we know that traditionally law making vests in the Legislature. Then courts which are traditionally meant to interpret the law and see that they are applied correctly, are in terms of this Constitution of ours, that is just an example, have been given the power of judicial review which has led to many judgments which led to some quarters of our society accusing the courts of overstepping. But I think they have the power to do exactly that, in the cases such as Grootboom, there are many different cases one could mention in different contexts. The Constitution allows the courts to do exactly that and they are doing their best to protect the citizen's rights which is their primary function actually. I don't if that answers you?

Msomi: No, it does. Thank you so much Chief Justice.

Commissioner Nkosi-Thomas: Such a pleasure to see you after such a long time and I can only wish you the best. But let me get on with it. No, no, we are not friends, she is a fellow commissioner in her other life. So the question that I would like to put to you - I listened with interest when you said to us that you have afforded acting opportunities as it were to eight female judges and I think that does excite one, because it does enlarge the pool from which this body could sort of fish for SCA judges. But an issue arose in the past and I don't know if you remember that, around the criterion used to afford people such an opportunity. In other words the suggestion being that it is done a rather arbitrary basis, cherry picking and all that. My question to you Deputy President, how have you managed to bring about transparency and to ensure that that opportunity is being made available on an equitable basis so as to avoid such a criticism going forward? Thank you.

Maya: Thank you Commissioner Nkosi-Thomas. I have not done anything different from what my predecessors have done before. Starting with the former President Howie, who brought me, the first black woman to the court, I am quite sure there was a lot of resistance from some quarters if not all the quarters of the court then. Though the years, the face of the SCA has changed and we have managed to get women appointments but very, very few. And I supposed because of my bias as a woman I made it my mission to get more. And remember that Judge Mpati was still there for half the time that these women were acting there. With his support and concurrence, he did not stand in my way, we were able to bring in these women, which I have continued to do since he left. I am not quite sure what you mean by making the process transparent, but I'll give it my best shot. As I said I have not done anything different from my predecessors. We usually call the JP of that particular division where you have identified a woman and maybe if there are colleagues from within the court at the SCA who are from that division, just ask them if they know that colleague. But the primary source of information as to the capabilities of that colleague will come the Judge President who works with the colleague on a daily basis. So that is the formula I have been using, and transparent or not, it works. And if you are looking for women you will find them, whatever method you use.

Mogoeng: Thank you very much Commissioner. Acting President Maya, just a few issues. There has been a suggestion that maybe one of the avenues to explore is to get people from the academia, particularly women such as was done with Justices Mokgoro and Kate O' Regan, and just bring them either to the Constitutional Court and I suppose the Supreme Court of Appeal. What are your comments on that possibility? And the reasoning is, whether they are familiar with the rules of trial or not is neither here nor there because you work on a record, you look at the record and write your judgments. Any comment?

Maya: Well I think it is fair that I should point that the Constitutional Court of the time was totally different. Knowledge of experience in a court room as a practitioner for example would serve a colleague from academia very well. It makes the learning process of working in court easier because you are familiar with these procedures. I think we have an example in the room. I understand that Commissioner Ntlama who is a full-blown professor, never worked in that kind of setting before, acted in the Eastern Cape, then is now acting in KZN. And I had taken an interest in her case, because I want in my capacity as a SAJEI councilor, just to find out how viable, how feasible it is for somebody raw from the academic world, how feasible is getting that kind of person quickly into the flow of things. And the report I got from the Eastern Cape, I spoke only to the Eastern Cape people, was quite positive. Yes, like anybody, even a practitioner who has not sat on the other side of the bench before, it won't be as easy, it takes a bit of time to learn. So it is a viable option Chief Justice, with the support of the courses, for example, that are offered by the South African Judicial Education Institute, where they are put through their paces just to familiarise them with what happens in a court room. So I don't know if that answers your -

Mogoeng: At SCA level and Constitutional Court level, direct either from practice or from the academia. That's what I wanted to know. I am sorry to use him as an example. Say Commissioner Motimele here, or Commissioner Nkosi-Thomas, let's turn to gender but also race, can you just take them, give them an acting stint at the Concourt or the SCA? Is it a viable proposition?

Maya: Well you have to be a judge to ascend to the SCA, and I am not quite sure, you'd guide me CJ about what the position at the Concourt now is but, if recent trends are anything to go by you have to have been a judge to be a judge there, acting or otherwise. Not since the days of Justices O'Regan and Mokgoro have we seen an academic at the Constitutional Court. So what would be the saving grace in respect of this, at least in the SCA, is that this colleague who originally came from academia would have had to serve in the High Court for a few years at least and then they would have learnt, I mean by the time they come to us, they have been moulded and schooled in the -

Mogoeng: You have opened up something that I must go through. And that is that it is not always a pleasant experience for counsel to appear in the SCA. Is it correct or is it incorrect? You would know some cases in that regard served before the Constitutional Court. Do people get the opportunity to present their case or is there the kind of interruption that could dislodge many a counsel?

Maya: Unfortunately that is true, Chief Justice, although it is not all the - my colleague next to you will bear me out on this one. It's just a tiny minority of colleagues -

Mogoeng: Oh it's a tiny minority?

Maya: Who may be accused of that type of conduct. And as I said earlier, this diversity workshop platform actually gives us an opportunity to discuss such issues and engage with colleagues who, I don't want to say behave badly, but who -

Mogoeng: Who could behave better -

Maya: Thank you Chief Justice, yes.

Mogoeng: I heard many years back that in Pretoria, white judges sat one side and black judges one side, but that was resolved. I am sort of shocked to hear that you seem to be saying that up until recently, 2016, that you'd find white

judges sitting all by themselves and black judges sitting all by themselves. Did I not hear you correctly?

Maya: Up until 15th February 2017, Chief Justice.

Mogoeng: 2017?

Maya: Yes, that was last term when we sat together. Together in the true sense of the word. For the first time, well at least since I got there.

Mogoeng: Why?

Maya: I suppose - look, the black judges, let's be fair, I think are to blame. We are all equally to blame. People, just like other animals in the animal kingdom tend to gravitate to those that look like them, who have the same interests as they do. It's just a common phenomenon of human nature. We had not tried - we really had not applied our minds to what this actually meant in real terms. And until we had this session, we realised that what we were doing was actually very bad and not promoting collegiality at all.

Mogoeng: At a leadership level, without being critical, what was being done? You have been to the Constitutional Court, you know how we interact. Why was it difficult? It's another animal farm - we don't gravitate towards one another. We're a family there and we are not pretending. If we disagree we disagree. But why did the leadership allow it to carry on until February 2017?

Maya: Well, as I said no one paid it any attention, we just accepted it as a way of life. All the SCA judges who have acted at the Constitutional Court, the first thing they will tell you when you ask how their experience there was, is to just rave how collegial that court is and just how respectful the colleagues are amongst each other. Each one of them, all those who have acted there without fail, including me, and it is something that we have, I speaking for myself, have envied for a long time. And I was asking myself but why, what is stopping us from behaving in that fashion?

Mogoeng: I understand, and you may confirm or if you are uncomfortable to confirm, don't, just let it pass. That it is possible for a senior judge, without having discussed differences with a junior judge who has been allocated a case, just to take it and start writing. Or to write a dissent that may turn to be a majority without having afforded the junior the opportunity to appreciate where he or she comes from so that if persuaded, the other one could write along those lines. Is that a misrepresentation of the position or not? As you can imagine I am shocked, because if these are true they have never been brought to my attention for any possible intervention.

Maya: Regrettably, just two weeks ago, I had to intervene in such a case. Where an acting judge came to me, very understandably very upset, because she had written a judgment, circulated it, and then suggestions had been made by all the colleagues. And it was agreed that the judgment was lacking in one respect or the other and would be supplemented. But no judgment, no critical judgment was made at all in respect of the bulk of the judgment. And lo and behold, on a Monday or whatever day it was, the judgment landed on her desk – and it was a re-write of the whole thing. But we managed to sort it out.

Mogoeng: Has that been happening over the years?

Maya: Yes Chief Justice, yes.

Mogoeng: Why was it allowed to happen up until now? As you would know, just to put in a proper perspective. I interfere as I should when there are problems with service delivery. That's why I ask for reserved judgments, relating to those that are three months old from all the courts. But in order not to micro-manage the leaders or undermine the authority, unless they bring this sort of thing to my attention, I steer clear. That has been the practice. Why was it allowed to linger on, for this long?

Maya: Maybe in fairness to my predecessors, because colleagues would just not bring it to their attention and to try to either live with it or deal with it in their own way.

Mogoeng: And not even tell other senior colleagues who could then complain on their behalf? And yet it was known. How did other colleagues get to know about it if it was not raised?

Maya: Well, we all knew. I have a senior colleague who sits in the Constitutional Court today who once acted in that court and the same thing happened. And this is an able and competent judge. The other colleague just pushed his own draft under this colleague's door, no word no warning at all, an indication that "I don't agree with you" here and there and it is something that we have not forgotten to this day.

Mogoeng: Is it fair just to - you know I don't think I should probe any further, you have said we are not the most collegial. Is it fair just to assume that now that you know the problems and you are concerned about it, should you be appointed President of the Supreme Court of Appeal, you will build on what you have started and make sure that collegiality obtains and nobody is made to feel small or is undermined?

Maya: That is a huge component of my vision for the Court Chief Justice. The Supreme Court of Appeal is a very hard working and efficient court, I think everybody knows that. The challenge just lies with the relations now, and I think it is possible to fix that problem. And we are on the path of doing that actually. I am very hopeful. It will never be perfect, wherever you find a group of people there are bound to be misunderstandings and all that but not on the scale that we are well known for unfortunately. And my leadership style, very deliberately, is an inclusive one. And my focus, and Justice Shongwe would bear me out on that, has been to try and just bring in the junior colleagues, who often feel they don't really have any standing in the court. No-one takes them seriously. Bring them in, be it in our core judicial function, that is the writing of judgments and so on. But just in the ordinary running of the court affairs, our court is run by

committees, and it is a system that works very well. We have various committees, the Finance, you know, which is manned by the most experienced judges, court administration, House, Library, and Research and so on. But practice in our court through the years has been that the most senior colleagues in those committees, we just run things. And from the day I arrived there and until very recently, you would hear colleagues complain that “my goodness I am in that committee but I have never have been called to a single meeting”, yet decisions, I learn subsequently, decisions have been made by the committee. So those are the things, one of the things, that I am trying to change. Make sure that the junior colleagues who are in those committees actually play a role so that you give people a stake, they must also feel that this is their court as well. And in that way, you create a pleasant work environment, where people actually look forward to going to work. There are many stories of colleagues who will tell you that they dread going back to Bloemfontein at the beginning of term, and that’s exactly what I want to eliminate. We should look forward to going to court, as we did all of us when we were in the High Court running our own courts.

Professor Motshekga: Justice, I am surprised that you are surprised that these problems are lingering on. In 1980, OR Tambo addressed the roots of racism and he observed, when addressing the World Council of Churches, that God created and placed men in dominion of the Earth and the other animals. But that Europeans place themselves in dominion over African people and animals. And actually they also created God in their own image. That’s why all the pictures of God, the Father and the Son, look like white people. So that’s how deep racism goes. Now until today there are separate church services for black and whites, the judges, black and white judges, sit differently, and the list can go on and on. The problem in my view, is that, as OR Tambo observed, we address effects and not causes. For instance, government is preparing a hate speech bill. Hate speech, it’s symptoms of racism. It’s not racism. So which means even government today is not ready to deal with the root causes of racism. Now to you Judge Maya, would you agree that we need to root out the causes of racism, not the effects of racism? And if we agree that we therefore need to criminalise racism, and I think there are precedents somewhere in the

world, would you agree that we need criminalisation of racism and not tinkering with it through legislation like hate speech, which is proposed by government?
Thank you.

Maya: Commissioner - Dr Motshekga, I think the statutory mechanisms that are in existence right now, if used properly and effectively, can take care of whatever problems of whatever racial issues linger in our society, and we know that the problem exists. Can I just be allowed to correct something that I may have miscommunicated, Chief Justice? In my early days at the Supreme Court of Appeal, where you sat in the tea room was chosen for you by the Chief Justice, and there were very few of us there at the time and I think that in that arrangement we managed to mingle. It's only when that rigid and inflexible rule was changed and people were given a choice to sit where they wanted, that we saw this phenomenon. And as I have said, it is not the white colleagues who decided to go sit on their own. White and black decided to sit separately. So I suppose we are all to blame. Why we would behave in that manner, now I think that's where - that's the interesting bit, where that came from. But I won't say anything to that.

Mogoeng: I think my point was - and I'm not being critical - it's an abnormality which ought to have been addressed by the leadership. That's the bottom line. Yes Dr Motsheka?

Motshekga: Judge you are saying that, if I heard you correctly, that it's human nature for people to gravitate away from one another?

Maya: No,no, no -

Mogoeng: She's saying ' Soort soek sort...'

Motshekga: Yes I want to address that. Maybe I didn't capture you correctly. But this idea of 'soort soek soort' is actually created in the minds of people, it's not inborn. You know at the beginning of the so called Christian century, everybody in the world gravitated to Egypt. The University of Alexandria, which

was a black country, run by black people, a university created by black people. The so-called Western civilisation today comes from Africa, Egypt. And the people that gave the world civilisation today, are looked down upon, even on their own continent, and in their own countries where they are supposedly in charge. So this thing is artificial, it's created, it's not inborn. And I think Honourable Mandela put it very well - that people are taught to hate, so there is nobody who was born hating. So that's why I want to suggest to you, in our circumstances, fighting racism and eradicating it, must be a fundamental duty because we can't create a non-racial, non-sexist South Africa, unless we deal with this racism.

Maya: I agree, Commissioner

Mogoeng: Commissioner Malema unless it's a follow-up, there is Commissioner Norman. Is it a follow-up question? Yes

Commissioner Malema: And I didn't want to speak but, is there a difference between multi-racial and non-racialism?

Maya: Sorry, that is not my area of expertise Commissioner Malema. I am not sure.

Malema: Isn't it we are conversing about the creation of a non-racial, from your leadership perspective at that level? And I am saying, in your understanding, in the course of creating a non-racial environment, can we differentiate between a multi-racial and non-racialism?

Maya: I am sorry, I don't know the answer to your question. I am not quite sure what it means. But I know what I want for my court. I want colleagues to treat one another with respect, be they male, female, pink, yellow, and so on. And that's all we want, so we can on with the business of dispensing justice to our people.

Mogoeng: For what it is worth, multi-racialism, isn't it where there are many races, and just non-racialism is where your race is inconsequential, you are just a human being. I am just raising it in case Commissioner Malema would want to dig deep into it as well. Your race doesn't matter, we may be of a different race but we are all human beings. Non-racialism, therefore you can't superior or inferior because of your race. Multi-racialism, we are many different races, we are there, but it doesn't exclude the possibility of race becoming used to the detriment of others and the advantage of others. I am just thinking aloud. Commissioner?

Malema: I am raising this Chief Justice because I listen to a lot of arguments about how whites and blacks are going to sit at the same table and all that. And then what? That's multi-racial. There is no sharing in a common vision. There is no sharing in wanting to achieve the objectives of the Constitution of the Republic of South Africa. But we are forced by circumstances. Because we are working together and the leader here says "I can't have blacks eating there and whites eating there, or tea, I don't know what it is, a tea room? You are all now going to sit together". But they just sit together but they don't share anything. They still look down at each other. The white supremacists still exist, and exactly what Dr Motsheka speaks about. If we can't address the fundamentals which give rise to racism, then there is nothing we are going to do except create a multi-racial society. But it is a debate for another day.

Maya: Another day. Although I would choose to differ with you just on one tiny aspect. That sitting together and sipping your tea next to each other makes no difference. It actually does, because it forces you to speak to each other. And maybe if we discuss the work that you are supposed to do as a team. Remember we work as a team there. We sit in panels of three or five, so I think it is a very important step towards being able to sit in a case and be able to speak freely with respect and dignity. And when are you going to get an opportunity to get used to this colleague? There are not many opportunities, and the most obvious one is when you go and sit in that room, even if it's just for a few minutes. It does make a difference. But as you say, argument for another day.

Commissioner Norman: Good evening. What I find concerning, as a follow-up from what Commissioner Malema was asking really is, all these judges who are now serving at the Supreme Court of Appeal have been before this commission, and each and every one of them, black or white, they had informed this commission I would imagine, at some point or another that they do not see race. And now from what you are telling us, clearly this is not what they have been doing. From the time they left being appointed to that court, they have been doing something that's contrary to what they'd actually told this commission, as to who they were and how they see that court going forward. That's the first thing that concerns me. The second thing that concerns me is, we have seen it, where you've invited African women to go and act, something that we truly applaud, but listening to you now, how are you going to make sure that the gains that you've made so far are not reversed? Because of the very divisions that are there. It may appear that, well, maybe you will be able to fix them, but they will resurface in the manner in which you have described to the commission where people's judgments are undermined and that's making those very people that you have invited to go act never wanting to go back.

Maya: You prepare colleagues when they arrive at the court that there may be difficulties, and if there are difficulties of any nature, your door is open - they must feel free to come and report whatever upsets them. And that what has been happening. And when these incidents arise, you address them, even if it's on a case- by-case basis. And once you address them with those colleagues, they will not easily repeat it again. I am sure. Because they will have been shamed. And that's what we have been doing. Junior colleagues know that my door is always literally wide open and unfortunately that attracts all sorts of distractions because everybody, you know, just keeps coming to speak to me. But that door is kept open so that everyone can just waltz in and tell whatever is on their mind. And that is what has been happening. All the problems, for example with the judges that have been acting now, all the problems big and small that they have experienced, they have come to speak to me about them, and we have addressed them. And I am hopeful that at least as so far as the culprits in these instances are involved, there won't be a repeat.

Mogoeng: There was a programme that we went through, I think you did too, shortly after our appointment. Sensitivity and Social Context Training, which SAJE continues to offer, which brings together people from different races and help them appreciate the prejudices they harbour one against the other, which they may not even have been aware of. The negative attitudes men have towards women and vice versa, that they are not aware of. The attitudes that people have - African people against Indians. Some, I remember used say “I understand you people never cry when you loved one has died, I understand you people don’t see anything wrong with having babies even when you are not married - you actually celebrate it”. All sorts of strange things that inform the prejudices we harbour one against the other were exposed. And people were speaking freely. We had facilitators. Have the SCA judges gone through that? Because until you internalise non-racialism, it can never be forced down upon you. You have got to embrace it. You have got see it as the right thing, the right way of life to pursue. Anything along those lines to de-brief, in quotes, some of our prejudices, as black people, as white people, so that we see the normalcy of relating as equal human beings regardless of our colour or gender.

Maya: That’s exactly what the diversity training that Judge Shongwe and I were talking about does. That’s what they call it these days. It’s exactly that exercise, Chief Justice. And it works wonders, and indeed we all carry these baseless prejudices and assumptions about one another, that exercises such as those can only help debunk, and you come out stronger and more informed, and you can only benefit from that. And as I said, we have agreed to have a follow-up one in the next three months. So we are on that path.

Mogoeng: Thank you very much Acting President Maya. On a lighter note I have never seen you so relaxed in an interview.

Maya: Thank you very much Chief Justice, maybe it’s the advantage of age, maturity. I’m an older woman now. I’m not easily fazed.

Mogoeng: Thank you very much. And even for forgiving us for keeping you until this late.

Maya: Thank you Chief Justice. And thank you very much to all the Commissioners.

Mogoeng: You are excused.