



JUDGES MATTER

Judicial Service Commission interviews

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Constitutional Court Deputy Chief Justice

Interview of Judge N J Kollapen

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Chief Justice Mogoeng: Good Morning Judge Kollapen.

Judge Kollapen: Good morning Chief Justice and members of the JSC.

Mogoeng: Are you well and relaxed, or are you as nervous as I always was when I came for interviews?

Kollapen: I am well but I must confess, I am also a bit nervous.

Mogoeng: Tell me, where were you born?

Kollapen: I was born in what is known as Lady Selbourne.

Mogoeng: Lady Selbourne?

Kollapen: Yes, Lady Selbourne, the Holy Cross Nursing Home.

Mogoeng: Near Pretoria?

Kollapen: Yes. We lived in Marabastad, but our mothers would go the Holy Cross to give birth to us.

Mogoeng: And are you one of the beneficiaries of the land restitution there?

Kollapen: My grandmother was, yes. She lived in Jerusalem Street in Marabastad.

Mogoeng: And - anything about your upbringing that you want to share with us? Something that can inspire the youth?

Kollapen: Chief Justice, I grew up in Marabastad and lived there for the first eleven to twelve years of my life. And as I indicate, it was a vibrant, thriving community for all South Africans on the one hand, but one also experienced the excesses of apartheid and saw what the system did to your parents, what it did to the community. But despite that one was inspired by the resilience of the community, you believed that tomorrow would be better. My mum was jailed when she was 20 years old, in the passive resistance struggle. She was jailed twice, in Durban. They went down as a group of volunteers. She is still living and is 91 now. She was also part of the historic '56 Women's March. So one grew up in an environment within the community that exposed one to the injustices of the times but also instilled in one a sense of belief, of hope, of value. I am privileged to have been part of that journey and to some extent it has shaped who I am today.

Mogoeng: Yes -

Kollapen: And just finally, I would just like to say that, my journey from then to now, I consider myself to be enormously privileged, as I think all of us in this room must be. Because we lived through apartheid and were able to be part of the historic, noble struggle for justice and freedom, we were able to witness the transition to democracy and we have had the opportunity to make a contribution. So every day when I go to work – and I take an interesting road to work. I drive to Thaba Tshwane, I see the Voortrekker Monument and then immediately afterwards I see Freedom Park. I then pass Kgosi Mampuru Prison, where I do a lot of my work and then I turn into Madiba Street and then the court, where I work. So every day it is still an enormous privilege to serve my society and to serve my country. Thank you

Mogoeng: Why did you do law?

Kollapen: I had an uncle, who wasn't a lawyer but he acted almost as a paralegal, and in those days if you needed to consult a lawyer you would speak to someone in

the community. And he encouraged me as well. But as I grew up I also had a sense that despite the horrors of our society, we could, through the Law perhaps, make some impact and make some difference. And in the seventies and eighties it was very difficult. The victories were few and far between but I believed then and I believe now, that the Law can provide a basis for the social construction of our society, just as it was a tool for the social destruction of our society, it can and it has demonstrated its ability to make meaningful change in the lives of our people.

Mogoeng: What is the total number of years you were an attorney for? That is before you went to Lawyers for Human Rights?

Kollapen: It would have been from about 1981 to '92.

Mogoeng: That makes it just over ten years. And what were your areas of primary focus?

Kollapen: Initially one had quite a general practice. Living in a community you served the needs of your community. But then the eighties were difficult years in South Africa. And I gradually became involved in what may have been termed political work. Young activists from Atteridgeville, from Mamelodi, who found themselves in conflict with the Law became my clients and I did a fair amount of work in that area. And gradually my practice developed into a more substantial focus on that kind of work. I also acted as a correspondent in Pretoria for Mrs Priscilla Jana who at the time practised in Johannesburg. And that gave me the opportunity to be involved in some very interesting cases and work with some interesting counsel and one learnt a lot during that period.

Mogoeng: And for some four years you worked for Lawyers for Human Rights – first as a national director of projects and later as the overall national director of the body.

Kollapen: That is correct.

Mogoeng: And then you went to the SA Human Rights Commission, where you were most visible, I dare say. And what experience - and don't be shy to brag, if you are able to brag - what experience were you able to pick up – that relates to the position that you have applied for now?

Kollapen: Well I think Chief Justice that at the Human Rights Commission one was in a very fortunate position to work in an institution that had the difficult responsibility of articulating and perhaps beginning to giving meaning in an ordinary sense as to what human rights were. We have this wonderful constitution but how does one translate that into reality in the lives of people? So one began to grapple with difficult issues such as equality, issues around the rights of non-nationals, issues around gay and lesbian people, around older persons. Around rural communities. My work in the commission took me right around the country. I spend days in Andriesvale which is right up in the Northern Cape, with the Khomani San people, looking at the reality of their lives but importantly how the constitution could be relevant and important to their lives. My work took me to a village in Skusune called Qabashe. So one was able then to get out of one's ivory tower and engage with people on the ground and their own expectations and their own understanding of the constitution.

I always recall a villager in Qabashe who said to me 'Mr Kollapen, you speak quite passionately about human rights. And that's commendable but if I may dare say so, you speak passionately because it has worked for you. And I promise you that when it works for me I will be just as passionate about it.' And I thought that was a very sobering comment, but not an unfair observation as well.

Because what it reflected is that there are so many people who live outside of the constitution and unless we are able to bring people under the constitution and to make it real and relevant in their lives. So my work at the Human Rights Commission was in part about doing that, in part about developing an understanding that rights are not just about legal norms but also about values.

And perhaps the values are more important. And if I ask myself why should we be committed to gender equality? Is it because the Law requires us to do so or is it because as a matter of conscience and a matter of personal ethics we believe in the dignity of women, and irrespective of what the Law may say tomorrow, that commitment will remain? And for me the values are just as important.

Mogoeng: Just in passing on that point, incidents of racism and gender discrimination did rear and possibly still do rear their ugly heads within the judiciary and also the broader society. What do you think that is so? Why do you think we are

still grappling with racism, gender discrimination and what do you think it is that we should be doing that we are not doing as South Africans? Based on your experience.

Kollapen: Chief Justice, while I think the transition to democracy was described as in some quarters as miraculous, I think that, with respect, we are an ordinary country capable of doing extraordinary things and perhaps with the benefit of hindsight, the process that saw the formation of the TRC and in a sense the process of dealing with our past was a very limited process. It really dealt with the excesses of the security forces, it dealt with the crimes of apartheid but it did not deal with apartheid as a crime, if you understand. And it did not afford ordinary people the opportunity to engage with each other. I recall that while I was head of the Human Rights Commission I made the remark at some stage that while reconciliation was important, reconciliation without transformation was always going to be lacking in its content and in its depth. And I don't think South Africans then and in fact now engage on these issues. So I ask myself the question – I grew up in Marabastad, but I must accept that the quality of my education in Marabastad and the amount of money the state spent on me education, growing up in Marabastad, was more than the amount spent on a young child growing up in Atteridgeville. Now what does that mean for me today? Does it not mean that I must recognise that to some extent I was privileged even though I was part of an oppressed majority? And I think for all of South Africa, we must on the one hand recognise those injustices and ask ourselves the fundamental question: How do we contribute towards building of a society? We can't say, with respect, that reconciliation has been effected, it is over and let's move on. We must indeed on but we must talk about those issues and I don't think we talk about them sufficiently. I think we talk about them in the aftermath of an incident and that's inevitable but not always the best time to do it, because issues become polarised, they move into their different camps. And yet there is so much we have to do.

Mogoeng: Well there now is that calmness and brightness on your face that tells me you are settled now. Let me now go where I really have to go. You have been a High Court judge for a little under six years now. Is that correct?

Kollapen: I started acting in 2010 and was appointed permanently in May 2011.

Mogoeng: Now with your background, how you saw your experience assist you, if it did, as a High Court judge in preparation for the position you have applied for.

Kollapen: Chief Justice I have certainly enjoyed the last seven years or so in my position as a High Court judge in the North Gauteng High Court. It's a busy division and I have been exposed fortunately to a wide range of issues in relation to the work I am required to do. Issues that deal with the law of defamation, admin law, family law. I also sit in a court where one is expected to deal with issues that you may not necessarily have had experience in as a practitioner such as issues relating to intellectual property for example, trademarks and patents and one is often thrown into the deep end. And so you apply your mind conscientiously, you use the skills of the trade that you have been taught, you rely on the advice and assistance of colleagues and you always remember the importance of the work you do, the impact it has on the lives of people and the need to be conscientious. And I think in that regard I have certainly enjoyed the experience, I have been able to have exposure to some interesting matters, write what I think may have been some interesting judgments. It has also given me the discipline to recognise that being a judge is different to being a commissioner on the Human Rights Commission. There one can get up in the morning and express a view that you think represents in a sense the collective views of the commission and articulate that view publicly. As a judge you don't have that privilege and understandably so. You function within a different discipline. You function with regard to the issues before you, the facts before you and the law before you. And I have come to internalise that discipline in my work and I enjoy my work tremendously. But beyond the work I do as a judge I have also been able to enjoy doing other things as a judge. In April last year I was appointed to chair the Law Reform Commission. That gives me a wonderful perspective of law reform from a different prism. The Law Reform Commission is charged with some very important projects which it is currently undertaking. Some of those deal with the custom of Ukuthwala, the suppression of witchcraft, the right to die, the decriminalisation of prostitution. And that allows you to look at an area of law from a different prism. I also sit regularly as a moot court judge, which I enjoy thoroughly. I am also involved in the training of young lawyers and to some extent, judges, through SAJEI. I have been a trainer on SAJEI's programmes and I have assisted the Pretoria Bar Council with regard to the training of pupils. I have also assisted the

Law Society of the Northern provinces in training of attorneys who want to become judges. And on issue that may be quite close to your heart Chief Justice, I have been quite involved in the case management committee, I sit on the case management committee in my court and I was also privileged to be a member of the National Drafting Committee that drafted the new Rule 37 that would give effect to, in a sense, the precepts of case management. So when I look at the experience in its totality, I have benefitted from a busy division, from good leadership that my Judge President and Deputy Judge President have exercised in giving me the opportunity to grow and blossom, and so to that extent that experience holds me in good stead for the position I have applied for.

Mogoeng: And in a way, I suppose that you would say that it flows from your *Afriforum* judgment , *Section 27* and *SANDU v Minister of Defence* judgments?

Kollapen: Yes, that I have had the opportunity to engage and interrogate the difficult issues that the Constitution confronts us with. And in doing so Chief Justice I think it is important to understand where we come from as a society and where we need to go to. It doesn't mean that that understanding gives one carte blanche to do as one pleases. But one needs to infuse that understanding in the work one does. And one hopes that if one read the *Afriforum* judgment, I seek to do that and in the closing part of the judgment I make the observation that we have a choice as a nation: we can live separately in our splendid isolation or we can embrace the diversity of the Constitution and the choice we make determines the nature of our society. So yes, I think I have been able to bring and infuse an understanding born out of my personal experience of what the Law must do and the purpose it must serve in society, but mindful of the constraints of judicial authority as well.

Mogoeng: And finally, unlike the other applicants, you have never acted at the Constitutional Court but that is simply because I never invited you. That is neither here nor there.

Kollapen: That is correct. And depending on how this process goes, I will always be willing to accept an invitation. (Laughter)

Mogoeng: Commissioners? Yes, Doctor? Before you go, we have agreed that as from today - no preamble, no more than three questions, follow-up only where strictly

necessary and with my permission. Just straight to the point and as briefly as possible.

Commissioner Motshekga: Chief Justice, I expected you to make that ruling yesterday.

Mogoeng: And maybe before you go, I forgot to welcome Chairperson Modise into our midst. Welcome.

Motshekga: Judge Kollapen, it is a pity I came late. I thought that you forgot to mention that you served articles in one of the leading firms and when you came I was a senior clerk and you were one of the most brilliant young lawyers. Why do you forget such an important thing?

Kollapen: Thank you Commissioner Motshekga, I did in fact serve articles with Commissioner Motshekga at the firm Savage, Jooste and Adams. I thought that I didn't want to specifically mention it because I didn't want to appear to be dropping names, but I do acknowledge that. That was a good time for me as well, and it was not an easy firm to work in. It was a very good firm but it was not a firm that was anywhere near to the kind of society we wanted to, and I recall our tea discussions, so I do apologise that I didn't mention it -

Motshekga: Don't you think that community legal services should be compulsory for law students, because we are told that universities produce unemployable graduates? Wouldn't it help them if during their studies they undergo training by people of your calibre?

Kollapen: I certainly would agree with that and I have on record supported that previously and said if - and it's based on a simple few powerful arguments that support that. The one is that the state pays largely for the legal education of young law students, like it does for medical students. Medical students are obliged to do community service. Young law students, if they were obliged to do community service, could receive a stipend, could be exposed to training opportunities but importantly could bridge an important gap in the access to justice paradigm. And that's a significant problem we face. The access to justice issues in our country still mean that a large number of people still don't have access to justice as they should and it makes the promise of equality before the law elusive. So to cut a long story

short, I would certainly be in favour of a programme that would make it mandatory for law students to do community service.

Motshekga: I'm allowed three questions so I still have one question. What would be your position if we were to propose that African customary law, like English customary law, together with one indigenous African language, should be compulsory courses for every law student that qualifies?

Kollapen: Well I think there's some discussion in that regard and I think it's an important issue. I would certainly support it. I have observed the debates with regard to the treatment of customary law in the present constitutional dispensation and it was really provoked by a discussion I had with the Minister of Justice late last year at a conference – the International Association of Women Judges – and arising out of that, there are some who say 'Well customary law is recognised in the Constitution as long as it is not inconsistent with the Constitution' and they claim that that relegates customary law to a secondary system of law. But in Section 39 the constitution speaks of, in interpreting customary law, one must give effect to the spirit and purport of the Bill of Rights, and so I think that a compulsory module in customary law would certainly be helpful. But arising out of the discussion honourable Commissioner, what I also thought about was that beyond the content of customary law we often don't speak of the values that underpin customary law and so content issues are difficult when one has to deal with its consistency with the Constitution and currently if it is inconsistent with the Constitution it will not stand scrutiny but the values that underpin customary law, for example the community, as opposed to an individual, the idea of an approach to justice that is not adversarial but inclusive, is something that I think, as judges, need to think about. And arising out of that discussion, what I did was when I got back to the office, I asked the researcher working at our court to pull out some articles on the issues because I am not an expert on it. What I then did Chief Justice was I sent a note to Dr Moshoeu at SAJEI just with the suggestion that maybe that issue can be considered as a topic for judicial training in the future and she kindly wrote back to me – sometimes when you make a suggestion you get the work – and asked whether I would be willing to put together a committee that might look at that issue and work with SAJEI and judges. But then we have to be honest about the judicial fit and how we include those values into the work we do. So someone comes from the community to my

court and he takes the oath – and I’m saying ‘he’ simply as an example but maybe because of my socialisation, I must confess - but before testifying, wants to say to me who he is - “I am so and so, I want you to know a bit about me, this is where I come from Judge’ - and our system is so rigid, so adversarial that it doesn’t create the space for that conversation. So as Professor [indistinct] has made the point – ancient customs often don’t fit into modern institutions and we need to look at the modern institutions and ask ourselves ‘How do we make them fit?’ And so one is hoping that arising out of my engagement with SAJEI, we can have that as a topic in the future. Thank you.

Mogoeng: And just by the way, that really makes our courts unfriendly, doesn’t it? That person is used to coming and greeting first before a conversation can start. And I have seen a judge, while I was in practice, destroy the confidence of a witness saying ‘Are you drunk or mad? Just tell us what you are here for.’ Anyway, Acting President Maya?

Acting President Maya: Good morning Judge Kollapen. I don’t have a question for you. I just want to supplement what you told us about your involvement at the Law Reform Commission. I was actually very disappointed when I did not see any mention of the role you played there, in your questionnaire. Because it is a very important institution in our legal set-up and what you do there is actually a complete job on its own because it requires a lot of time and dedication, which you gave. I just wanted to add what you did not mention and that is that you did not actually get involved there only from last year – you were my deputy from 2013 until last year and you kept the fires burning because you were right there in the seat while I was in Bloemfontein and whenever there was a need for our intervention you were ready to come in. I just wanted to add that because I think it is very important.

Kollapen: Thank you. My apologies if my questionnaire wasn’t as comprehensive as it should have been, maybe I should have been more comprehensive -

Maya: No, you are just modest, because I see there are a few other things that were left out, but that’s no problem.

Commissioner Hellens: Thank you Chief Justice. Judge, first just a comment. I note from all the input that you are very speedy in delivering your judgments and that

is something to be commended. Not all judges are keeping up to that standard. But now a question. There have been an increased number of cases of courts being called upon to pronounce on the lawfulness or constitutionality of actions or conduct or decisions of the Executive or even of Parliament. When or if called upon to make such a decision, what is your approach, mentally, bearing in mind the doctrine of separation of powers? How do you tune your thinking in approaching the question? What are your guiding principles? What do you say to yourself? 'Right, I am confronted with this. How am I going to approach it?' I'd like you to take me or us through your mental process on such a topic.

Kollapen: Thank you Commissioner Hellens. I think my starting point would be: one: the supremacy of the Constitution which is enshrined in Section 3 read with Section 172 – the duty of a court to declare conduct that is inconsistent with the Constitution invalid, to the extent of its inconsistency. But that is a legal response. Recognising that the separation of powers doctrine is not an absolute separation, precisely because courts are called upon to pronounce on the conduct of other arms of Government, one is then guided by various principles that have emerged over time. And when one looks at the judgment in the *Economic Freedom Fighters* case, for example, the courts have said that courts should not hesitate to declare conduct that is unconstitutional, so. At the same time, courts should be very cautious in not encroaching into the domain of the Executive or other arms of government. So in that context, if the Executive has made a choice among a number of choices, it is not my call as a judge to determine which is the best choice, or which choice I would have made. My understanding of separation means that I must defer to that decision, provided that it passes the test of reasonableness in PAJA, the test of rationality for example that was expounded in the *Simelane* judgment, but on a case by case basis one must in a sense, bring to bear, I think, that consciousness to the work one is doing, recognising one's judicial authority, and in fact duty, that is captured in 172, but on the other hand also recognising the authority that is vested in other arms of state and being deferent to that. And I think the judgments of the courts – certainly in the *EFF* matter and in the *National Treasury v OUTA* matter provide useful guidance to judges in approaching one's difficult task – and it is not an easy task, I must confess. But if you approach it with that paradigm you will probably come out on the right side.

Commissioner Notyesi: Judge, I only have one question. There is a criticism that the current legal education – the LLB – is not adequate and just produces students who must memorise some concept, some Latin concept, and resulting in the absence of constructive thinking. What would your suggestions be, what do you think must be done in respect of the curriculum in order to ensure that we have a product of a lawyer that is ready, that can be a practitioner under the constitutional state of South Africa?

Kollapen: Thanks Commissioner. I am not sure how qualified I am to answer the question because my exposure to legal education has been in terms of my own education. But I am also exposed indirectly to it because I come into contact with practitioners who have come through the system and also when I admit young attorneys, I often speak to them, and you have this particular expectation of what you want a lawyer to be and to do in South Africa. It might be romantic to some extent but I think it isn't because I think one is entitled to expect of your young lawyers to have sound technical skills in understanding the Law but coupled with that, they need to have a good sense of where the Law is located and what the Law is about. And I am not sure if that that is always centrally part of their education. It may be a module tucked away somewhere but it shouldn't be, it should be central to, and I also think there is also possibly a shortcoming in the lack of a connection between the theory of the Law and its actual practice. And the practical law schools and other such structures try and bridge that gap, but speaking very anecdotally and certainly not as an expert I think some greater practical focus during the academic cycle might be useful as well.

Notyesi: Last one Chief Justice. We have observed in some very important public cases that have been through to the Constitutional Court, the SCA, and in particular to your division here, in recent days and talk of the SASSA case and all those cases, and the observation is that black practitioners were just not there. How in your view, impact, in terms of transformation and in particular, in ensuring that black practitioners find their way [section inaudible] into the judiciary. What would be your suggestion or your views on that? That is my last question.

Kollapen: Thank you. I think that is an issue that has been on the agenda for a long time. And with respect when one looks at the composition of the bench of counsel

sometimes in important cases it is quite stark. And I think beyond a commitment to transformation, and commitments are generally easy to make, where is the action around it? And I know there was a media report a few days ago where the Chief Justice was speaking about briefing patterns, or how state agencies instruct and whom they instruct. Now while one could say to them - do something more positive, be more transformative. For me a possible solution lies in the Equality Act. Now the Equality Act, which was passed in 2000, is the prevention of unfair discrimination, but also the promotion of equality. Only the preventative parts of the Act have come into operation, so it deals with non-discrimination, and it deals with the equality courts. But Section 24 of the Equality Act onwards places an obligation on the state to take positive measures in certain instances to achieve equality, including equality plans. And so that would be a wonderful opportunity I think if that part of the Act came into operation. It wouldn't be the only opportunity but it would place an obligation on organs of state to show how, through their plans, they are advancing equality. I made some enquiries in the course of last few days and I understand that the regulations that are required to bring into operation the promotional aspects of the Equality Act are in the process of being finalised. But that would be one way only. I think voluntary measures are important, but the state I think has within its resources the means and the ability to make a very important contribution in this regard. And using the Equality Act may be one way of doing that. Because then what they would do is that a state agency would, through its equality plan, indicate how it has advanced equality in the legal profession. And wouldn't have to just make a commitment to that. It would say 'Out of 50 briefs that we have given in the past six months, this is whom we have briefed, in terms of men, women, in terms of black people and in terms of people with disabilities.' And that could be a standard by which you could hold them accountable.

Commissioner Mampuru: You were born and bred in Pretoria whereby the majority of the black people speak Setswana, some Shangaan and Tsonga. Zulu is very minimal. How many official languages do you speak? That's the first question. Number two: The Constitutional Court bench comprises nine justices. Six are men, three are women. In terms of gender there's an imbalance. And according to one of the commentators – they are saying your appointment will only be for the

diversification of the composition of the court. What is your take in this regard? Do you think the JSC can recommend your appointment based on that? Thank you.

Kollapen: I must confess I only speak two official languages. And in part through my own failing. When I was at the Lawyers for Human Rights and the Human Rights Commission I made a commitment that I want to speak two additional languages – and African indigenous language and my home language Tamil, which I don't speak either. I have made attempts – I just didn't succeed in them but I must confess that maybe I could and should do more about that. That's my answer to the first question. As for the second question I accept the need for diversity on the bench and ultimately, if the appointment of a woman to the bench will advance the diversity of the bench, I accept that unconditionally. I also believe though that if I am appointed to the bench I contribute to that diversity, not because I am Indian but because of my particular diverse background and my experience. But I unconditionally accept the need for gender equality in our society, and that if an appointment is made in that regard that will be perfectly in keeping with the need for the bench to reflect diversity.

Commissioner Stock: In terms of your own view – because I see in your CV you have extensive experience in the legal fraternity – and also based on your experience as a former chair of the Human Rights Commission, what in your view should be the role of the judiciary in the enforcement of socio-economic rights?

Kollapen: Thank you. I think this links up to some extent with Commissioner Hellens' question around the issue of separation. And clearly the Constitution has a strong commitment to the advancement socio-economic rights – and understandably so as well – because it was powerfully argued at the time that the Constitution was drafted that a vote without food may well be meaningless. However in the context of the separation of powers doctrine, our courts appear to have adopted the standard of reasonableness - one – that ultimately the task of delivering on socio-economic rights is that of the government – is that of the state and the court will not interfere in the measures they have taken, provided the measures are reasonable. So the court has consistently maintained that and courts have not acceded to the request to begin to define the core content of a socio-economic right as well – what should the right to water be, to housing, should it be two bedrooms, three bedrooms, toilet inside, toilet outside, again because that is the domain of the state. And there has

been some criticism around that. But I think the courts have also viewed the right, just not from its substantive content, but also have also engaged with the concept of meaningful engagement, which for me is quite important, as a mechanism by which the state and its citizens can talk around in a sense the question of giving effect to the right and I think the whole idea of meaningful engagement consolidates the notion of participatory democracy. I think it was Amartya Sen on a visit to South Africa, who said that there are two perspectives of democracy – the one is the public ballot but the other is what he called the public reasoning perspective and that is the ability of Government to engage with its citizens – he called it government by discussion and I think the whole idea of meaningful engagement fits neatly into that.

Stock: My second question is that based also on your experience as an experienced judge, you might have experienced also some weaknesses and shortcomings in the justice system as a whole. I want you to just highlight one of those weaknesses and give us a perspective as a commission, as to how you, as an experienced judge, I mean what is your perspective in terms of addressing some of those weaknesses and shortcomings. Thanks.

Kollapen: I just need to think about the issue of the weaknesses and shortcomings in the system. But I would think the one issue is that of access to justice – something we experience in courts – unrepresented litigants and poorly represented litigants as well. What we were able to do at the High Court – and I was privileged to work with the Judge President on this – is to establish a Help Desk, with the assistance of the Law Society and an organisation called Pro Bono. So that from our court we can direct a litigant to go to the ground floor in the building, to the Help Desk, who will then consult with the individual and make a referral to an attorney or advocate who would be willing to do the matter pro bono. And so the issue of access to justice remains an important issue – because we take so much pride in the Constitution and this notion that we are all equal before the law, but for that to become a reality, access to justice becomes important. Thank you.

Commissioner Msomi: Judge my question is around that there are five candidates who are all applying for one vacancy at the Constitutional Court. All of them appear to be more experienced - at least on paper – than you are. All of them have had an acting stint at the Constitutional Court. The question very simply - I am asking is – to

sell yourself – why you. Why should you be sent to the Constitutional Court against four experienced colleagues of yours?

Kollapen: Thank you Commissioner. Commissioner, I don't wish to compare myself to the eminent colleagues who will come after me. I am here to present my candidacy – and I understand your question is in that spirit and in that context as well. And while I accept that my other colleagues would have more judicial experience than I would, my conception and understanding of the Constitutional Court is that that judicial experience is but one component of in a sense one's appointability to that court. And I think that if one looked at the court historically as well, the court had judges, the court had academics, which contributed to the richness and the diversity of that court. So to the extent that my years of experience may not be greater than the other colleagues, with respect I am not sure if that should be dispositive of the issue. I think one must look at the nature of my experience – not just as a judge - but my previous experience in my other capacities as well, as the chair of the Human Rights Commission, as the chair of the Law Reform Commission. With respect I think that those are factors which need to go into the equation. Because ultimately the Constitutional Court almost defines who we are. It defines the nature of our constitutional state, it gives meaning and effect to the values. And I think that my judicial experience as well as my other experience place me in a good position to make a contribution to that. So if the determination was made purely on the basis of one's years of experience, then it would be quite a mechanical exercise. And with respect, I don't think that is the nature of the exercise. But if the determination is a more holistic one, then I do think that the other factors come into play. But having said that, I am not saying that I am better than any of the other candidates and that is not the case that I come to present.

Msomi: The second question is – and it's a point that cannot be ignored – and I'm not sure if, Chief Justice, I'm not sure if I am speaking out of turn, but there's a note in our packs, it's from a certain TuaniMalautsi, [sp?] who criticises you in the judgment in matter of Cash Crusaders and Franchises (Pty) Ltd. Are you able to comment on that criticism? Just for your benefit – I'm not sure whether you have had sight of the email – but – and I am going to quote him verbatim – he refers to the case and he says: 'You will not only note the laziness on the part of the judge but also a clear demonstration of lack of understanding of the Law, not a well thought

through and poor judgment of four pages on a crucial life and death case by the judge.' This is a complainant, he places it before us – what is your response?

Kollapen: Thank you Commissioner. I do recall the case. What had happened in that was that The High Court had granted a provisional sequestration order against the gentleman in question. The matter came before me on the return day. On the return day he was represented by senior counsel, and three crisp points were raised in order to argue that the order should not be made final. The one point related to a challenge to the return of service of the sheriff. The complainant said that the return of service is inaccurate, because the sheriff said he could find no goods to attach and that would be an act of insolvency. I dealt with that comprehensively in the judgment and I referred to case law in the judgment as well, with regard to the effect of the return of service, as well as the duty and the onus on a party challenging its correctness. The second point raised was the question of his ability to pay. Again I referred to a judgment where the court had found that a purported claim that he had, was not a valid claim and therefore it was beyond doubt that he was unable to do so. And the third point he raised was that I should exercise my discretion in not granting a final order because courts have exercised such as discretion where there was an offer to pay. But I found that there was no offer to pay because in his answering affidavit he had said 'I do not owe this money'. So I dealt with all three of those points as crisply and decisively as I needed to. I do have a copy of the judgment. It may be more than four pages but it does not really matter how long it was, I do think that I dealt with the matter adequately.

Msomi: Thank you so much Judge. Last question from me – I want to canvass your views around two issues: judicial activism versus judicial restraint - what are your thoughts on that? And the role of the judiciary in a developmental state. Thank you Chief Justice.

Kollapen: Thank you – I think - and I'm not so comfortable with categories like activism and restraint because there's a tendency that it takes on different meanings. But I think, for myself, that the judicial role that I must play is not confined to sitting as a judge in court. That I can play a role that is bigger than that but that recognises the restraints of my authority. And let me give you some examples. I do think that at the beginning of each year, judges should address students at every university or

every technician in the country. And I think there are enough judges to do that, where we should go out and speak to people who are beginning to embark on a career in law. About what the Law is about. About the kind of contribution they can make. About how the Law can achieve their own personal self-development. Make them feel good about themselves and that they are able to make a contribution. Now if you call that judicial activism, then I am in support of that. I think judges can be involved in judicial training – the training of advocates and I've given examples of that. I sit on the Law Reform Commission as chair of the commission and it provides a wonderful bridge in terms of what I do as a judge and what I am required to do. So if that is what activism is - yes – but I'm also careful that my own personal views are mine and should remain mine. That I am not at liberty to stand on a box and express them in society in the name of judicial activism as well because I must also be part of that body of men and women who must ensure the integrity and the protection of the integrity of the judiciary.

Commissioner Malema: I want to ask you a very important question – very important and I need a very important answer Judge to this question. But firstly I must say to you if you don't succeed please don't be discouraged. Even if there is another vacancy you must come back. But this important question is very important. What do you call citizens who live in a junk state?

Kollapen: Laughs

Malema: Are they not called junkies?

Kollapen: Commissioner Malema, I'm not sure if this question is linked to the announcement yesterday with regard to our credit rating. And I was thinking about that this morning in two perspectives. I said I was hoping that at the end of this interview I was not relegated to junk status. And maybe your appeal to me to come back in the future might be an indication of that. But I won't say more about that. (laughter). I recall when I had my first interview, Chief Justice Ncobo said 'Mr Kollapen it was nice of you to come in, we will see you again.' And then he immediately said 'I don't mean at another interview'. But to answer your question directly – and I don't want to get into the politics of that. Rating agencies have made a decision. There is a debate in society about whether the ratings agencies are correct or not and what criteria they use and whether they are selective and how

they approach developing countries versus developed countries. But I don't think that our credit rating as junk status must reflect on how we feel about who we are as citizens of this country. So I don't feel like a junk person. I feel like a proud South African. I am mindful of the problems in our society and I am mindful that some of them are formidable. But I have always been absolutely proud to be part of this wonderful society. And I think we must together find the solution to our problems. So it's probably junk status in terms of a credit rating - but we are an extraordinary people.

Mogoeng: Well I'll always remember that – I don't feel like a junk person. (Laughter).
Commissioner Modise?

Commissioner Modise: Thank you CJ. Good morning Judge. Do you believe the current system of disciplining lawyers and judges is effective?

Kollapen: I understand that at the level of lawyers, the law societies have effectively a peer review system where lawyers sit in judgment of misconduct of other lawyers, impose sanctions and in appropriate cases would refer the matter to a court where they think that a suspension or a striking out is warranted. And I imagine a similar system applies in respect of judges, where judges themselves sit in judgment of the conduct complained of in respect of other judges. I think there might be some space and some room for a discussion on whether that process may be better enhanced if it was infused with some participation outside of judges. But I think that on the one hand judges are well placed to understand the work of judges, I think that judges act with integrity and will not cover up as it were the misconduct of their colleagues, but public perception is also important and if there could be a discussion with regard to lay persons or non-judges being part of that process, I think it could be an interesting discussion.

Modise: Well public perception does persist but I think it a discussion for another time CJ. Judge, have you ever been in a court where a party was represented by an ill-prepared or ineffective lawyer and if you have had this experience, what would you do?

Kollapen: Thank you Commissioner. I think one does from time to time see – well on the one hand what you might call the imbalance of arms – and that's one issue –

where you could get a formidable team of lawyers of senior and junior counsel on the one hand and on the other a single practitioner. That doesn't necessarily mean that there is going to be an imbalance in the arguments. I recall a person who appeared in person, who did a very good job against a team of lawyers. But to get to your question where the quality of the representation is not effective – I think one must be careful as a judge of not descending into the arena and be seen to be taking sides in order to address the imbalance. But at the same time I think there is a duty on one to ensure that the issues that are relevant for determination in this case do emerge, are addressed, do come out in evidence, so that you are best placed to make a proper determination, notwithstanding the inefficiencies that may exist. But it's a delicate balance and a fine line to tread.

Mogoeng: Thank you Commissioner. I think if you could just revisit the commissioner's question. It was raised by commissioners recently. And the question is: Is the disciplinary mechanism against judges really effective? Think about the Motata case. Think about the Hlophe case. For how long have they been making the rounds? What needs to be done for the impression not to be created that there is a lack of enthusiasm on the part of judges to deal with alleged misconduct against their colleagues? What needs to be done differently? Those are the perceptions that the commissioner is alluding to.

Kollapen: Thanks Chief Justice and I do think those perceptions don't enhance, as it were, the reputation and the integrity of the judiciary. I'm not sure if I am sufficiently acquainted with the current processes but I do think that -

Mogoeng: Part of it, so that you deal with it holistically, is this: should judges even be taking points, going from one court to the other with a view to preventing the process from being proceeded with?

Kollapen: Well that is indeed unfortunate and one may argue that they shouldn't. On the other hand, the counter argument may well be that as litigants, they are entitled to access to courts in terms of Section 34. But there may be a case for a limitation around that, especially when it deals with issues of technicality. Because I do think that ultimately the message must be sent out that when there is misconduct and the misconduct is not substantially in dispute, there must be decisive action. If not, the perception persists that judges get away.

Mogoeng: And they will look like junk persons.

Kollapen: Yes (laughing). But I think one may need to carefully examine, because - with respect, even a new process or a new procedure may well be the subject of a legal challenge. But maybe that should be challenged and the court should deal with it decisively, and we have something better in place.

Commissioner Magadzi: My take will start from your judgment – Section 27 and the Minister of Education. I was in that space and you were talking to me, when in the end of it all you said we should put systems in place so that in the end we can be able to make sure that the learners are not disadvantaged – which we did – and thank you, because we were able to get 76 percent outcomes in the Matric results. But having said that - interaction with yourself, on the other end, as a human rights commissioner, as we are dealing with the farm workers, also one gained an experience on how to deal with human rights issues, particularly of the farm workers who actually would drink water after the oranges have been washed and then they get given that water to use in the domestic environment. To me the question would be – what makes it such a critical thing in you which you are able to really lift up all those little things that will fall by the wayside? And I am saying falling by the wayside looking at the current situation again in Limpopo where at the beginning of the year there was kind of a shortfall in terms of giving the textbooks again. What are the laws that need to be changed? What are the things that need to be done? And I am just thinking here in terms of concurrent functions which are taking place. What is it that we should be able to do so that it doesn't disadvantage those that we are supposed to deliver services to?

Kollapen: Thank you. I think part of the question relates to on the one hand the recognition that the new constitutional order has created high expectations but also high demand and the need for high capacity. And sometimes we fall short because we don't deal sufficiently with the capacity requirements. So for example, the idea that a grant must be processed within 90 days, is wonderful. But in order to meet that expectation we must ensure that we have the concurrent capacity to process that grant within 90 days. Otherwise we undermine the very system within which - So coming back to your question, I think that was a difficult case in the sense that clearly the right that needed to be protected was not in dispute. But the manner in

which it was to be protected going forward had to be dealt with and to that extent the court then dealt with a catch-up plan in respect of students, etc. I think ultimately the primary responsibility remains on the state to ensure that it complies with its obligations. And I think that judicial activism would prevent one, in a sense, before a matter comes to you, from saying or doing anything about it. But when it does come to you, I think you need to understand it in that big context so that you can provide an effective remedy. A remedy that is not dealing with the mischief that presents itself will never be effective.

Magadzi: Lastly Judge, transformation – in general I would say and particularly, from focusing on the rural areas – what is it that you believe, as a people, we should be able to impress upon those that cannot speak this language that you are speaking – the Queen’s language – so that they are able to understand matters of transformation, they are able to comprehend, they are able to live on matters of transformation? And I will just give you an example. A few weeks ago I get given a question of the traditional law, the religious law and the civil law marriages. And the question is: which one supersedes which one? And these to me are questions of transformation because we know that previously the civil marriage law was the one that will always be outsmarting all these other laws. What is it that we should be able to say that as an indigenous person in the Republic of South Africa, my traditional law should be able to hold in a marriage and then I don’t need to go through a religious marriage, I don’t need to go into the civil marriage – I stick to my traditional marriage?

Kollapen: Thank you. I think that was the question that was raised earlier with regard to I think the question of Commissioner Motshekga, that the Constitution, as currently framed, recognises customary law, but only to the extent that it is not inconsistent with the Constitution. And some have been critical of that, saying that there is no parity then. On the other hand there is the argument that the Constitution is supreme and it is important I think to recognise on the other hand that culture and custom are not static. They are dynamic and evolve over time. And that one needs to also recognise that one cannot and one should not in the name of culture, custom or religion, have a licence to perpetuate discrimination against somebody, to create disadvantage. So it is a fine line that has to be drawn, but if we accept on the one hand, the supremacy of the Constitution, then it would appear to me that we must

accept then, that to the extent that I must be free to practice my religion, my culture etc, I have to do it within that framework.

Minister Muthambi: Good morning Justice Kollapen. I am looking on the questionnaire, paragraph 14 – the one that you have completed. Paragraph 17 reads: What would you regard as your most significant contribution to the Law and the pursuit of justice in South Africa? And in your own words you have said that “using your training as a lawyer to serve the country is a humbling experience”. I must say one is impressed by your community work that you are doing. I see that you are serving in the case management committee, you are the judge in the National Child Rights Moot Competition. Also in South Africa’s Moot Law competition and the national schools. Also you are assisting the Bar in their training programme. It’s a lot. I am raising these issues in line with, there’s a document which has been given, to say, how do you balance, how do make sure that this community work or activism doesn’t affect your work? I see that there are two reserved judgments which have been pending since June 2016. To say then - we are happy that you are playing your part as a South African, to make sure that you contribute towards the development of law in this country but then there are these two judgments. Don’t you think that being actively involved in all these committees it also affects your ability to do your work?

Kollapen: Thank you Minister. Minister I think I have been able to, with some discipline, divide my time but recognising that my primary duty is that of a judge. And up to now those activities, which are largely linked to my office as a judge, have not impacted on my work. I wondered if I could get details of those two judgments Chief Justice -

Mogoeng: They are - the one that is nine months old is *Beaulane SA Properties Ltd v Minister of Public Works*. You are with Tolmay J and Makgoba AJ there. The one that is said to be 13 months old is that of *F Simelane v State*.

Kollapen: Chief Justice can I deal with those as well please?

Mogoeng: It is part of the Minister’s question. I think you have got to explain why so long.

Kollapen: *Beulane*, to the best of my knowledge, was handed down some time ago and I can provide the necessary proof before the end of business today to that effect. I am not sure how it got onto the system as being outstanding. *Simelane*, to the best of my knowledge, was also handed down, it wasn't a judgment that if I recall, I wrote. When we sit in two-bench appeals it is four judgments and we divide them two: two but I can follow up both today. To the best of my knowledge, I have an outstanding judgment in a complex matter and that has been outstanding for about three months. It relates to the constitutional attack on the Upgrading of Land Rights Act and it relates to a housing development in Mokopane, and it's a bit more complex. Personally I would never have outstanding judgments as long as this, but Minister, could I, with your permission Chief Justice, provide that proof today?

Mogoeng: Do that but indicate how long it had been reserved before you delivered judgment.

Kollapen: Certainly, I will do that.

Muthambi: Okay. Then also you are the chairman of the South African Law Reform Commission, having been appointed since April 2016. I happened to appear in Parliament last week before the portfolio committee and then I was made to understand by the Justice Department that the South African Law Reform Commission has been involved in Project 25. Project 25 is aimed at reviewing all laws that are contrary to the equality clause in the Constitution. And I also noted in Parliament when MPs raised it with me that there are almost 1080 laws that are still outstanding that need to be overhauled to bring them in line with the Constitution. So the concern is – what do you think Government must do to enhance the capacity of the commission to be able to undertake this mammoth task? Secondly, how long do you think it can take the commission to complete this work? I am also informed that generally the commission is slow when it comes to its research.

Kollapen: Thank you Minister. Minister the Project 25 that you referred to was a comprehensive project that we had – certainly when Justice Maya and I arrived at the commission - had inherited and what it sought to do was to look at every government department, to look at all of the laws that they administer and to test those against the Constitution in terms of its consistency with the equality clause. It was really a desktop exercise and I'm pleased to say that most of that task has now

been done – I think there may be less than ten departments still left. It is done in cooperation with the various departments. We have also had a discussion in the commission with regard to the slow pace of law reform. And the one argument is that law reform is a slow, deliberative, consultative process and must of necessity take time, especially if one is to go and consult across the length and breadth of the country. On the other hand there is a strong view that sometimes an inordinate delay may mean that the product that you finally produce is no longer relevant because so much time has passed. And so certainly in discussion with the department and certainly with the Minister and Deputy Minister, there is a need to find a balance between being thorough, being properly consultative and on the other hand ensuring that one is able to produce law reform products within a reasonable time. With regard to the capacity of the commission, I have managed to secure an arrangement with the Judge President, in terms of which I serve one week a term full-time at the commission, which is quite useful. It enables me to be at the offices of the commission, to engage with staff, to immerse myself in the work. It may not be sufficient but at least it is better than sort of floating in from time to time. The Law Reform Commission Act provides for the appointment of a full-time commissioner and we've asked the Ministry to seriously consider the appointment of a full-time commissioner - that would certainly enhance and support the capacity of the commission. Thank you.

Muthambi: Thank you. When you were interviewed by this commission for the position that you are currently holding, I think you were very clear about the transformative role that the judiciary has to play and also you were very eloquent when it comes to the matters of inaccessibility of courts for the poor. As Commissioner Magadzi has said earlier, you have been very successful in your judgment on the right of access to courts, that shows you have lived up to this ideal. She has mentioned the case of Limpopo Education and I have also seen the other one of *Hennie v Minister of Correctional Services* with regard to the issue of allowing prisoners to have laptops to study at prisons. But then I wanted you also again to further reflect to say – are these ideals that you have preached during your previous interview being lived up to by your fellow judges in terms of this transformative role and access as well? Is the status quo the same as it was when you were interviewed? If something has been done, is there more that still needs to be done?

Kollapen: Thank you Minister. I think that more always needs to be done because the task of transforming our society, the pride that we take in our constitution, must be a pride that every South African feels and they must feel that way because it means something to them - it can't be something that lawyers speak about. And so I think judges have an important role to play in that regard, in understanding that context and I do believe, with the greatest of respect, that the judiciary has made progress in that regard. I think the appointments to the bench have brought to the bench people with that commitment - and one finds it in your discussions in the tea room, in your discussions with colleagues. You find that sentiment being expressed – that I take pride in being a judge, I accept the immense responsibility that goes with it and I have come here for a purpose. I have come here not just to write a judgment – I have come here for a purpose. Maybe we don't talk enough about it but certainly when we have our judicial education programmes, it gives us the opportunity as judges to reflect beyond the technical work we do. What is the role? Certainly when I was appointed as a judge then - and now – my role is more than, it is writing the judgments, it is listening to the cases but it is part of being a cog in this bigger design of really working towards building a better society. And I do think that has improved. But it is an ongoing task, it is work in progress.

Professor Ntlama: Good morning Judge Kollapen. I hope you still remember this face. You have forgotten? Okay. CJ

Kollapen: I'm sorry, I don't want to attribute it to age – I mean mine – not yours, sorry

Ntlama: When you were chairman at the Human Rights Commission I was also there as a researcher on equality, okay, it's fine. Right, I have just three questions. In your questionnaire you indicated that seven of the judgments that went on appeal were overturned. As a judge, how do you feel with your judgments being appealed and what impact does it have on you as a judge and your career?

Kollapen: I think when one works diligently, you approach every judgment with the idea that you want to write a good judgment and ensure that that judgment is consistent with the Law and the facts before you. But you also accept that your judgments can be overturned, and I must confess at a personal level that it's painful sometimes, when you read it. But you accept the authority of the higher court. But

what's more important is that you then seek to take lessons from that, you read it with humility and say: where did I go wrong and how do I correct this in future? Sometimes you make a basic error. Sometimes the appeal court disagrees with a factual finding you make, and some of those judgments will reflect that, where in the one case I found that an agreement was contrary to public policy, because it was a sham agreement but the court of appeal said it is not – it is what the parties agreed to and so it must be given effect to. So you accept that and you learn from it and you move on. But I think it's important that you approach it with the proper mindset as well.

Ntlama: The second question is your view regarding the concerns about the politicisation of the judiciary, particularly with the matters that have come before your division.

Kollapen: Well I think that - the nature of the matters that come before courts are very often political and perhaps some of those matters are better resolved elsewhere. But once they come to court and there's a proper case made out in terms of formulating the relief that is sought within the framework, then courts are enjoined to deal with it. You can't duck it and you must deal with it. But you must deal with it in accordance with the law, the principle of separation that we spoke about and the facts before you, and deal with it with integrity, whatever the outcome might be. That's your job as a judge.

Ntlama: One last question. With your human rights background, I would like to find out from you your view regarding the definition of a marriage as a civil union in respect of couples in same-sex relationships, because those matters might come before you.

Kollapen: Well I think the idea of a marriage has evolved and changed quite radically from, certainly the time when I got married, the idea of one man and one woman constituting a marriage. And so the social mores may have changed, the majority might see it differently and that's the challenge of living in a society such as ours. The constitution provides a space for everybody, in our bewildering diversity, the Constitution must protect us. And I am often asked that question by people and I certainly did it when I was at the Human Rights Commission. Someone says to me: But you know I don't like a particular class of people and the Law requires me to like

them. And I say to them: The Law doesn't require you to like them – the Law simply requires you to provide to them the same opportunity, the same protection, the same guarantee before the Law as you have for yourself. So I think in that context the idea of marriage has evolved beyond our traditional notions and it's difficult moving along and changing times...and you speak to people and they ask you these difficult questions and your job is to explain to them as I try to do, what it means to be accommodating, what it means to live in a diverse society.

Commissioner Fourie: The issue of the objection has been dealt with by Mr Molatsi so I don't think that matter needs further attention apart from stating that you confirmed my impression that those were the remarks of an aggrieved litigant who didn't think the outcome went his way. The one issue I would like to deal with is – you are currently a judge in the High Court and particularly the Gauteng division. And you have been there for six or seven years. One often hears about the workload of judges, particularly in the Gauteng division. In your experience Judge Kollapen, is the workload of judges in the Gauteng Division manageable? And if in your view it is not, what can you suggest can be done to effectively deal with that?

Kollapen: Thank you Commissioner Fourie. With regard to the complaint, obviously when I saw it I take it seriously and I would not want to simply dismiss it as an aggrieved litigant because I feel one must do justice to it, because he may well feel that he has a genuine complaint, and it is for that reason that I brought the judgment along with me, I read the judgment again and I was able to respond to the question of how I dealt with him because it was still fresh in my mind. With regard to your second question - yes it is a busy division, and I think different judges deal with the workloads they have differently. One tries to be on top of one's work and that was why I was a bit taken aback by the two reserved judgments, which I will deal with. That you almost, within 24 hours of hearing a matter, begin to put something down, begin to draft, have a sense of what your reading demands are, knowing in advance that this weekend is out – I have to read – next weekend is fine. But I often make the point – I'm certainly able to manage the workload – and I make the point that when I put my hand to apply for a permanent post in that division, I was mindful that I was going to a busy division. And so I must accept in part the responsibility that goes with that. But at the same time, I think it's not just my issue that you have raised – it's the issue of the court as a whole and certainly the Judge President has been alive to the

concerns raised by judges, there has certainly been some relief in the manner in which the roster has been drawn, so for example the opposed motion roll that used to be dealt with by four judges is now dealt with by five judges. Appeals are dealt with in a way that will ensure that if there's a massive appeal that has to be dealt with, only one appeal will serve before judges. So there has been some attempt to ameliorate that but colleagues still complain about the workload and I can understand that as well.

Commissioner Masuku: You made some comments on the Equality Court. I just want your views on whether you think it is effective in the role that it should play in ensuring that discriminatory practices and racism are eliminated. I ask this question because I have a feeling that there is room to involve just ordinary members of the public in a jury-type set-up where members of the public are adjudicators of conduct that is considered to be repugnant to good relations. For example, a case that involved the singing of a liberation song would have come out differently, in my view, had the community been asked to be part of the panel that dealt with whether or not that song conveyed the kind of discrimination and racism that the court was constituted to deal with. So I just want your views on whether you think it is effective and whether there is room for that court being improved in such a way that ordinary members of the community can preside and determine whether or not complaints of unfair discrimination are founded and not just left to judicial officers to deal with, because that's a social problem. And the second question I have relates to your views on judicial immunity. You know judges are immune from civil and criminal liability for comments they make while they sit as judges. So while they are sitting as judges they cannot be sued, whether civilly or criminally. What do you think is the purpose of that principle of judicial immunity? Does it have a role in promoting judicial independence and what would you consider to be the appropriate limits to that principle of judicial immunity?

Kollapen: Thank you Commissioner. Commissioner I have not kept up to date with the statistics in respect of the Equality Court but certainly, at the time that I left the Human Rights Commission, there was a clear sense that the expectation that the Equality Courts would be used more frequently was not met. The number of cases that were going through the equality courts were really not in keeping as it were with the social reality that one read about every day in our society. And various questions

were raised with regard to the efficiency of the courts because the courts were meant to be structured in a way different from your traditional courts. You would have your clerk of the Equality Court, who was meant to be proactive, was meant to speak to a complainant and convert that person's story really into a complaint which could then, and certainly in my experience, I found in some jurisdictions the equality courts worked quite well because of the person in the form of the clerk, a proactive clerk who understood the equality issues translated into a more effective, well-used court. So I think that's the first part to your question, that the efficiency and the use of the courts is something of concern, but there is anecdotal evidence that if you have your front person well immersed in understanding the issues of equality, the Act, that makes a meaningful difference. With regard to the second question, I think on the one hand, you want to ensure that judges who sit in matters can deal with and make pronouncements on the basis of what is before them and to that extent, judicial immunity for example serves that purpose in ensuring that judges can function effectively and if they have to make an adverse comment regarding a witness, that they can do so without the fear that there will be litigation. However as I understand it as well, where judges may exceed the bounds of what is reasonable, they may well be the subject of a misconduct before the JSC, so that seems to be - that's my short answer, which I'm not sure is effective in dealing with what you seek.

Masuku: Thank you. Thank you Chief Justice but the first question wasn't really answered. What I am looking for is a view on whether you think that the value and importance of the equality courts could be enhanced by including ordinary members of the community as adjudicators, of determining what would be racism, or unfair discrimination, that kind of thing, and that that is not left only to judges.

Kollapen: Oh sorry, yes, I apologise for that. I think that that is an important and difficult issue because what it means then, if I understand your suggestion, is that the task of making the determination of whether speech is hate speech, or conduct is discriminatory, should not be the exclusive reserve of your presiding officer, who currently would be a magistrate or a judge, but could be, I think at the end of the day though that even though it's a social construct as to what would constitute discrimination, it finds itself and it has to be given expression within a legal context, there are rules of law and I would rather think the answer would be that if you have sufficiently aware and conscious presiding officers, the benefit of the community's

sense, in any particular case, should be infused into that process and it need not be infused simply by having the community preside. If you are sensitive enough and if you understand the issue, then as a presiding judge you can ensure that that evidence is brought before you and the same purpose is then served.

Mogoeng: Thank you Commissioner. Thank you Judge Kollapen, you are excused.

Kollapen: Thank you Chief Justice. I will just get the email address from somebody so that I can provide the information with regard to those two issues. Thank you for inviting me.

Mogoeng: Thank you very much.