



JUDGES MATTER

Judicial Service Commission interviews

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Western Cape Division of the High Court

Interview of Mr T D Papier

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Chief Justice Mogoeng: Good afternoon Mr Papier. Just switch on the mic there.

Mr T.D. Papier: Good afternoon Chief Justice.

Mogoeng: Are you a bit nervous, or just as comfortable as you are when at home?

Papier: Not as at home, but I am comfortable. Thank you, Chief Justice.

Mogoeng: Thank you. Now, tell us about your legal experience. You've been an attorney for, for a long time isn't it?

Papier: That's right Chief Justice, for about 30 years.

Mogoeng: Three zero?

Papier: That's right.

Mogoeng: Wow! And the diversity of work you did as an attorney?

Papier: Yes, and Chief Justice, for the first 17 years I practised in a township called Mitchell's Plain in the Western Cape, and for 17 years I did probably exclusively human rights related work, and litigation. After 17 years I transitioned to a corporate and commercial firm called ENS Africa, where I specialised in commercial work, in

the commercial department, practiced commercial law, and spent two years in the U.S. doing postgraduate studies. I was also privileged to spend -

Mogoeng: That was at Harvard, isn't it?

Papier: That was at Harvard, Chief Justice.

Mogoeng: Yes, and your second master's degree?

Papier: University of Cape Town.

Mogoeng: The University of Cape Town was for commercial law?

Papier: That's right, Chief Justice.

Mogoeng: What did you use your mediation, is it a diploma or certificate?

Papier: It's a diploma.

Mogoeng: Mediation certificate?

Papier: Yes, it's a certificate yes, and I've been privileged to be invited to mediate in a number of commercial matters, but also in the context of community work, and I think that one of the encouraging experiences in a large corporate and commercial law firm was, when I was appointed, for example, to administer the Richtersveld community. Then I was appointed as the administrator of the communal property association, in the Richtersveld, and of course it was a fragmented community, and it was the success of the project depended on the way in which I was able to, in fact, engage with the communities and the different parties and players, and that was a huge success. Similarly, I was privileged to serve the profession on the Council of the Law Society of the Cape, and a council pursuant to my departure as a councillor, as a president, I was called upon to in fact mediate issues on council from time to time. There's also been, I was privileged to be appointed as the administrator of the Estate Agents Affairs Board, for example. There were internal and external dynamics, and in those contexts, you know mediation skills come to the fore, and then of course there's been mainstream commercial disputes, where I was invited to mediate as well, and yes.

Mogoeng: I have an insatiable appetite for mediation, but time does not permit that I go all the way. Just very briefly, tell me how mediation could be beneficially introduced into the court system, then the higher court system, very briefly, yes.

Papier: Chief Justice I think that there are some scenarios that would not be appropriate for mediation.

Mogoeng: Like rape cases, murder cases?

Papier: Absolutely, there, plea bargaining might have some elements of mediation, and some elements of mediation can come to the fore, when in the sort of trial

management context, to encourage the state and the defence, to engage with each other, so there are elements of mediation. I think in matters like family law matters, or in other commercial disputes as well, might very well be right for mediation, and it arises in the context of counsel. I am often intrigued by huge teams of counsel, coming in to introduce themselves to me as an acting judge, and to ask the simple question: "have you been talking to each other", seems to produce some interesting results. They would return and thank you for encouraging them, to reflect and resolve issues, and I think that the skill of mediation would make one alive and sensitive to circumstances where mediation would be appropriate, and encourage the parties to go and do that. Of course that would be within the formal structure of the judicial service. I think outside of that structure, where the profession is perhaps engaging with its members, and there are disputes coming to the fore.

Mogoeng: And community advice, justice institutions?

Papier: Yes indeed, and I think that in those matters that are ripe for mediation, and identified as such Chief Justice. Yes, it would be most appropriate, and I think and enjoyable to see parties resolving their disputes in, in a way that is less confrontational.

Mogoeng: If you were to be appointed a judge, can we count on your availability to assist in training programs, relating to mediation and the actual implementation of mediation in the court system?

Papier: It would be an absolute pleasure to do that it's something I enjoy Chief Justice, and I think it's part of being making justice accessible to all who need it, so it would be an honour and a privilege to in fact contribute in whatever way I can.

Mogoeng: What is the longest period to have taken before you could deliver reserve judgment?

Papier: Three months and one week Chief Justice.

Mogoeng: That is the longest?

Papier: That's right.

Mogoeng: Very well, JP?

Judge President Hlophe: Thank you, Chief Justice. Good afternoon Mr Papier.

Papier: Good afternoon JP.

Mogoeng: You are Papi-er, you are not Papier?

Papier: There are seven pronunciations -

Mogoeng: Okay, you don't object to Papier or Papi-er?

Papier: Not at all.

Mogoeng: Thank you. I just didn't want to offend.

Papier: Not at all Chief Justice, that's impossibility of performance.

Hlophe: Thank you Chief Justice. It is customary at this commission to disclose that I have known you, since 1996, I think we met upon your returned from Harvard.

Papier: That's correct.

Hlophe: And we've had over the years, a very cordial relationship, that I want to disclose up front. In fact, we worked on a number of projects together, even when you were president of the Law Society, also when you were a chairman of the Sheriffs Board, over the years we've known each other.

Papier: Yes.

Hlophe: May I also confirm for the record, that you have acted in the division over the periods indicated in your CV.

Papier: Thank you.

Hlophe: I have a couple of questions for you Mr Papier, the first relates to racism.

Papier: Yes.

Hlophe: It's a common cause, I put it to you that there is racism on the bench, there is racism in the profession, and there is racism everywhere in South Africa.

Papier: Yes.

Hlophe: Were you to be supported for appointment by this committee, kindly share with us what steps you would take, to assist in the eradication of racism, either individually or collectively as it rears its ugly head?

Papier: Yes, thank you Judge President. I think there are different categories of racism, if you will, there's the overt racism, and wherever overt racism rears its ugly head, it needs to be dealt with, unambiguously, in no uncertain terms. I think that I'm more concerned about stereotypical and stigmatic practices, that has a desperate impact, on impacting negatively on people of colour, and I think that, Judge President, sometimes those practices manifest itself by perpetrators, either consciously or unconsciously, intentionally or unintentionally, and I think that it's incumbent on all of us to, to engage constructively, to try and eradicate the evil of racism wherever we find it, and in whatever form it manifests itself.

Hlophe: The issue Mr Papier, of skewed briefing patterns, whereby black people, and African women in particular, are on the receiving end, is it not a form of institutionalised racism if you'd like?

Papier: There is no question about that Judge President, and particularly I think that is one of the examples, where stereotypical and stigmatic racism manifests itself, and once again, now that we know that, what are we going to do about it, and how do we engage with the problem. And I think that's the challenge to, to all of us, to engage constructively with those problems that we experience, and that we know about, yes.

Hlophe: The Chief Justice alluded earlier, to court based mediation. I'm not going to repeat that, but would you agree with me, that there are other mechanisms, in addition to court based mediation, such as pre trials, continuous rolls, and so on which I call effective tools of caseload management?

Papier: Yes, there is no doubt about the effectiveness of the effective tools, of case for case flow management, Judge President. And I think that every initiative has its place, it's not a one-size-fits-all. I think it invites all of us to be innovative and creative with regard to mediation case flow management and the tools that are working exceptionally and exceedingly well.

Commissioner Stewart: Thank You Chief Justice. I must I also disclose, I also know Mr Papier; I've worked with him in the past. I only have a short question, in your application form you mentioned at paragraph 6.2.3, that you have been specialising in corporate and commercial law since 2004, and have therefore not been directly involved in litigation. Are you confident that you've had enough litigation experience, on the bench, to deal with whatever would be thrown at you as a High Court judge now?

Papier: Yes, thank you Commissioner. Seventeen years of my pre-commercial life, was spent in the courts, litigating, and that was not briefing counsel, it was actually doing the litigation myself, and being back in the in the criminal courts, I've been privileged to be presiding in some criminal trials. I think it's a happy homecoming.

Commissioner Motshekga: Okay, I came out of Harvard Law School, with the reluctance of recommending anybody to go there, because I thought people who come out of there with elitism, and not interested in community justice. How did you manage to be community orientated and even practice that and go to the ground?

Papier: I can only step on the ankles of icons, the people I've been privileged to work with over the years. Those great leaders that informed my political conscience, the clients I've been privileged to serve the institutions. I've been privileged to serve, and of course Harvard is a diverse institution, it has a human rights program, and a human rights faculty attracting human rights leaders from all over the world. I was privileged to form part of a group of postgraduate students, a hundred and fifty postgraduate students from 50 countries across the world. Many of those students have in fact committed their lives to the cause of human rights and social and economic rights, and of course on the other hand there are, and I think Mr Commissioner, that it's the way one observes the management of power, the management of credentials, the management of perceived status, if you will, it could

either drive humility, or what could drive pomposity and arrogance. I've chosen to, in fact, ensure that a leadership in humility is probably one of the most important attributes we can ask on variable.

Motshekga: That's commendable, thank you very much.

Commissioner Mpofo: Thank you very much CJ. Mr Papier, you've basically grown up in the Western Cape?

Papier: That's correct Commissioner.

Mpofo: Yes, now and if you don't mind me saying, I mean everything here points to you being a progressive lawyer. Would that be fair, modesty aside?

Papier: I have been called that before.

Mpofo: Yes, okay now I want to talk to you about, no that's not a question, I'm being intimidated ... looks like you have mobilised ... The question I really want to ask you is one which is about language.

Papier: Yes.

Mpofo: Do you agree with me that it is incumbent, more particularly on progressive lawyers like yourself, to encourage people to learn other African languages. Having grown up in the Western Cape, have you taken any steps to learn this isiXhosa, or if not, would you agree that one of the ways in which this could be encouraged going forward, would be to make it as a compulsory subject to use, rather for students, to learn one of the indigenous languages?

Papier: There is no question about that commissioner, and absolutely no doubt in my mind, that the need to encourage everyone, to not only embrace, but to speak an African or an indigenous language, particularly isiXhosa, is absolutely critical, so ndithetha ncinci IsiXhosa. But I had done, I have tried, and I have been attending numerous lessons, and on an on-going basis and that will not stop, it will continue and I think that it's most certainly an exciting initiative that we must encourage.

Mpofo: I am glad to hear that, thank you Chief Justice.

Commissioner Fourie: I must also disclose that I've known you for many many years. I just want to ask you one question, amongst many other things, were albeit a long time ago, chair of the National Board for sheriff's lists, and you indicated in your questionnaire, that you contributed to the drafting of the National Action Plan for transformation of the sheriff's profession. There are serious challenges as we speak with the sheriffs, serious service delivery problems. One of the reasons may be that many sheriffs battle to financially survive.

Papier: Yes.

Fourie: Have you got any ideas, briefly, as to how that very serious problem can be addressed and hopefully resolved?

Papier: Yes, thank you Commissioner, and my life with the Sheriff's Board probably goes back to about 18 years, where we worked long and hard to put in place, a national action plan to transform the sheriff's profession. The work was done, the plan was put in place, the plan was presented, but adopted 18 years later. I think with regard to the question you raised Commissioner, you would find geographically, a number of areas that are exceptionally lucrative, but a significant part of the geographical areas are not economically viable, and so during my time 18 years ago, I encouraged the board and the department to promulgate regulations, appointing more than one sheriff or multiple sheriffs to one area of jurisdiction, and the purpose of that was to ensure that more historically disadvantaged sheriffs would be able to be appointed to lucrative areas of jurisdiction. And so I think that is one way in which an analysis could be done to identify those areas, that would be able to accommodate more multiple sheriffs. Of course the areas that are not economically viable, would probably remain economically non-viable, because the work of the sheriff is dependent on the on the flow of process from from the courts. Other than reviewing the model of the sheriff's profession innovatively, where one says, well, is it perhaps time to consider where one should move away from these distinct jurisdictions and have one profession, and get sheriffs to respond to process in a way that they are not restricted to their jurisdictions. But I think that that is a debate that would have to be, I think the big problem, the crisp response to your question Commissioner, is the super lucrative areas and the economically non-viable areas, and that is the big challenge.

Fourie: But surely those economically non-viable areas do need sheriff services?

Papier: They do absolutely.

Fourie: And hasn't the time perhaps come that, sheriffs should, I don't want to burden the state, but I'm just putting that as a solution, that sheriffs be appointed and remunerated, and be remunerated by the state, as opposed to trying to run their own businesses, so to speak?

Papier: Yes perhaps in economically non-viable areas that would work, but in economically viable areas it's a very, very lucrative business.

Commissioner Schmidt: Thank You Chief Justice. Mr Papier in due respect impressive CV. I found one problem with, on a lighter note, but it deals with the issue in paragraph 8 of your nomination form -

Papier: Yes.

Schmidt: It basically says, that you, African National Congress branch Exco and Legal Advisory Committee 1990-93.

Papier: Yes.

Schmidt: Was that at the legal advisory committee, on branch level, or which level?

Papier: On branch level yes, or provincial level.

Schmidt: Provincial?

Papier: Yes.

Schmidt: And then you say ad hoc assistance, and here's another time period in 1995 to 2017.

Papier: Yes.

Schmidt: Currently still?

Papier: As a lawyer, I assist, if as and when required, with legal issues on election day. I would assist to mediate in the townships. That role as a lawyer is on a needs basis, as and when required, and of course as and when available.

Schmidt: Can I be as frank as that, just ask would it involve any political electioneering or physical.

Papier: No no, this is strictly legal advice, compliance with the electoral laws compliance, legal compliance issues, no campaigning.

President Maya: It is not often in this country that black lawyers get an opportunity to practice meaningfully in the area of corporate and commercial law. Even when they do have the necessary academic qualifications, what would you do differently, and what can we do to break down the barrier, so that in the foreseeable future we have a wide pour of black legal experts in measures and acquisitions and all these fancy, yes.

Papier: Thank you Commissioner. Very well, thank you for the question Commissioner. I think that it is so, that black practitioners must be consistently encouraged to be exposed and evolve as experts in specialist areas of commercial law. I think it is incumbent on the partners, the leadership, the firms, as our firm had a transformation program, where the partners and directors would in fact ensure that historically disadvantaged practitioners students, are in fact appointed. I was privileged to lead a team of up to eight lawyers and candidates, and at one stage my team was entirely black. I have also participated in, and set on the Cyrus Vance panel, which is a program ran by the New York Bar Association, and there we would in fact identify about eight black practitioners, with one or two years of commercial law experience, or wanting to get into commercial law, and they would in fact locate those students, and lawyers with New York Wall Street law firms, and of course banks, like the Morgan Stanley's and others for a year, to be exposed to top-end

corporate and commercial, and banking and finance transactions. These initiatives are all in place with regard to the question of what I did in particular. I was privileged to serve and to represent some parastatal, where we constituted a panel of five micro-enterprise black owned and controlled law firms, particularly women, and put in place a joint venture agreement, where those law firms in fact participated together with the teams of experts, to get exposure and opportunity into the world of corporate and commercial law. Because I believe that, exposure and opportunity equals expertise, and so we need to in fact create those opportunities for black practitioners, to be exposed in an environment that's conducive to inspire them. First of all, to remain, and then of course encourage them and all of us to prosper.

Maya: Those are brilliant initiatives, but my concern is that it does not seem that they are practiced uniformly by all the relevant law firms in this country.

Papier: Yes.

Maya: What can we do to make sure that, you know the gates are opened to our lawyers?

Papier: Yes Commissioner it's, I think we first of all, we must never give up hope, and we must always keep on encouraging, in whatever form and in whatever opportunity we have. Encourage the leadership of those firms, the attorneys, and the profession, to enhance their transformation programs. Of course we can't also do that in a in a clinical way, because it's about the hearts and minds of people, who actually understand that you need to create an environment in which you are able to conducive to learning, conducive to motivating, conducive to inspiring, and unlocking the potential in candidates, and so the encouragement is one, I think. It's also important to understand that, it works both ways. I think the private sector and the public sector need to in fact be encouraged to be very firm, with regard to their requirements, to see black lawyers forming part of their teams. Now there are a number of these initiatives in place, but whether to give meaning form and content, to those initiatives, I think that is where we often encounter some of these stumbling blocks. So I try and encourage wherever I am able to do so, talk to whoever is willing to listen, and constructively engage with regard to creating opportunities for candidates interested in acquiring the skills, and evolving into two experts in the corporate and commercial world.

Mogoeng: Commissioner Nyambi, I noticed that I haven't cancelled you out, although I've called people who come after you, did I ever call you? I apologise to you, it's your turn now sir.

Commissioner Nyambi: If you can share with us your best and worst experience in the legal fraternity, briefly, if any?

Papier: Yes, I think there's been a couple of bests. The succeeding in representing your clients, who have been victimised and brutalised back in, you know, prior to

1994, by the system, being charged with criminal offenses, or charged with political offenses, and in fact securing their acquittal. That is an obvious highlight. Being able to contribute, I think one of the best moments for me, was when the Cape Law Society adopted an obligatory pro bono rule, and then of course I was privileged to serve on the Law Society of South Africa's pro bono committee as well, when all the provinces in fact, ultimately adopted an obligatory pro bono rule. That was a highlight for access to justice, and so there's been a number of those. Worst? Umm -

Mogoeng: I think you can mention one or two.

Papier: Yes, very well. Not being able to achieve the objectives that one ultimately wanted to achieve, seeing a client suffering at the hands, you know, of an unjust system.

Commissioner Malema: The former Deputy Chief Justice Moseneke, are you aware that he was in Robben Island?

Papier: Yes.

Malema: Why was he there? Why was he in Robben Island?

Papier: For, he was convicted for terrorism.

Malema: For his political activities, right? And he belonged to a political party?

Papier: Yes.

Malema: And he was a good Deputy Chief Justice.

Papier: That's correct Commissioner.

Malema: Thank you.

Mogoeng: Mr Papier you are excused, you are excused sir, oh no, no I had not noticed, Commissioner Masuku, I apologise to you. Mr Papier, Commissioner Masuku has a question.

Commissioner Masuka: Thank You Chief Justice; it's a very short question Mr Papier. Would you consider the Law Society to be a progressive organisation, the Law Society of Cape Town, we asked the previous candidate the same question, so I just think it's fair to ask you that same question as well.

Papier: Thank you Commissioner. The Law Society of the Western Cape is a diverse organisation, it's a diverse body. The constituent members of the Cape Law Society consist of BLA, Nadel, and the so-called statutory component. I think that it is diverse in the true sense of the word, we would find conservative views, you would find progressive views, and I think that the element that, during my time, that galvanised the Cape Law Society, was the element of good faith. Where you have participants, regardless of the diverse views, committed to one to make a difference,

and sometimes there are highs, when you are able to move, what we would perceive or what some would perceive to be a progressive objective forward. The pro bono adoption was a progressive moment, yes.

Mogoeng: Thank you so much Commissioner Masuku, You are excused, sir.

Papier: Thank You Chief Justice, Commissioners.

Mogoeng: Thank you.