



**JUDGES
MATTER**

Judicial Service Commission interviews

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Eastern Cape Division of the High Court (Judge President)

Interview of Judge S.M. Mbenenge

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CJ M. Mogoeng: Good morning Judge Mbenenge.

Judge S.M. Mbenenge: Good morning Chief Justice. Good morning commissioners.

CJ M. Mogoeng: Are you well?

Judge S.M. Mbenenge: Yes, I am well. Thanks.

CJ M. Mogoeng: Thank you. Maybe it is only proper that I leave it to you to tell us in your own words why you believe you are the right person for the position. Just, just brag unreservedly.

Judge S.M. Mbenenge: Want me to go to town?

CJ M. Mogoeng: As much as you believe it is appropriate.

Judge S.M. Mbenenge: I will. Thank you, Chief Justice. Perhaps let me start off by saying there are certain attributes when it comes to leadership. And when we talk about leadership you always have to measure yourself against those attributes. The first one being that I believe I am a visionary. I believe I am influential. I've got the ability to give directions and also, I can manage conflict. I always look at conflict not from a negative perspective but, for me, conflict is an opportunity to resolve issues so that we can all move forward hand-in-hand. I also believe that I do have human relations, good human relations and the other thing about me is that I'm extroverted. I'm not the sort of person who is hard to predict, you get to know out the outset what my views are on a matter. I'm just talking now purely at the level of administration and leadership. And it sometimes helps me because once I bounce off a view there is an opportunity to steer me in the right direction. Lest I'm not absolutely correct. I am born and bred in the Eastern Cape, that is the place where I practised as an Advocate. I parted there as a lawyer. I acted in the Eastern Cape not just in Umtata but in the various divisions, or sister-divisions within the Eastern Cape. I had the opportunity to observe leadership styles. I remember I acted for the first time during the days of Zietsman JP the then JP of the Eastern Cape prior to the merger. I acted as a judge under the leadership of the former JP, Judge Somjalo under Judge Sangoni. I acted in the Labour Court under the leadership the now DCJ. I acted in KwaZulu-Natal under the leadership of the former JP Chabalala that afforded me the opportunity to, to get exposure when it comes to leadership. But let me now share my vision against the background that I've just presented. Having mentioned that I believe that I am a visionary. At the present moment, rationalisation is still underway in the Eastern Cape. I believe that a JP should be pivotal in ensuring that those processes yield eventually the desired results. When I, when it comes to rationalisation and in the context of me sharing my vision I have observed that there is disparity when it comes to workload. You will sit in Bhishe you will see that the lane may not be as fast as it is when you're in Umtata for instance or in Port Elizabeth or elsewhere. All that has to do with the fact that the jurisdictional areas, the way they are carved now, are such that the workload may not be such that it is spread evenly. There is currently at an administrative level a realignment of

Magisterial Districts. There is an attempt to align them with Municipality Districts but that may have a negative impact on the rationalisation process. So, it means a JP should be alive to that and should ensure that he influences the course one way or the other for the betterment of the governance of the division. I've addressed the issue of the workload in that context. Then there is uniformity of case flow management. You will find that the idea has been embraced in Umtata. It has been embraced in Bhisho. The idea is beginning to, let me say it's at an inception level because it would seem that even in Grahamstown and Port Elizabeth the idea is gradually being bought. But at the level of my vision, all I can say is what is important is uniformity when it comes to case flow management. It is indeed so that in those areas where it has been embraced and it's running, there is room for improvement. I have observed on some occasion that practitioners don't tend to treat it seriously and it is for the judge concerned to instil seriousness on the part of practitioners. I say so particularly because there will be instances where you see that a particular firm of attorneys will have sent a candidate attorney when in fact it's an important time and it's time to get a senior partner; somebody who is alive to the issues in the case. To participate in case flow management. Having mentioned that I have observed also that there is no Civil Court running roll in place. These are matters that have been discussed, I'm not claiming victory when it comes to this. I am mentioning it in the context of vision, mindful of the fact that certain processes were decided on and when it comes to the Civil Roll being a running roll to ensure that matters set down, for instance, on a Thursday do not get postponed because a particular judge has been allocated to handle civil work just for one week. So, I'm simply mentioning that I have a vision in this regards I would champion that cause and ensure that things happen the way they were planned. I also have a vision about a user-friendly Motion Court system. I say user-friendly Motion Court system because at present you have a situation where two judges run Motion Court on a particular day. They are duty judges. They will handle Motion Court, the one judge will go into court in the morning at 10:00 am the judge concerned will finish, let's say at 12:00 am, then the next judge will walk into court and finalise the business of the day. But I have observed CJ and commissioners that, that setup is not without problems. Motion Court is meant to be speedy and cheap. Now you have a situation where practitioners have to wait whilst the one judge is handling the matter or the particular roll. Waiting to get into Court for the second roll. They are not, they won't know when that particular

judge will finish so they've got to wait on the wings, so to speak. Then there is also the problem of a particular litigant. Let's say its Standard Bank for instance. It's a default judgment situation, by way of example, the one judge may grant the order the other one may not grant on the same day. Then that speaks volumes about how judges look at things. Or at least, if I may refine it, let me say it doesn't reflect good; a situation where this litigant with the same set of papers get the order they are seeking but with the same set of papers they don't get the order with another judge but that is just a peripheral level. In my view in those places where files run up to 100 or more my view is let's rather have two Motion Court days so that the one Motion Court day will be a Tuesday and the other will be a Thursday but get one judge handling those files. In my view, the other judge can handle opposed applications. There will invariably be about 8 of them. I'm of the view that insofar as the load may be heavy on some days because some matters are complex, and the files are voluminous it would be available to the leader in that particular division to ensure that those judges whose matters have collapsed come to the aid of that particular judge. If it comes to a push. But my experience is that it is possible for a judge to hear opposed applications all by herself or himself, but it comes to a push there should be mechanisms set in place to ensure that they are aided. So, that is the vision that I have. I did, when I was in Umtata, purely, purely by way of testing the setup or the system avail myself, I did avail myself to do unopposed applications all by myself. They ranged between 90 and 120 and my experience is that it is possible for a judge to handle that number of files. The challenge though is that those files will be availed by the registry office in the afternoon of Friday, leaving you with basically few days to prepare. So, it is in that context that I am saying in those areas where files range from 90 to 120 it would be good to split Motion Court into two. That holds for Port Elizabeth where you get about 100 to 120 files; that holds for Umtata where you get you about 100 to 120 files; may not necessarily be so with Bhisho the workload is not, does not justify the splitting of Motion Court. Then there is the issue of appeals being heard in Grahamstown on a particular week. I think the hour has come for Umtata in light of the roll that we have in Umtata to run a similar dispensation where the full Court will sit on Monday and then ordinary appeals are heard on Wednesdays and Fridays. I believe that the hour has come, and I have a vision in relation to that. Then there is the issue of rotation of judges, bear in mind that we've got this vast area, a huge Division geographically very wide in area and judges gets

appointed to be judges in a particular Division. I think the start starting point is merely to say one must live with one's choice. If you choose to be a judge in Umtata you may have to be a judge in Umtata, if for any reason you've got to move from Umtata to some other sister-division maybe a good case could be made but let me not digress, let me let me simply address the issue of rotation. For purposes of cross-pollinating judges, it is good, especially at the level of appeals that you have a full Court comprising two judges from outside of the Division wherein the matter is serving and possible one other judge from that particular Division. The reason is not far to seek. It is to make sure that justice is seen to be done as much as possible. I also believe that when it comes to Motion Court work rotation should be implemented. For transformational reasons you have a situation for instance of a judge sitting in Port Elizabeth or even Grahamstown not steeped in Customary Law who if deployed in Umtata for some week will eventually get exposure in that field. You also have a situation of judges sitting in Umtata where there is virtually no commercial work, they need exposure in commercial work. It would be good to implement rotation at that level. Having said that there are financial constraints and also other resources because the challenge ends up being a situation where judges are more on the road than being in their stations discharging their judicial functions. So, I would like to qualify what I have said I'm saying in short; rotation is good to a limited extent and for the sake of certainty it could be kept at something like judges will leave their stations for something like 2 or 3 weeks out of 9 or 10 weeks per term for the reasons I have mentioned. Then there is the issue of acting appointments. A JP obviously plays a pivotal role when it comes to acting appointments and an approach which I would term trial and error would not be the best of approaches. I think the starting point is to say there are practitioners in a particular Division that appear before those judges in that Division; their skills as lawyers are gleamed when one reads their papers. Skills; writing skills and their ability to think on their feet is also something that is gleamed in Court when they appear. So, when it comes to practitioners, advocates and attorneys there should be no problem in my view in identifying up and coming and potential judges. This is not something one can do single-handedly. Of course, one does need to interact at a certain level with legal bodies. We can't leave it there. The judiciary covers Magistrates as well. Judges interact with Magistrates at a certain level. We know that there are reviews from time to time, queries are issued. Magistrates are called upon to proffer responses to

queries raised by a particular judge. That is a moment for getting an understanding of who, at least know what they are doing out there in the Districts. We can't leave it at that. We don't have to conventional history has proved us wrong. There was a view in the past that academics do not belong to the Bench. I believe they too could be elevated in fitting situations. I'm thinking for instance of a situation where a particular academic writes a lot on issues and judges get to know this person who is mighty when it comes to writing articles that get published. That coupled with the training that SAJEI offers I believe we should also be able to get judges appointed from academic circles as well. One should always be mindful of the fact that we are still involved in transforming the Bench. If you look at the situation for instance in the Eastern Cape you will see that there will be seven judges in all, in Port Elizabeth and two are females. I don't think that speak well of the Division. So, it means there is this challenge. You go to Grahamstown I believe there are eight judges in all, only two are females there. The situation may not be that bad in Umtata because it's three upon eight but at the same time I can say transformation has not been attained to its, the desired level. So, at the point of selecting judges, one must be on the lookout for females to ensure that transformation is achieved. So, much for acting appointments. I believe I have led by example. I don't believe that a head of a Division should be translated into something like a chief clerk; somebody who runs around doing administration only. My honest view is you can only lead by example by writing judgments that get to be reported. It is an idea that I would sell even to Magistrates. You get to the Magistrates Court, you'll find that chief Magistrates hardly go to court. My view is the hour has come for us to say look at our Chief Justice I'm not buying your face Chief Justice, by the way; but let me mention this much that I've had moments when I've sat watching television, Constitutional Court in action where you see the Chief Justice interacting with lawyers. You look at the file, you can see that it is marked. This is the person who runs around, who crosses the seas involved in administration. My view is that heads of court can only lead by example. When they find time to be in court it is a question of percentage of course. There are administrative tasks to perform but it is good when you read a law report you see that a particular JP has at least penned a judgment. So, much for that. And let me say perhaps before I leave that point I believe and I am sensing from the nomination letters that I've done my part in leading by example insofar as I've been afforded the opportunity to lead. Then one time we were sitting in one of the

committees, Provincial Efficiency Enhancement Committee, and something emerged during the deliberations. The fact that on some occasion there will be somebody convicted, they end up having to serve their sentences, they end up applying for leave to appeal and leave is granted, and they are released on bail. Maybe because circumstances have changed. It has been found that some of the people, one or two or more, end up not facing their sentences. When eventually the appeal does not succeed. And during my investigations, finding out how things are done elsewhere I found that elsewhere; in Cape Town in particular there is what they call Audit Appeals Committee; the JP being the chairperson of that body; the Registrar; officials from the Correctional Services Department; members of the South African Police Service; Legal Aid Board and staff from the DPP's office. They have got this audit system to check who was granted leave to appeal. What happened to the appeal eventually. Was the appeal successful? What became of the person who was eventually released because at the level of applying for leave to appeal they were released. So, that's something worth emulating. I do have this in mind and given a chance it is something that one would implement. Let me also say towards the end on the issue of vision that I would live a life of promoting good relations between the Bench and practitioners and other interested bodies. Having meetings held from time to time to get a feedback of what the Bench is doing and where the Bench may be lacking and so on. Then let me mention one last thing and here CJ and commissioners I may be tramping, trampling on dangerous ground but it is something that I can't restrain myself from mentioning. My dream is about a 5-day court week. Not a 4-day court week. All over South Africa if you go to a court you will find that the speed tends to be slower on Fridays. Come 12 noon after lunch you may find that there are no courts sitting. Now I did mention that I, I may be tramping on dangerous ground here. I am not sitting here to accuse anyone. I am simply sharing a vision because my view is that the legacy that we will leave is such is that things will dwindle with the passage of time. We will get to a situation where Fridays becomes dies non. And once again at the risk of being -

CJ M. Mogoeng: For the benefit of those who have never studied Latin?

Judge S.M. Mbenenge: What dies non, oh, dies non.

CJ M. Mogoeng: Dies non.

Judge S.M. Mbenenge: I see, non-court days Premier. Non-court days, sorry for that. When it comes to that the issue is not just about the Bench it's about practitioners who believe that come Friday it's time to request a postponement because there is a funeral on the following day and so on. Also, there is a problem because matters that are set down for Fridays will invariably be those matters that are going to be settled. But with the running roll that will disappear. If you've got a situation where there is a running roll. Matters are set down for Friday. They don't get settled they should begin on Friday, and in that way Friday may stop being what may be perceived as dies non or non-court days. So much for sharing my vision. There is nothing wrong in dreaming. I am sharing my dreams. Given a chance those dreams may come true. CJ, what else? I could pose certain questions and answer them?

CJ M. Mogoeng: Maybe, maybe you should –

Judge S.M. Mbenenge: Such as for instance –

[crosstalk]

CJ M. Mogoeng: Oh, you want to pose them and answer them? Or would you rather, we pose questions.

Judge S.M. Mbenenge: Let me, let me. Everybody is paid for being here and they should do their part and pose questions. But because I'm driving on a freeway let me rather drive. Somebody may pose a question. You were not here, I am sorry you were here not so long ago for a slightly, a less senior position and you were not recommended what business have you got to be here? I think that is one of the crucial questions which I must pose and endeavour to answer. The JSC in its wisdom took the decision it did, I have no qualms with that decision. It related to the circumstances that prevailed then but let me remind everybody here this morning that during the previous rounds I was nominated, and I did not stand. I actually turned down the nomination. Reason being that I was of the view that I had to reflect

on the matter, and I had not been afforded sufficient opportunity to do that. And secondly, I did it because deep down in my heart of hearts there were four candidates, colleagues of mine, I had a belief that at least one would be recommended. That did not happen. I am here today, I've been nominated by the same bodies who saw leadership qualities in me, they nominated me the second time around. I turned it down because I believed amongst other things there were people that would one or two would be recommended. At least one of the four let me put it like that. And this time around I availed myself more particularly after being afforded the opportunity to act as Deputy Judge President of the Umtata Court. A decision made by the Ministry with the support of the most senior judge in my division, Nhlangulela A. JP. And I availed myself. I availed myself against the background that even when I was here the first time around there were footprints that I had made in my legal career. I had under my belt 1 year 4 months as an acting judge and 2 months of full time judgeship. I had written judgements that were publicised, that were reported even then. Some and South Africa international recognition. If you read my CV, I believe the CV has been supplied; you will have seen that the judgment in S vs Mporofana was referred to twice by the Namibian court. That is something that happened at a time when I was acting judge as an advocate. Now as I talk I've got 33 years to my credit as a lawyer. And for me the fact that most of that period was not spent as a judge I believe with respect it is immaterial. I was a lawyer during the 33 years period; I was lecturing; I was a Prosecutor at some point; I was a State Law Advisor at some point; I was a Junior Advocate; I was Silk for 11 years; I contributed to the jurisprudence of this country. I was not a plumber or a carpenter. I was here part of the legal system. So, if there is somebody here who is still under 33 years please don't take it to your heart. I am just mentioning that for 33 solid years I've been a lawyer. And I've contributed remarkable to the jurisprudence of this Country. Look at the time I spent as a full-time judge; 9 judgments to my credit reported in the Law Reports during the two-year period. Those are footprints worth mentioning. And I believe my being appointed as Acting Judge, Deputy Judge President of Umtata afforded me the opportunity to prove, allow me to say beyond reasonable doubt that the leadership qualities that I've, that I alluded to earlier on have been now confirmed. Chief Justice and commissioners please allow me, allow me it may take a little bit of time to read from the various letters the relevant paragraphs; people pointing to me, mentioning leadership attributes that I have. For

instance, in its letter dated 24 June 201, BLA had the following to say, I'm just quoting three paragraphs:

"His understanding" that is myself "His understanding of our division is born of the fact that as an advocate he has taken many acting stints in the Bench of this very division as such we are confident that such acting stints have allowed him time and vast occasion to acclimatise himself with the division. Its best attributes which must be affirmed and its challenges which must be dealt with firmly and decisively. This is over and above the fact that he has since been appointed as judge in this division on a full-time basis. A Judge President must lead a distinguished court of the legal profession in the form of his peers. He must thus enjoy their respect as an epitome of judicial excellence. We have no doubt that Mbenenge J is a living example of this indispensable attributes of a Judge President."

Then lastly, BLA letter;

"Mbenenge J has exemplified this leadership style that has believed in the vitality of stakeholders during the short period he has been acting as the Deputy Judge President for Umtata. It is because we believe many challenges in the Eastern Cape call for a leader who is prepared to interact with stakeholders on the basis of necessity."

And the Transkei Society of Advocates in their letter dated 30 August 2017, says something and I'm reading just 2 paragraphs from that nomination letter; I do this CJ and Commissioners because it's better to let other people say something about you than you're saying something about yourself.

Paragraph 4:

"In everything he does Judge Mbenenge strives for excellence and is intolerant of shoddiness and mediocrity to some he may come across as too strict at times, but the truth is that all he always wants is for the standards in his Court to be kept at an appropriately high level and never to be dropped which in our view is an essential attribute of a prospective Judge President. A case in point is that he is currently in Acting Deputy Judge President in our local division. Within a week or so of his taking over the reigns as such palpable improvements in the running of the division were observed and almost overwhelmingly remarked upon by the legal practitioners in our division. A similar trend to the entire Eastern Cape Division that he would inculcate as a Judge President would be most beneficial on a wider scale."

And then the last paragraph of that nomination letter reads:

“As a Judge, we consider him to be quite competent and having a firm, yet fair hand in his dealings with those he interacts with. He delivers his judgments without undue delay and their quality in our view are always impeccable, display sound reasoning and well research prompt delivery of judgment is a very essential attribute of a Judge President of the Division who has to lead by example.”

Perhaps let me pause here before I quote another letter. I counted no less than 7 judgments where I sat as part of the full Court in instances where Senior Judges of the Division actually called upon me to write the judgment and they concurred with me in the final analysis. Which means senior members of the Bench in the Eastern Cape do repose their trust in me and they respect me as a competent and capable lawyer. The nomination letter prepared by Advocate Nhalandi it is, the paragraphs are not numbered but it's not a very long letter, and I quote:

“He has in his short stint of less than a month been able to stabilise this division resulting in a smooth running of the Court that has not been seen for a while in these environs in bringing stability to the Court he has led by example in ensuring that the Court start at the correct time and trials are progressing as they should. It is my view that if he were to lead this division he would enable the Eastern Cape Division to rate amongst the best performing Divisions in the country. I have firm belief that his appointment would be supported by the majority of structures in the profession.”

Close quote. And that did come to pass. The nomination letters, the number of the letters, the fact that they emanate from legal bodies is not without significance.

NADEL's letter reads:

“The role and the differences made in Umtata during his short stint as the Acting Deputy President is another indication that indeed Mr Justice Mbenenge is an appropriate candidate to be considered for appointment to the JP position.”

So, in short, in short then allow me, in conclusion, to say the appointment of a Judge President from Junior Ranks is not unprecedented in this Country. Judge Ghomo was appointed Judge on one of them by 1998. He became Judge President on 1 November 2001. So, after 3 years he became JP. I can imagine there were many other senior people as part of that particular division. But in its wisdom, those who took the decision or in their wisdom took the decision they did. He has gone on retirement now, we all know, but things ran smoothly there as elsewhere I guess. I could cite many examples. The issue of seniority has got this thing in it that in our minds at times we tend to be, how shall I put, we are erratical in how we look at

things. It is as if the one who is the lead judge is the superior one. We could look at it from another angle. He is a chief servant. The other time I said it is not ascending to superiority, it is descending to servanthood if you get appointed as a JP. I could mention instances, for instance, Somijalo when Judge Somijalo rather, when he was appointed JP he had been judge effectively from 1 May 1995 and was appointed AJP on 18 January 1997 in the Umtata Court. There are many instances, I don't wish to bore this forum by citing all those instances but we all know the history of this country. We've been following up on this and I believe we've got lessons to learn from that. I am not in the least suggesting that regard may not be had to seniority, but context speaks, and my view is one can be elevated from junior ranks and become a JP. Especially one who has been afforded the opportunity to prove oneself and has, in fact, proved oneself beyond reasonable doubt. In summary, I was here last time. I was not taken on. I don't have qualms with that it was for a less senior position, but the difference is that once again during or let me say in the interim I proved myself as a competent lawyer and when afforded the opportunity by, by the most senior judge in the Division Nhlangulela A JP I demonstrated that I could, I could be a lead judge if afforded the opportunity to do that. Yes. CJ I'm changing down now, you can hear my voice.

CJ M. Mogoeng: Ja. I realise you didn't want to leave any stone unturned.

Judge S.M. Mbenenge: Yes, lest somebody stumbles. Yes.

CJ M. Mogoeng: No thank you so much. J – DJP?

DJP: You and I have been having continuous exchanges with regard to administration of the Division and I take off here. I've been impressed by that introduction because I think it has contributed and if sustained it can contribute to the success of the Division going forward. However, you have because of your situation confined most of the time to Umtata station. And I would like you to give us a glimpse of your interaction with colleagues. Insofar as this might impact on the seniority, junior status as the case may be, relationships generally and, and the success of the Division in the final analysis.

Judge S.M. Mbenenge: AJP to the best of my knowledge and belief, colleagues in Umtata, and even elsewhere; I'm talking about senior, the most senior judges they actually encouraged me to avail myself for this position. In Umtata, some senior judges approached me and encouraged me to do so. You will have seen that I've cited as referees 2 of some of the most senior judges in our division. And to the best of my knowledge and belief, I was well received in Umtata. After I was appointed there with you having made the recommendation, of course, I was well received in Umtata and to the best of my knowledge and belief there are no qualms from colleagues about what I have done and what I have not done. To the best of my knowledge. I cultivated a sense of transparency being alive to the fact that for instance if cases collapse on Monday or Tuesday or Wednesday the tendency is for judges not to come forward and say send me I'm available. I can do something for Thursday and Friday. AJP you know that we've interacted on that subject from time to time. The issue of transparency and I am proud to say it's an idea that I sold and it's an idea that the two of us will continue selling in Umtata for that matter and elsewhere. And as far as I am concerned I have not heard any whisper from anyone with any justifiable grounds to say we've got this man he's overtaken us. He is junior, and we are senior. Well of course for the reasons I have mentioned it would not necessarily have been a legitimate concern. Senior judges in a division when one who is junior, competent, capable with leadership qualities are there to give guidance and I think you know from your own experiences that you tapped on the resources of senior judges. You've got experience when it comes to that and I believe as Acting Judge President you were not left alone. You've got competent lawyers there, judges who have got the history of the Division who have shared with you why certain things were done in a particular fashion and you've had to interact with that and the same has happened to me AJP.

DJP: I will not make a mistake of overlooking the side of the general staff in our courts because that counts so much in supporting what judges do. What has been your impression? I raise this question because in my experience having worked at all the stations over years I have been receiving varied responses. I go to one station the relationship, or the response is good. At another, it is not good and it's human after all.

Judge S.M. Mbenenge: It is.

DJP: What comment can you give on this? Because it can hamstrung the work that a judge does in a division.

Judge S.M. Mbenenge: The first thing that I did upon my arrival in Umtata was to call a meeting of all staff members and to demonstrate to them that they're pivotal to the administration of justice. And one of the things that I harped on was the fact that even if you are a secretary to a judge, bear in mind you are not a judge. If for any reason a judge has to leave chambers under understandable circumstances, of course, it doesn't necessarily mean that a particular secretary or PA should also follow suit. I am mentioning this because one may be seen to be very strict because one is saying let us observe working hours. And I never gained the impression that there was mumbling after that meeting. Instead, we got cooperation from the relevant staff members. I'm now talking about Umtata because there is where I was afforded the opportunity to be lead judge. I do know that even in Bhisho where my substantive position is I have lived this life of saying Friday is not dies non even in the mist of frowns at times. Where I move from the premise that if I've got to impose sentence I would do it at 3 o'clock on Friday and I know I attracted frowns from time to time. But for good reasons. For the good of the legal system and I am not ashamed of that. And I am mentioning this as an example, moving beyond the four corners of Umtata. And yes, that's far, that's how far I can take my answer AJP.

DJP: And CJ I won't make a mistake of not testing the question with regard to CFM believing as it were that case flow management does help a lot in easing up judges so that they may be able to help elsewhere where there is a need for them to come in.

Judge S.M. Mbenenge: Yes.

DJP: In telling us about CFM and its implementation you did say that it is implemented in Umtata.

Judge S.M. Mbenenge: Yes.

DJP: You did also say that it is implemented in Bhisho. That being a pilot site for CFM.

Judge S.M. Mbenenge: Yes.

DJP: But I did not hear you properly when it comes to its implementation in Port Elizabeth and Grahamstown.

Judge S.M. Mbenenge: Yes.

DJP: The question that I'm asking is a sharp one.

Judge S.M. Mbenenge: Yes.

DJP: It's either yes or no. Do we have your honest opinion CFM going on in PE and Grahamstown?

Judge S.M. Mbenenge: It has not started AJP. It has not started. We all know this, let me call it sad history, that there was resistance when it comes to those courts. But we also know when the fullness of time came the idea was embraced. But it has not yet been implemented. You were calling for a yes or no, but allow me to expatiate. I remember that there is a proposed judicial case flow management procedure emanating from Grahamstown quarters. It's a document that I've been interacting with it makes good reading until you get to paragraph 9 thereof which says, without in any way limiting the discretion of the Judge President the prescribed judicial case management procedures shall apply to the following category of cases. Then they mention all medical negligence claims, all commercial matters in which more than 5 million rands is claimed, see all claims against the Road Accident Fund in which more than 500 million is claimed. I have been interacting with this particular paragraph. Because complexity is in my view a determinant. It's not about the values. A case may be a matter involving 5 million, but the issues may not be complex. And a matter may be novel for instance and it may require engagement at case flow management level. So just to sum up the idea has been embraced. I don't

want to say grudgingly. I've got to look at it from a positive perspective but there is this proposal. You and I know that it has yet to be the subject of debate, but I believe case flow management falls to be introduced in all sister-divisions in Umtata. I am sorry, in the Eastern Cape. It should vary, the way in which is it implemented should vary from case to case and type of litigation. For instance, the issue of value in the litigation becomes irrelevant when you talk about case flow management in application proceedings for instance. My belief is that at the outset a judge is allocated Opposed Motion Court files for argument sake it is incumbent on that judge to call for the Registrar to bring the files. The judge to go through the files, check what documents are missing, what heads of the argument have not been filed and so on and so forth. To avoid a situation where on the hearing date you get a situation where the matter gets to be postponed because somebody has raised non-joinder or some such other defence. Leading to the matter not being disposed of. So, the point I'm making is that case flow management seems to be limited to trial work were as you and I know that it's been applied when it comes to crime. I've seen it happen in Bhisho with DJP van Zyl taking the lead therein in criminal cases. And the hour has come to spread it across, even appeals for that matter. So, the answer to your question is it has not been implemented. It has yet to be. The idea has been embraced. Albeit that there are reservations based on what I've read but I believe it is not something that is irresolvable it should be resolved.

DJP: The last question CJ. What is your view with regard to the engagement of acting judges? Is it or not that they should be encouraged to go through the SAJEI programme given that are fast in the Eastern Cape running out of the pool of Acting Judges. What is your view on that? What plan do you have with regard to?

Judge S.M. Mbenenge: I don't want to sound conventional, not even conservative. Earlier on I alluded to something which is that judges have this one advantage, including a JP and a DJP, having to sit in court watch practitioners perform, read papers, the ability to gleam that this is Bench material can be gleamed from how they address Court. How they write documents, legal documents and so on. But Sanjay is an indispensable tool for the development of judges. I do recall that I attended a course on aspirant judges in Cape Town some time ago. At that particular

point, I had acted as a judge, I had written, reported judgements. But when I got there I was edified.

DJP: Thank you CJ.

CJ M. Mogoeng: Thank you, DJP. Premier?

Premier: Thank you very much, Chief Justice. Just two questions to judge Mbenenge. The first one is just one the case flow management. You did earlier speak to the disproportioned load of cases in the various sister-divisions there where I thought that this case flow management is a devise or instrument to try and regulate the ease with which matters are heard. Don't you find it a bit queer that in the Grahamstown and Port Elizabeth divisions there seems to be lack of movement in the matter? I don't if I am characterising it correctly. But there does seem to be what in me reads like reluctance. Don't you find it?

Judge S.M. Mbenenge: I think Premier we've gone past that now. Everybody will be afforded the opportunity to state a view on a matter. I think there was a misunderstanding of what norms and standards issued by the office of the Chief Justice were about. There was this view that this is a permissive dispensation, yet it is an essential tool to the running of cases. So, I would say I found it queer then but the way I see it now people out there are repentant. I read this particular letter, particularly that paragraph where the endeavour is sort of to streamline this dispensation so as to deal with, you know, certain cases whereas it should be as wide as possible. But at the end of the day Premier it is for a JP to influence change even among those who tend to resist. Now I'm saying this in the context that indeed it is that there was resistance initially but after some time the idea was embraced.

Premier: Now my last one is; just on the attributes you referred to earlier when you spoke. And I must say that all the other recommendations that come they really are very impeccable and they make a very flowery outlook. Just one question for me, in the course of your career did you have to manage disappointment and perhaps if anywhere, there is any example. Why I'm asking is that between assertiveness and at time perceived arrogance or arrogance –

Judge S.M. Mbenenge: Yes

Premier: There is somewhat a fine line but how do you generally manage in such? Have you ever had to manage disappointment?

Judge S.M. Mbenenge: It would sound artificial for me to say that during the best of time when I thought I was assertive I was perceived to be more on the arrogant side. I do remember on one occasion Ms, then Acting Judge President of Umtata, Justice Petse who is someone I relate with at a casual level. He gave it tough a little bit to me when I was arguing a matter and I ended up reacting in that particular scenario. And later that day I picked up a phone and spoke to him and said I was thinking I was assertive but now that I had reflected on it I thought I was a bit arrogant towards him. And he responded by saying, yes you were less than diplomatic. So, I am not an angel. CJ you'll remember during the best of times Moses lost his cool. You remember that. He lost his cool. Sorry, sorry because I am mentioning this because that's something that's a bit common between the two of us. He lost his cool and he ended up not touching the promised land. But we read scripture and find that eventually he was taken to go to heaven. I don't want to delve into that. I know, I know we differ when it comes to these things but I'm just mentioning it passing.

Comm Malema: [1:02:26 inaudible]

[laughter]

Judge S.M. Mbenenge: You won't get my confirmatory affidavit, Commissioner Malema. I've had those moments and AJP Nhlangulela one of the most patient of judges will recall that there were moments where I was a bit rough and I've had to learn from those who are cool and collected and calm when they do things. Those are odd moments they've happened. President Maya, how did I behave appearing before you? There may have been those moments. Anyway, the long and short of it that would have been an exception to what generally prevails. But let me harp on one thing the ability to manage conflict is a gift that I have. The fact that if I see you, and when observing that you are grumpy towards me I am very quick to approach

you and say it looks like there is this cloud that has descended between the two of us and I've lived that life. Thank you.

Premier: Thank you, Chief Justice.

CJ M. Mogoeng: Thank you, Premier. And Acting Judge President Nhlangulela I apologise I wasn't aware you were acting as Judge President. My apologies sir. Judge President Hlophe.

JP J. Hlophe: Right. Thank you very much, Chief Justice. Firstly, let me disclose to this commission that I have known Judge Mbenenge for many years. We first met in Umtata in 1990 when I was an academic and over the years we have had a very cordial relationship. I have two questions for you Judge Mbenenge. The first is this; we have a problem in the profession about skilled briefing patterns whereby black lawyers, attorneys and advocate do not seem to have access to good work. Which in turn prepares them to be good judges at the end of the day. Because lawyers of today are judges of tomorrow. Right, that is the first question. The second question relates to case flow management. I would like your views in respect of the following essential tools of case flow management preferable in the following order; one pre-trials in both civil and criminal matters, do you believe they are an essential tool and how to let's unpack that. Two, Court-based mediation; court based mediation as an essential tool of case flow management. Three, continuous rolls that are also an essential tool of case flow management. Four, limiting the time of counsel to prepare to present an argument in Court; limiting counsels time to present an argument in Court and finally limiting the heads of argument. Before you answer those questions, or before you elaborate in that regard I just want to say as far as case management, case flow management is concerned I come from the school of thought which says, it cannot be left in the capable hands of individual JP's to do their own thing different things in our different corners. It must be coordinated there must uniformity all of us must do exactly the same thing so that the practitioners who appear in Gauteng who have to go and argue a case in Grahamstown know exactly what is expected in Grahamstown because the same thing is done here. If they go to the Labour Court exactly the same uniform practice must be adhered to. Right against the background, I would like you to deal with those questions.

Judge S.M. Mbenenge: Thank you JP. I don't believe that when it comes to briefing patterns the country has achieved what, well has achieved or reached the threshold or the requisite standard. Time and again you will see that commercial work will be, will still be in the hands of whites and white firms who still prefer briefing white counsel. Something could be done about it. We would like to see senior counsel roping in black females, or black counsel to impart their skills. The State Attorney is doing its best. I've seen it in Umtata. I've seen it in Umtata the State Attorney is doing its best to spread the work and that is empowering those who practice in that division. Look at matters appearing before the Constitutional Court, for instance, there will be instances where there will be a mighty white senior counsel at times with even three junior counsel handling the matter. None of whom belong to the category of people who are supposed to derive a benefit from transformation. I am still of the view that there is still a shortcoming when it comes to this. The issue of briefing patterns. Coming to case flow. Yes, we need to have uniform tools as you've pointed out. I must not appear in Port Elizabeth and then find a different set of rules applicable there. It's a situation where if you look at the norms and standards as the groomed norm or let me say the fountainhead of case flow you get an idea that it should be codified somehow. What is applicable should be applicable the country over. Court-based mediation is possible. Of course, not in all matters. There are matters that may be subjected to some form of mediation. Let me take the odd case, you know for instance burial cases you find those cases out there in Umtata where people fight over dead bodies. You know instances like those mediation is called for. An approach that says you are blood relatives doesn't ever think that if you bury then the estate will go to you. It's governed by different rules altogether. You may as well find that you bury today and then tomorrow the estate goes to somebody else altogether. To ensure that families live in harmony. I am making that as an example. And then continuous roll is something that I'm very fond of. It is something that I believe will go a long way towards ensuring that civil courts and criminal courts are well run. Matters are disposed of. They don't spill over to the following term. And they are finalised within a particular term. Limiting time for the presentation of the argument is a good thing. It is good CJ you did it most of the time I appeared in the Con Court. You called counsel to chambers you engaged them, it was not an arbitrary decision. You would say for instance Mr so and, so you are for the appellant

and what about 30 minutes so on and so forth. We've seen it happen and I believe it is something that could be invoked even in our courts of first instance. Heads of argument that is governed by the Rules. The Rules make it clear that you are not presenting a thesis. It's actually just heads of argument. It's the points that you will be raising. But at the same time, at the same time it always good for whoever pens heads of argument to refer to everything that they will be relying on when they present a matter. I think that covers the salient features of your question JP.

CJ M. Mogoeng: Thank you, Judge President. President Maya.

President M. Maya: Than you, Chief Justice. Perhaps I should start by disclosing to the commission that, like my colleague Hlophe JP I know the candidate very well. We go back many, many years. Good morning Judge Mbenenge, oh Acting Deputy Justice Mbenenge.

Judge S.M. Mbenenge: Good morning President.

President M. Maya: How are you?

Judge S.M. Mbenenge: I am very well, thanks. And you?

President M. Maya: Good I'm fine, thanks. I am not going to ask you about your capabilities as a judge and an administrator because I don't doubt them. And I will also not hide the fact that I'm hoping, I had hoped to poach you to the SCA because I think you would add immense value to the senior courts. But I respect your choice, for now.

Judge S.M. Mbenenge: Thank for the compliment, President.

President M. Maya: I am going to ask you about your temperament. I know that you've there have been tentative questions in that regard and you've answered them. But I still want to satisfy myself that what I know about you is actually correct. You described yourself as a forthright person and I know that from personal experience. This quality sometimes may come across as arrogance as was pointed

out earlier and abrasiveness. Now I want to know if it has affected your relations with your colleagues where you are acting now in any way, with adversely.

Judge S.M. Mbenenge: To the best of my knowledge and belief, nothing whatsoever I relate with all of them cordially. None of them has ever come to me pointing to the fact that I stamped on them somehow. That's the short answer, President Maya. I am saying to the best of my knowledge. And I would have expected anyone for some or other reason who thought that at some point I was a bit stern towards them to come forward and afford me the opportunity to deal with that sort of concern. For instance, I would have had occasions knocking on the door of a particular colleague finding that the colleague is not there. Not knowing where the colleague has gone to. Picking up the phone and getting a response like this, no my home is not far from here, I'm done with court and I think I alluded to that earlier on. Moments where I have actually said at least I should be put in the picture if for any reason a colleague must be away at least I must be put in the picture and get to know. What happens if you go there, you happen to be working on, on your pool and you drown there and I don't know that something has befallen you. Now, President Maya, you will agree with me at the level of us being adults it doesn't, one doesn't take kindly to being steered in the right direction when somehow people come short. I earlier on alluded to the fact that transparency is something that we should continue selling. People who finalise their cases on Monday or Tuesday don't have the right to simply disappear. I know that when I pick up the phone checking where so and so it I would never have shouted to the top of my voice. I would simply have said, Oh I thought you were in your chamber I've got a matter to share with you here. I don't know whether you follow what I am saying. The point of substance is that if, if an adult is found wanting and is corrected the response may not necessarily be positive. That's all I can say.

President M. Maya: All right.

Judge S.M. Mbenenge: Work is work, you job you job.

President M. Maya: I am satisfied with your answer. Judge Mbenenge. I have a few more questions.

Judge S.M. Mbenenge: Yes.

President M. Maya: The one relates to a perennial problem in that Division we know that the Eastern Cape Division has consistently over many years struggled to get competent women judges. Now for lack of effort. Now, have you been able to identify the cause and what ideas do you have to address that challenge? The -

Judge S.M. Mbenenge: The –

President M. Maya: No, no let me just list them. Then you can answer them all at ones at the end.

Judge S.M. Mbenenge: The first one President Maya is about problem in identifying –

President M. Maya: The challenge relating to gender diversity in that division. Despite the fact that a number of women have been given a chance to act there. Over and over again but when they come they found to be not appointable.

Judge S.M. Mbenenge: When they come here?

President M. Maya: When they come. Yes, those who come here. The other question relates to problems that were brought to the attention of this commission in earlier interviews that there are serious challenges in the magistracy. Now when you, if you are appointed you will have to assume responsibility for the wellbeing of the magistracy as well. Now I want to know if you looked into that area and what have you found and what ideas do you have to improve the dire situation that was described to us before. The last question relates to your relationship with your competitor, Judge van Zyl. You work in a very small division. Very few judges there intimately. Now I want to know if your candidacy now has affected your relationship in any way. And whether if he is appointed and you are not you will accept his leadership.

Judge S.M. Mbenenge: Yes. Thank you. Let me simply deal with the last one as number one. We relate well with Judge van Zyl and van Zyl DJP who is my superior at Bhisho. I know of nothing that separates the two of us as brothers and I expect him to answer a similar question and I can state without fear of contradiction that he will confirm exactly what I have said. There is no reason why I would not serve under his leadership. If he were to be appointed and I not I know of no reason. We travelled together yesterday, flying here. We conversed about this and that. We've related well with one another as far as I am concerned we may have different temperaments. I may be this extroverted person. He may be more on the introverted side. That's neither here nor there as far as I am concerned we are relating well. I think should allay your concern President Maya in relation to that question. Then the issue about gender diversity and the fact that we've had women come here and not taken on. I was not particularly involved in the appointment of acting judges even as a judge at that particular point in time. Not talking about me being ADJP at the present moment. I just have that one philosophy that there should be less of trial and error. That is a notion from which I spring. People should have proved themselves as competent lawyers. There are many women who are competent as lawyers. Well, it is sad that some have had to come here and not get to be recommended to be judges. So, I can't directly [1:22:01 inaudible] an answer for a particular functionary who was responsible for the selection during that era. But I have shared with the commission what my philosophy around acting appointments I believe there are many female practitioners. Female magistrates who can be subjected to some form of test and get recommended for appointment as acting judges. They get observed. They are monitored. They are assisted and prepared to become good judges. And eventually get to be here and appointed by the commission. That is how far I can take my answer President Maya. Moving from the premise that there is a way of identifying competent lawyers, potential material for judgeship and I believe woman out there do qualify. They may be less when it comes to numbers because of the disadvantages of the past but I still believe they are. Then Magistrate shortcomings I must confess I've not had the opportunity to interact with Magistrates in the true sense. All I can say upon my appointment as acting deputy judge president one of the functionaries that I met with was the chief magistrate for Umtata with whom I shared my ideas and how to do things and what vision I have. For instance, the fact that chief magistrate should be of assistance in identifying magistrates who are potential judges. They

should interact with the JP and be able to identify those who tend to be more on the side of being potential judges. I did interact with the Chief Magistrate Ms Solwandle I also cultivated in him what I shared earlier on with this commission the fact that we don't become not lawyers when we become heads of court. We still have to be in court and we can only lead by example and promote standards in our various divisions. Yes, I think I've covered the silent features of the question President.

CJ M. Mogoeng: Commissioner Fourie.

Comm Fourie: Thank you, Chief Justice. Good morning Judge Mbenenge.

Judge S.M. Mbenenge: Morning Commissioner.

Comm Fourie: The Judge President of the Eastern Cape will become the leader of 4 courts in that province. Now in my view, those 4 courts operate quite separately and or independently. For example, this is borne out by the fact that vacancies are advertised, it's advertised for Umtata, it's advertised for Bhisho, it's advertised for Grahamstown, it's advertised for Port Elizabeth. Whereas in the Gauteng Court, for example, we don't advertise for Johannesburg and Pretoria; we advertise for the Gauteng Division. In KZN vacancies are not advertised as in Pietermaritzburg or in Durban but the KwaZulu-Natal Division. Now I have had the opportunity during July to travel the Eastern Cape and I again passed Umtata, Bhisho, Grahamstown etcetera and I just yet again came under the impression that the reason for that might be the location of those 4 courts and in particular the distances between those courts. Now I am a firm believer that if you are a Judge President of a division that you should have a hands-on approach. You should be there. You should be present, and the problem starts when Judges President are not hands-on and their- and are absent. You become the captain of the team and you gotta be on the field with the team. You gotta lead the team on the field and it's no-good sitting on the sideline when the pavilion starting to direct proceedings on the field when things get tough and hot. Now if you are to become the Judge President of the Eastern Cape, and it's no secret that there are concerns about the Eastern Cape and the functioning of the courts there. If you are to be the Judge President and if you ascribe to what I say that you need to be hands-on to be an effective Judge President how, and I didn't

quite hear that when you spelt out your vision. How do you intend dealing with this problem of 4 courts and your hands-on presence in those courts?

Judge S.M. Mbenenge: Thank you. My simple answer Commissioner is that the Judge President is responsible for drawing the roster what I have in mind is that I should be present at least per term one week in each one of those divisions. Be it that I will discharge appeal functions or duty or oppose motion court or purely administrative functions I believe that I can only be hands on not by remote control, but I would have to be in Umtata for something like a week. I would have to be in Bhisho for something like a week, I would have to be in Port Elizabeth for something like a week. Not necessarily as a bystander or a spectator, but there is something that I should be seen to be doing. We must also remember that 2 of those sister-courts or divisions has got DJP's. There is a measure of respect and approaching things such that you don't invade the space of a DJP that you trust. I think what is important is the interaction between the JP and the DJP. And for them to rhyme the same and to have the same rhythm in doing things. In my view, Commissioner, much as you would have to be there and be present, and be hands-on, we should remember that there is a DJP that the JP must trust that the JP must interact with. That is my answer.

Comm Fourie: Judge I'm encouraged by the fact that you said you think you need to spend time of each of those courts. I appreciate the role of the DJP and I am not underplaying or underestimating that, but the DJP is not the JP.

Judge S.M. Mbenenge: True.

Comm Fourie: And the JP is the captain.

Judge S.M. Mbenenge: Yes.

Comm Fourie: The DJP is the vice-captain. But I am encouraged to hear that, and I think you are quite right that you need to physically spend time within each of those courts in order to have a hands-on approach. Perhaps on a lighter note, during our

last, the last time that we interviewed you was in October of 2015 for the position of DJP.

Judge S.M. Mbenenge: Yes.

Comm Fourie: On that occasion, Commissioner Malema said to you, you can't be baptised today and appointed a pastor the next Sunday.

Judge S.M. Mbenenge: Yes.

Comm Fourie: Are what you telling us today suggesting that you are of the view that it is now time to become a pastor?

Judge S.M. Mbenenge: Yes. Yes, in a manner of speaking. Yes, he spoke about baptism and the fact that you can't really wake up the following day and say where do the pastors sit? I will never forget that day. Anyway, let's call it. Let's put it like this, I did sum it up and I said when I was here there were people who believed that I could lead. The same people have nominated me being of the view that I can lead. But this time around let me face Commissioner Malema. Let me look at this side. This time around I has been afforded the opportunity to prove myself. Where are the chairs? Where do pastors sit? I can pose that question.

[laughter]

Comm Malema: [1:32:55 inaudible] It's exactly where you are sitting.

Comm Fourie: Thank you. Thank you, Judge. Thank you, Chief Justice.

CJ M. Mogoeng: Thank Commissioner Fourie. Commissioner Nochesi.

Comm Nochesi: Thank you, Chief Justice. Judge Mbenenge there are out of your plan that you've outlined there were two things that I would like to raise with you. I think the Chief Justice would like as well to hear you speak on this matter. There is a challenge of the delay of delivery of Judgments. That, I'm speaking from my

background as a practitioner, it is subject to lawyers to some difficult situation when a client comes to ask about his judgment you say, no the judge said it is reserved, that week is reserved. You end up hiding yourself under the desks simply because the judge has reserved a judgment. Firstly, do you, during your acting stint in Umtata did you observe that challenge. If yes, what is your plan of action in responding to the issue of the delay of the delivery of judgements?

Judge S.M. Mbenenge: Thank you, Commissioner. It's not just about what I plan to do in future. I can share what I have done, and I believe the AJP will bear me out here. The starting point is that norms and standard stipulate that if at all possible you should be able to say to litigants and practitioners, I am reserving judgment and I will be handing it down on such and such a date. That is the starting point. Judges do this when it comes to criminal cases. They reserve judgments on the merits and they indicate when judgments will be handed down and I don't see why there should be a difference when it comes to civil cases. But let's accept that at times civil matters involve complex issues of law. The norms and standards make it clear that judgment must, as far as possible, be handed down within 3 months. And what I have done, what I will continue doing if afforded the opportunity, or even if not afforded the opportunity what I will influence in this division is this, come end of the term You circulate a form where judges commit themselves pointing out what judgments were reserved. What dates they were reserved on. For starters, this is done at the end of the term. We all know from a reading of norms and standards that recess is not a vacation. Recess is time to work on outstanding judgments, partly heard matters and so on and so forth. That's very clear. The reason why I do it in that fashion is that when we reopen, when there is reopening or when recess is over I circulate the same form. That form is going to tell me what judgments were written over recess and by the second time around there would be a column if a judgment has not been written to a finish which says, anticipated date of handing down of judgment. So that system, in my view, is a system that I would sell for the entire division. And let me mention that for the second term I did circulate the same form. I did that when I had been acting for that particular term; May to June. And I forwarded that form to the AJP for him to get an idea of who has not handed down judgement and so on and so forth. I did the same at the end of the term that ended in September and I wrote a note to the AJP to the effect that it may be that we will have to deal with the issue of

long outstanding judgments. I am happy to announce that there is only one outstanding judgment from the form that I, gleaned from the form that I circulated, and which attracted responses from the judges. There is one outstanding judgment, and regrettably, it's been outstanding for something like 9 months and it's something that I've spoken to the AJP about. I've spoken to the judge concerned about, in soft tones President Maya. Question being when is the judgment likely to be handed down. It is not a nice question, ne? It's not good but-

CJ M. Mogoeng: Wait a minute, in which division?

Judge S.M. Mbenenge: Umtata.

CJ M. Mogoeng: Oh, I'm surprised because I was actually sending Mr Chilwan around saying I've got the report on reserve judgment from Grahamstown, Bhisho and Port Elizabeth where is the report on Umtata? And he says they say there is no reserve judgment.

Judge S.M. Mbenenge: Well I -

CJ M. Mogoeng: There is nothing at all.

Judge S.M. Mbenenge: I do have the relevant form that I forwarded to the AJP. Remember I must observe protocol, and -

CJ M. Mogoeng: No sure. I'm just expressing, I am not condemning you.

Judge S.M. Mbenenge: Yes. Yes.

CJ M. Mogoeng: I'm just expressing surprise because when judgments have been reserved for 3 months, at most, it must reflect in this report.

Judge S.M. Mbenenge: Yes. I hear you CJ.

CJ M. Mogoeng: And, and it's not even there. And worries me when it comes to the Eastern Cape because I learned at some stage for the first time during the interviews that there is a judgment which was reserved for some 6 or 8 years.

Judge S.M. Mbenenge: Wow.

CJ M. Mogoeng: That's why I'm very particular about the Eastern Cape as well.

Judge S.M. Mbenenge: Yes. The concern is legitimate CJ. I have mentioned to the commission my plan, plan that I've implemented. I know it may attract a measure of wrath from, from those affected but the norms and standards are there, they tell us what should happen. But in this particular instance, I was mentioning, I interacted with the judge concerned. And the answer what I got was simply that it involves complex issues of quantum in a medical negligence case and the judge concerned informed the that there was interaction between the two of them, that is including the judge concerned and the AJP, that something will be done. But fortunately, I have been informed by the judge concerned that the judgment will all probability be handed on 17 October. I am just missing the, let me just check, I've got the correspondence here. But there is an indication that the judgment concerned will be handed down. It is the matter of Mamposa vs MEC for Health. A matter with complex issues when it comes to medical negligence. It was reserved on 2 December 2016 and the anticipated date of hand down based on the form that I circulated giving effect to my plan of action it will be handed down on 17 October 2017. It is a matter that I have discussed with the AJP. So, there is that plan, which I have implemented. Which I will continue to implement even if it attracts a little bit of discomfort from colleagues. You have to suffer for beauty.

Comm Nochesi: Thank you, judge. I am taking comfort that you have some plan for, on the issue of delivery, quick delivery of judgment. Now there is also another concern which we have particularly from the NEEC, a committee in which I sit. The overcrowding of prison cell. Particularly by persons who are, I mean you have somebody who is granted bail, 500 bail, he cannot afford it, but he is kept there. Or somebody who should not even have in the first place –

Judge S.M. Mbenenge: should have been there, sentenced to prison.

Comm Nochesi: No, no should have been, should have, the awaiting trial prisoners. He should not have been locked all what you should have done given notice to the person to appear in court.

Judge S.M. Mbenenge: Yes.

Comm Nochesi: Do you have any plan in responding to the issue of crowding of prison cells? I mean these are the issues that I believe in the PECC you must have dealt with or, I mean you have interacted with this matter? What, do you have any plan around that?

CJ M. Mogoeng: Commissioner Nochesi, overcrowding does not come about purely because people have been refused bail or have been granted bail which they cannot afford to pay. But is also crops up in instances where Magistrates sent people to prison because they avoid the review processes. They don't want to be queried. In relation to that all I can say is that meetings involving the Judge President and all the Deputy Judge President together with Officials from the Correctional Services Department and from particular Magistrates Courts would have to sit and, they'd have to converge and discuss this issues on a daily basis and conscientise one another in relation thereto. The only solution is firstly conscientising people about the problem identifying the relevant people and I have mentioned the relevant functionaries and a cure to the problem will come about easily if that approach is adopted.

Comm Nochesi: Chief Justice I am sure it will be the third question, which is the last. On the, you outline on the roll in the running roll, sitting roll and all that; case flow management also in application or in motion proceedings. Because it seems as if the understanding is that this case flow must only be on trials.

Judge S.M. Mbenenge: Yes.

Comm Nochesi: Now my question, particularly with regard to the Eastern Cape and in Umtata where urgent applications are simple, denied of their urgency by a judge once there is a Notice to Oppose it, just pushes back and then it's just become an ordinary application. What is your view on the establishment of an Urgent Court Motion that is there, its running parallel to the Motion Court?

Judge S.M. Mbenenge: Yes, earlier on I alluded to decentralisation of functions from two judges who are called Duty Judges during a particular week. A situation which in my view is not appropriate at tapping of resources. I mentioned that it should be possible for one judge to entertain Unopposed Applications and in those Courts, were Unopposed Applications exceed 60, 70 or 100 for that matter you can then have two Courts, one Court running on Tuesday and another on Thursday. Presided over by the one judge, but over and above that, that judge would hear opp- I mean urgent matters. Urgent matters should belong to that judge. Because invariable that judge may complete the roll on a particular day by 11:30 or 12:00 noon and we'll have to deal with certificates of urgency and urgent Opposed matters. So, the dispensation that I alluded to earlier on should in my view take care of the concern that you've expressed.

Comm Nochesi: Last question now. This is the last question. This relate to you personally. There is a perception or there – I mean if you if you can comment to this question because I don't have anything written with me. So, you can [1:46:51 inaudible] you don't want to. That you're sort of an aloof person in that you, you among the practitioners you do prefer lots of senior counsels more than the attorneys. What could, what is your response on to that those matters?

Judge S.M. Mbenenge: Ja. The concern is not even a complaint it is very illegitimate. I'll tell you why I say that. At a time when I was chairperson of the Bar, I'm going to mention no less than three attorneys who were appointed to become judges because of my influence. I am going to mention them; AJP Nhlangulela, Justice Petse who is now serving in the SCA, who else? I am not certain in the case of the late Dukata who was also an attorney. You'll remember earlier on I alluded to my vision about acting appointments. I did not confine it to advocates, or senior counsel for that matter. The fact that I was senior counsel at some point would not

justify me preferring advocates and senior counsel over other practitioners of, practitioners from other branches. I presented a broad picture. Even an attorney, even an attorney can outdo an advocate. I have seen this Mr, Commissioner Nochesi, I've seen attorneys appearing against advocates and articulating their points in a more structured fashion than what advocates have done. So, there is no basis whatsoever for this perception which you've shared with the commission. I interacted with attorneys. I have encouraged attorneys to consider at times, you know, moving from the conventional school of thought some to go for advocacy and others to become judges. In fact, at the time when Justice Petse was considering, at that particular time, Justice Petse was considering doing pupillage under me and I said hang on, now Chief Justice let me quote yet another story. Who am I to baptise you? You must baptise me. You remember that story? I said you are bench material. I encouraged him to go to the Bench and he did well. He still does, I believe. So, is there mention of me being aloof? I wonder what the basis of that is because I interact with people freely. I don't, I don't I'm never aloof. And there are many people here that I've interacted with. They will bear me out. There is an element of being a social giant on my part and people will bear me out, those I've interacted with. Thank you.

CJ M. Mogoeng: Thank you Commissioner Nochesi. Doctor Motshekgo.

Prof M.S. Motshekgo: Judge I am an Honourary Professor at Nelson Mandela University. And when I lectured the LLB students they confronted me with a problem of preparing them to become unemployed graduates. Now when I tried to find how does that happen they say because we get academics who have no practical experience to teach them. Now I was very encouraged to hear that you advocate that academics should also be eligible for appointment as judges.

Judge S.M. Mbenenge: Yes.

Prof M.S. Motshekgo: Do you have some ideas as to how these academics can be prepared so that they don't just hold a string of degrees but they when they are in court they don't even know when is the time to stand up or to sit down.

Judge S.M. Mbenenge: Yes.

Prof M.S. Motshegko: Secondly, you haven't mentioned anything about judges' clerks. Do you think that they should be more space created for judges' clerks so that apart from pupillage we can start grooming young lawyers to become advocates and judges from that level?

Judge S.M. Mbenenge: Yes. On the issue of judges' clerks, I would add researchers, court researchers. People who -

CJ M. Mogoeng: That's another name for it.

Judge S.M. Mbenenge: Yes.

CJ M. Mogoeng: That's another name for it. Yes.

Judge S.M. Mbenenge: Thank you CJ. Deployed in the various divisions I have actually in, so many words encouraged to some of them having gleamed through my interaction with them they are writing skills to do pupillage or go for candidate attorneyship in my view that would be the best way of going about. Commissioner, we can sum it up by simply saying a JP must have her or his eyes wide open all the time. To identify people with the necessary skills and the potential to become judges. And in my view, history as I said earlier on, has proven us wrong. I've read some judgments penned by persons who were never practitioners. Maybe let me not mention names of people who have not practised, and they are academics and had touched a few Court premises as presiding officers here and there, and mediation here and there, consolation and they ended up being judges. So, there is no scope of being dogmatic which would open our doors wide. The only thing that I said earlier on was academics come from the academic world. What is important is identifying them with a potential they have and steer them in the direction of judgeship. Encouraging them to go for aspirant judges, courses, affording them the opportunity to act and structuring that process. You can't just through somebody in the deep end and expect that they will sit in the Opposed Motion Court when they've not started

with Unopposed and so on and so forth. So, there should be structured way worked out to accommodate even academics in my view.

Prof M.S. Motshegko: But, one question. Mindful of the workload in the judiciary would you support an idea that judges should also give lectures at Universities so that students can come face to face with people who deliver the judgments that they read.

Judge S.M. Mbenenge: Yes. That would be a good idea. Practical exposure for students.

Prof M.S. Motshegko: The last one. I lectured at Unisa for 10 years as senior lecturer. We had a journal called [1:56:08 inaudible] where we would criticise or analyse judgments all the time. We, you support an idea where one says, let's have journals student or academic journals at universities where academics and students are given opportunity to engage with this judgment that are being handed down and show the merits and demerits and in a way that judges should not feel that they are being attacked.

Judge S.M. Mbenenge: Yes. Constructive criticism is part of development in any situation. I don't believe judges should not take kindly when constructive criticism is offered. That is all I can say.

CJ M. Mogoeng: Thank you, Prof. Commissioner Norma.

Comm Norma: Thank you, Chief Justice. Good morning ADJP.

Prof M.S. Motshegko: Morning Commissioner Norma.

Comm Norma: Good morning. As a mother and who started practising at a young age and you have a judge who has a young family and perhaps a single mother as a judge, what is your plan? How do you plan to make sure that, that judges live as a single parent is made easy in a way that she will be able to perform her duties as a

judge but also find comfort in knowing she will be accommodated when she has to attend school functions and things like that? Thank you.

Prof M.S. Motshegko: Its tough one. At a practical level it may be tough but at the same time, sensitivity for me would not start with me becoming the Judge President. I do recall that I as a silk worked with no less than one, two, three, four, five, six, seven, eight, nine, ten female advocates. So, that element of being sensitive because of personal circumstances is something that in my case will not start with me being considered to be appointed as JP. There should be a measure of accommodation the Constitutional Court, we will all remember, pronounced in the Pillay vs KZN Government case on the notion of reasonable accommodation. So, it is all about reasonable accommodation and treating people on the basis that they will be accommodated because of their different circumstances. I am alive to the fact that the case had to do with religious liberty, but the notion of reasonable accommodation should cut across, that's my short answer to the question. Reasonable accommodation.

CJ M. Mogoeng: Thank you, Commissioner. Deputy Minister.

Deputy Minister: Thanks, Chief Justice. Good morning Acting DJP. I've just got two issues to canvas and they have, some aspects have already been canvassed already. But the first one was just President Maya asked you about the Magistrates and I must say I was a bit disappointed with your reply. Which indicated that they were more feeders of the High Court whereas in fact in terms of the Superior Courts Act Section 84C the Judge President, aside from the responsibilities of the Chief Justice, the Judge President is responsible for the coordination of all the judicial functions. Of the Magistrates Courts within the jurisdiction.

Prof M.S. Motshegko: Yes.

Deputy Minister: And so, for example, the, there is no Chief Magistrate in Umtata. Mr Solwandle-

Prof M.S. Motshegko: Is acting.

Deputy Minister: - Was acting -

Prof M.S. Motshegko: Yes. [2:00:45 inaudible] left.

Deputy Minister: There is a new, there is a new Chief Magistrate who started, Acting Chief Magistrate who started 1st of October, Ms Mbico. But if you become Judge President you would be expected to play quite a crucial role in that coordination in the province because you've got three Chief Magistrates.

Prof M.S. Motshegko: Yes.

Deputy Minister: And a number of problems. You had the problem in Umtata about two years ago where practitioners didn't want to use the Regional Court for civil matters. And so, they came and crowded the High Court -

Prof M.S. Motshegko: The High Court. Yes.

Deputy Minister: That did I think largely get addressed. I don't know if you got any comments on it but that is the role you are expected to play. And so, if I can ask you again that question, how are you going to fulfil this function in terms of 84C of coordinating the judicial functions of all the Magistrates Courts in the Eastern Cape. The second question was also partially canvassed by Commissioner Fourie, but given that you've got four Courts in the province and the two busiest are at either end of the province and then you've also got the Magistrates who are also quite, have a number of challenges in the Eastern Cape, are you going to have the energy to do all this?

Prof M.S. Motshegko: Practically, let me start off with the second question. Practically my view is it may be almost well impossible to visit all the districts as a JP. You've alluded to the fact that there are three Chief Magistrates. The interactions should be at that level. The tools, the working tools to access and check on what is happening should be at the level of the JP interacting with the various Chief Magistrates, Commissioner. I'm not saying there can be no interaction –

Deputy Minister: I'm just saying don't forget the Regional Court President as well.

Prof M.S. Motshegko: Yes, the Regional Court President as well. At the level, thank you for that. At the level that for instance, we've got one Regional Court President if I remember in the Eastern Cape. There should be meetings with the Regional Court President share, discussing matters of concern for instance on the issue of practitioners preferring to run to the High Court. Just as a judge not necessarily as an ADJP I have moments where I have actually indicated that costs will be granted on the Magistrates Court's scale in instances where practitioners have elected to go to the High Court. That is one of discouraging them. And I've had responses like well the Magistrates there don't fully understand civil work and so and so forth. Now that in, and by itself points to the fact that the load on the part of the JP is huge. The responsibility is huge. The responsibility is huge there are those areas where empowerment will be needed. But practically all I can say is interaction between the JP and the Chief Magistrates and the Regional Court President is a necessity. Then there was this about four Courts Commissioner?

Deputy Minister: The question was will you have the energy?

Prof M.S. Motshegko: Oh yes. I've contextualised it.

Deputy Minister: Yes.

Prof M.S. Motshegko: I've contextualised it. Yes. The energy to the extent that there is a level at which one must interact with the relevant functionaries heading the various stations and not necessarily being at the stations at all given points in time. There will be occasions when it will be necessary to actually pay a visit to a particular Court because they are concerns that the facilities are not up to scratch and one would have to deal with that head-on. Thank you, Commissioner.

CJ M. Mogoeng: For what it is worth, even if there are no concerns from time to time I've visit Magistrates Courts and it has proved to be beneficial.

Judge S.M. Mbenenge: That's worth emulating Chief Justice. Thank you for that.

CJ M. Mogoeng: Yes. Commissioner Smith.

Comm Smith: Thank you, Chief Justice. There seems to have been much emphasis on the fact that you are a relatively junior in terms of the standing of a judge which in my view shouldn't be a problem as long as you've got the ability, the personal trades to lead the division successfully. My concern is more along the lines of what the Acting JP state and that is that your success seems to be confined to Umtata. And that there appears to be a lack of perception of interaction with judges of other divisions which may be bigger and may handle more cases. Now there is a risk factor attached to that appointing someone who hasn't had the opportunity as Acting as JP for that division. I seem to, I seem to be looking for a way of dealing with that concern which I haven't heard you dealing with it in terms of the question by the Deputy Minister saying, this is how I will deal with Magistrate. I will go look for the Chief Magistrate or the -

Judge S.M. Mbenenge: Same approach.

Comm Smith: And that was, I was leading to the question how would you interface with the Deputy Judge President but also with the Judges in your, in the unknown field of not having acted before. And what kind of approach would you take?

Judge S.M. Mbenenge: Perhaps let's view it from this angle Commissioner. During my presentation, I pointed out that judges, the division over have respect for me. Now if you look at the CV, look at the judgements that I've penned. They are not confined to Bhisho where I am stationed they are judgements written in relation to Port Elizabeth cases, Grahamstown cases one earns respect in the course of interacting with colleagues when one is deployed to the various sub-divisions or sister-divisions. Perhaps let me add and say some of the most senior judges even in those divisions have encouraged me, have encouraged me to avail myself. And in so many words I also alluded to the fact that I have penned full court judgments some of which are reported. Pointing to the fact in those instances I wrote those judgments and in fact, I did so because I had been requested by senior judges themselves.

They could only have done that purely because they trust my judgeship. So, there is that trend generally and then on the issue of having acted as DJP and not as JP; leadership is leadership. That's how I can, I can approach it. Leading, being lead judge the ability to facilitate work in a division. But remember I also pointed to the fact that we've got precedents in this Country. We have people who became JP's without even having acted as JP's. You will recall that I made mention of names, I would hate doing that again to belabour that point. It is all about leadership qualities that one possesses and the trust that the colleague's repose in the particular judge his capability as a lawyer. But most importantly when you lead it does not necessarily mean that you know it all. You are there to facilitate. It is your opportunity to acknowledge skills within your division. There may be people good in Tax Law; there may be people good Maritime Law; and all sorts of other fields. What is important is to ensure that you identify the relevant people at all given points in time. Facilitation mainly is the crux of my answer. Which has nothing to do with seniority? The ability to be a facilitator can be found even in a person who is junior. The issue about juniority is, is you know, its, it's hard for one to move from the premise that one who has been a lawyer for 33 years is junior. I think I think let me put it like that. I've been a lawyer for 33 years. I've penned judgments, I was silk, I was involved in High Profile cases before the Con Court before the SCA. I contributed with the jurisprudence of this Country. So, yes junior but capable and ready to facilitate, and ready to be guided by seniors. Thank you, Commissioner.

Comm Smith: Thank you, Chief Justice.

CJ M. Mogoeng: Thank you, Commissioner Smith. Maybe so that you don't deliver that point again. My colleague and friend, the President of the Federal Constitutional Core of Germany, came straight from the University to become President of that Court. That is one of the finest you can ever come across.

Judge S.M. Mbenenge: Yes.

CJ M. Mogoeng: And Robert was a most junior judge, the Chief Justice of America, so please don't go back there.

Judge S.M. Mbenenge: I won't but perhaps allow me to quote what Frank Fitter ones said in relation to the appointment of a Chief Justice, not a Judge President. I quote:

"The most relevant things about an appointee that is as Chief Justice are his breath of vision; his imagination, his capacity of disinterested judgment; his power to discover and suppress his prejudices throughout history the Supreme Court of America has called for Statesmanship the gifts of mind and character fit to rule Nations."

Nothing is said about seniority.

CJ M. Mogoeng: Commissioner Mpofu.

Comm Mpofu: Thank you very much, Chief Justice. I think I start on a lighter note on the question of seniority. It's all in the eye of the beholder. Whenever I, anybody accuses me of seniority I tell a very simple story and I say when I did pupillage we had a small study group that where we were studying towards the exam and one of the three people in that study group is now the President of SCA. So, my seniority, but me measured there.

[laughter]

Judge S.M. Mbenenge: Yes, say it aloud Commissioner Mpofu. Maybe there is something common between the two of us.

Comm Mpofu: Yes.

Judge S.M. Mbenenge: There is something common to the extent that the President of the SCA is somebody that I respect was received by me in Umtata when I was practising and lastly, I became silk after practising as an Advocate for 11 years. I know of people who have practised as advocates and never became silk. But nothing hinges on that. It doesn't define their competence and capability. Some have chosen not to be silk. So, this label stemming from hierarchical minds can mislead us at times.

Comm Mpofu: Thank you. Right. Now on a more serious note then. I'd like, well firstly maybe more for my own education everyone is talking about four Courts in the Eastern Cape. What is the status of the East London Court and where does it fit in the mix of, and I'm asking this in relation to your undertaking to present, physically present in all the Courts.

Judge S.M. Mbenenge: Rationalisation will eventually address this problem of having a Court in East London which is a satellite Court of Grahamstown.

Comm Mpofu: That's strange.

Judge S.M. Mbenenge: Which means you've got Bhisho, but at a practical level judges serving in Bhisho also serve in the East London Circuit Local Division, for now. But we know eventually there will be rationalisation and then East London will eventually fall under the Bhisho High Court.

Comm Mpofu: Okay. So, as we speak -

Judge S.M. Mbenenge: But as we speak now the situation –

Comm Mpofu: There are five courts for practical purposes?

Judge S.M. Mbenenge: There call it five in the sense that –

Comm Mpofu: Four and a half?

Judge S.M. Mbenenge: Yes, four and a half.

Comm Mpofu: Okay. All right thank you. Then the other thing that I wanted to ask about is and this is a follow-up really on the issue of uniformity that Judge President Hlophe spoke about. Which I am a fan of. Obviously there, the local nuances in the Court, but I think as far as possible we should strive for uniformity so that you know what to expect. Whether you are in the Northern Cape or whatever because the fact that you have a unitree court system.

Judge S.M. Mbenenge: Yes.

Comm Mpofu: Now a specific question there is a phenomenon in the Eastern Cape called the certificate of urgency which I detest very much. Because, and that's simply because I am not used to it, as somebody who practices here. So, I always either get my junior or my Attorney Mr Najesie to prepare one of those. Now on the question of uniformity that Hlophe JP was talking about would you say, what is the rationale of that and if we were to strive for uniformity would you strive for dropping it in the Eastern Cape or making a national phenomenon from, in your experience, as someone who has practised across the country?

Judge S.M. Mbenenge: First and foremost I think I need to explain that a certificate of urgency will always be part founding papers in every urgent application. I think the certificate of urgency that you are addressing yourself to Commissioner Mpofu, is the one that is applicable in an instance where one seeks to be heard outside of ordinary Motion Court days. And I think that is what you are addressing concerning to.

Comm Mpofu: That's the one.

Judge S.M. Mbenenge: Yes. If we look at it from the angle of case flow management, we can say it's one of the best dispensations worth selling the country over. I'll tell you why I say that. A certificate of urgency contained in a file even before a case has been launched is a good dispensation. It's got own demerits depending on how you apply it. In my view it is an opportunity, it presents an opportunity for a judge to pronounce on the urgency or otherwise of a matter before the relevant proceedings are launched. But it is no reason for arbitrary decisions. In other words, it doesn't mean that a judge looking at a certificate of urgency can simply say the matter is not urgent, struck from the roll. It's no license to do that. In my view it could be used, it should be used to interact with the particular practitioner and say in issuing the necessary directive the matter is not urgent; you need to supplement, bring more information relative to why the matter should be heard of normal Court hours. If we look at it from the other side; if we say a judge will simply look at the certificate of urgency and simply say the matter is not urgent. Boom-bang

then that is arbitrary. It's not good. The system is not good. In my view, if we look at from the angle that case flow management cuts across all litigation, cuts across criminal matters, criminal appeals, civil appeals and so on. For me, it's an opportunity to set-out a process in Motion rather too set in Motion the process of ensuring that when the matter eventually gets to be heard everybody will be before Court. Because the judge concern should even give a directive; serve this papers on a particular litigant by a certain date if you are going to seek interim relief. Let the matter be heard by a particular date before a particular judge who will be duty judge at a certain given point in time. But insofar as it is a source of arbitrary decisions, it's not an idea that I can sell. In other words, it's something that can be abused. It's got its own demerits as well at another level. Let me explain for instance. It means you as litigant or practitioner, you pointed to an attorney for instance who will be left on his own or her own to prepare the certificate. My problem is that instead of drafting papers on an urgency basis you spent time preparing a certificate of urgency. You spent time pointing out who the applicant is, something that must be done in the founding affidavit. You spent time pointing out to who the respondent should be, what sort of relief you will be seeking, and the cause of action whereas the matter is urgent. So, in my view, it depends of how you look at it. It, therefore, means that it could be used to improve our set-up. Hinging of cause on whether it is not a reason for judges to avoid handling matters and simply chasing them away. That is something for another day.

Comm Mpofu: Thank you. No, thank you very much. I really appreciate that answer because I, as I say I find it an irritant maybe because I'm used to practising in Courts where it is not required. So, maybe its something we can to refer to the CJ to consider whether either on the ticket of uniformity whether you may, you nationalise it so to speak or you actually drop it all together.

Judge S.M. Mbenenge: Yes.

Comm Mpofu: Because it does take time to, and you are right you still have to argue urgency anyway. But you have to go through this whole rigmarole, ja. Okay, Thank you. Now ja, absolutely. Would you be amenable to the idea of dropping it?

Judge S.M. Mbenenge: I would not -

Comm Mpofu: Wearing your former advocate's hat -

Judge S.M. Mbenenge: I would not be territorial about it. It's not something I can reject out of hand. It's a system that was well thought out, it's a system that requires interaction between the Bench the practitioners. -

Comm Mpofu: Perfect.

Judge S.M. Mbenenge: and at the end of the day we must remember that good things may come from the Eastern Cape. The Eastern Cape can pilot something and sell it across –

Comm Mpofu: Don't I know that.

Judge S.M. Mbenenge: But at the same time I can't be territorial and say it's the best system under the sun it depends on how you want to approach it. But at the level of case flow management and our theme of uniformity maybe it has to be dropped.

Comm Mpofu: Thank you very much. Okay, the last point is really, and this was covered more or less by the Minister and to some extent by the CJ. It is a proposal I was going to make when you spoke about your physical presence in the courts striving for being there physical as possible. I was going to say you know, justice in this country is really dispensed in the Magistrates Court for the majority of our people. Would you be amenable to doing unannounced random visits at the Magistrates Court? Obviously subject to time.

Judge S.M. Mbenenge: One Friday afternoon at three or half-past three?

Comm Mpofu: Yes. And as the CJ said without there being any particular crisis in that particular court.

Judge S.M. Mbenenge: Yes.

Comm Mpofu: And this obviously something the Eastern Cape is a vast province. We, you might want to enlist the assistance of the DJP's and maybe two or three; a small team of people who do those unannounced visits, as we say one Friday afternoon you just arrive. Because that is really where you are able to see -

Judge S.M. Mbenenge: I welcome that proposal Commissioner. It is something worth implementing.

Comm Mpofu: Thank you.

CJ M. Mogoeng: Commissioner Masuko.

Comm Masuko: Thank you, Chief Justice. Good morning Justice Mbenenge.

Judge S.M. Mbenenge: Good morning Commissioner Masuko.

Comm Masuko: I have two questions one relates to your views on the use of language in the courts. Having access to justice is diminished significantly when the language of an area is undermined. Or when is sought through a language that is not familiar to your community?

Judge S.M. Mbenenge: Yes.

Comm Masuko: And I would like to your attitude towards that, the idea of languages whether you subscribe to the idea that in all courts at all times the language of record should be English or all other languages should be accommodated. The -

Judge S.M. Mbenenge: I, oh sorry.

Comm Masuko: The second question, I beg your pardon, just a second related question, in fact, relates to the first. And it is what your views are with respect to the development of traditional courts into institutions through which justice may be

dispensed. And of course, I mean if you'd be in a province where traditional courts are still functioning.

Judge S.M. Mbenenge: Ja.

Comm Masuko: And it will be important to just know your views on what you think about the role that traditional courts may play in the overall development of our justice system.

Judge S.M. Mbenenge: Thank you. On the issue of language policies; my answer would be in the affirmative insofar as the question is this, do I advocate a situation where only English should be the language. I am saying for easy access to courts consideration will eventually have to be given to ensuring that all other languages are accommodated. You would have seen reading my CV that there is a judgement that's been reported that I wrote. It is a review judgment, I think it's Jungulanga or some such other name dealing with the issue at hand. You would have seen when reading that reported judgment I think it is reported in one of the 2016 South African Criminal Law Reports. You would have seen that the idea of languages is embraced by me in that judgement fully. But at the same time, I am appealing for a coordinated approach it is something that needs to be worked on and, at a step by step level. It's not something that be achieved overnight. You would have also seen if you read that judgement that there are committees which were set-up to deal with that and come up with recommendations and those committees have yet to issue those recommendations to be given effect to. But what I was lamenting about in that judgement was the fact that a particular magistrate had simply issued a judgment in Xhosa not taking into account the fact that this should be coordinated. You can't wake up and write a Shoto judgement or a Xhosa judgment it must be a coordinated system. And yes, that's as far as I can take it. My answer –

Comm Masuko: Sorry, I don't understand the, what you mean by the coordinated? What do you mean with that?

Judge S.M. Mbenenge: I mean the committees should come up with recommendations that should be given head to by everybody at the same time.

Uniformity be struck the country over. On the issue of traditional courts there are advantages that to speak to access to courts which is a Constitutional norm I can only say that if you, if you read judgments like Bagindawo and Hlantlalala vs The Regional Authority Courts in Transkei and so on some of those courts were abolished because their norms did not accord with the constitutional dispensation, but those judgments should not be read to mean that traditional courts should not be resuscitated and run in those areas where tradition is still the order of the day. But I can only say what is important is that there is always constitutional testing. We need to test what is happening thereby subjecting it to constitutional norms. That's all that there is to it. Section 39 subsection 2 speaks about that. The development even of customary law within the spectacle of the constitution. So, it's not something that I would shoot down Commissioner Masuko. It is something that I would say let it be attended to. We've constitutional norms to guide us in relation to what procedures should be followed and what functionaries should play a role in those courts and so on. Thank you.

Comm Masuko: Thank you, Chief Justice.

CJ M. Mogoeng: Thank you so much Commissioner Masuko. Just starting with the language. You know one of my envies when I made my South Korean colleagues, my colleagues in Indonesia and Russia and even Japan, is that papers; argument and judgment are all in their mother tongue. What do you think it will take and how long, if at all, for us to get to the point where it is possible to do the same thing in relation to each official language?

Judge S.M. Mbenenge: CJ it's a question of availability of resources that will be, from what I've seen, and seated where I am today the challenges that one has seen, you know, as being part of this huge establishment; the Office of the Chief Justice. We should get there but lack of resources will delay the process understandably so.

CJ M. Mogoeng: What about the development of particularly African languages in a manner that will make it possible for you to articulate a legal concept well in your mother tongue. What will it take to do that? Do we have that? Do we have lawyers for instance who, at the moment, African lawyers who can articulate legal principles,

constitutional principles in their mother tongue or is some development required before we can get there?

Judge S.M. Mbenenge: When last, I checked African languages seem to be elective courses towards an LLB degree. Until such time that these languages are made to be part and parcel of the curriculum we will always have challenges. notional challenges, even concepts of law and all that.

CJ M. Mogoeng: Yes. And until African people are encouraged to take pride in their languages because its, the common trend is you can find as many as ten Botswana people all by themselves or Basotho people, five minutes is too long for them to speak in their mother tongue without throwing in English or something else.

Judge S.M. Mbenenge: Yes.

CJ M. Mogoeng: And I was give you an example that you know one of the things that moved me when I watch television and I happen to switch to Lesotho television station is the debate in Parliament in Sesotho but you won't find that in KwaZulu-Natal or in North West just Tswana even if everybody understand the language.

Judge S.M. Mbenenge: Yes.

CJ M. Mogoeng: So there is something that needs to be done there, isn't it?

Judge S.M. Mbenenge: Absolutely Chief Justice.

CJ M. Mogoeng: Yes.

Comm J. Malema: The Xhosa's are worst Chief Justice.

[laughter]

CJ M. Mogoeng: I don't agree with Commissioner Malema.

Female: I also object to that.

[Foreign language]

CJ M. Mogoeng: Now, I'm going to ask you unfortunate questions. But, you can say no, no I never thought that through if that be the case.

Judge S.M. Mbenenge: Yeah.

CJ M. Mogoeng: And you may not be familiar with the challenge because you have not never been appointed to a permanent leadership position in the judiciary. So, I am mindful of that.

Judge S.M. Mbenenge: Yeah.

CJ M. Mogoeng: Here is a problem. The Chief Justice, the Judges Presidents fulfil an oversight role over the Magistracy. Now in terms of the functioning of those Courts, now one of the things we need are dependable statistics. In other words, you don't just have to depend on what the Magistrate gives you. It's got to be possible administratively to source those statistics for yourselves. The Department of Justice and Constitutional Development was able to do that because you've got a manager on, a court manager; an area court manager; and a director core operation who in liaison with the regional head would then convey those statistics to the National Office of the Department of Justice and Constitutional Development. Now when the office of the Chief Justice took some of these administrative responsibilities over it is a director for operations who was, who were transferred to the office of the Chief Justice. Delinking her from the area court manager and the court manager on site. So, she may beg, let me use she, she may beg for the information, but she has no right to insist on that information. How do you, what do you think could be done to make it possible for those statistics and any other information to be gathered by the office of the Chief Justice in these economically challenging situation so that we have dependable statistics available whenever we need them. So that as JP you are able to say, wow there are problems at this area, at this Magistrates Court I need to find a way to assist the magistrate there in collaboration with the cluster head to

address the problem. What could be done? If you haven't given thought, I'll understand.

Judge S.M. Mbenenge: I have partly given a thought because there is a practical situation that emerged whilst, during my stint in Umtata A situation where the statistician concerned visited my office seeking a measure of an edification having this particular challenge. She wanted to know in the context of Motion Court or applications whether she could enter in the, as part of the data she was collecting whether she could refer to, for instance, a Rule 35 application as an application that has been completed or not. Remember there is one case number, remember the action would have commenced. Remember at some point there is the issue of discovery. Remember at some point there will the issue of an application being brought under the same case number to compel discovery there is that scenario. Against this scenario where one brings an application in terms of the PAIA; Promotion of Access to Information Act. They seek an action but would like to have recourse to documents first. Now those are two scenarios that are different. The one scenario that I alluded to initially relates to a matter that has not run to a finish, Chief Justice. So, my answer in that situation would be this matter has not been completed. This is just an interlocutory application, so the template has no reference to interlocutory applications, it's just about whether an application has commenced and has been finalised. Now that should teach us a lesson. What lesson can we glean from that? The particular lady who is a statistician is facing these two scenarios she seeks an explanation as to how she can resolve the problem. How she can identify this one scenario as against the other. In other words, can it be said in a situation where you launch an application to compel discovery in a pending action if the court ends up granting that order will you enter that as a finalised matter? There is no template in that situation that speaks to interlocutory applications. So, my answer was simply that there is such a thing as an interlocutory application it relates a pending action when a court grants an order it doesn't mean the action has been finalised. That against the situation where one launches an application to have recourse to documents with a view to launching an action or an application. In that scenario when the court grants an order that particular application would have been finalised. What answer then will I give to your initial question? My answer will simply be that there is a lot of training that is required for statisticians to

understand what is happening in courts. And to see whether the templates cannot be accommodated to cater for the different scenarios because at the end of the day CJ you may get wrong information. You may get a situation where it is mentioned so many applications have been finalised or matters, civil matters have been finalised only to find that it was only an interlocutory application, the matter has yet to be finalised when quantum or judgment on quantum is eventually handed down. That's as far as I can take it.

CJ M. Mogoeng: Yes. No, thank you. The reports I receive relate only to reserve judgments. Don't you think it's necessary to have reported on partly heard matters and their lifespan? Something that says when did the matter, when was the action filed, when was the matter heard for the first time and how many times was it postponed?

Judge S.M. Mbenenge: Yes. Yes, Chief Justice, there is no doubt that for the CJ to be in the full picture there need to be information passed indicating what partly heard matters we still haven't sort. I believe that that is done in our Division.

CJ M. Mogoeng: What about the reasons for the postponement?

Judge S.M. Mbenenge: Then it means there must be a column –

CJ M. Mogoeng: Do you think it is necessary to have reasons or not?

Judge S.M. Mbenenge: I believe it is necessary to mention the reasons. Because some matters will get postponed twice or thrice for one and the same reason. The Road Accident Fund –

CJ M. Mogoeng: Final, final [2:41:56 inaudible] for witnesses.

Judge S.M. Mbenenge: Yes.

CJ M. Mogoeng: Yes. Now, what solution would you propose for applications that are dealt with over a period of as long as a day, two days or even three days?

Applications, motions proceedings, what solution would you say should be provided to that problem?

Judge S.M. Mbenenge: You mean an application set down an opposed application?

CJ M. Mogoeng: Yes. Opposed.

Judge S.M. Mbenenge: With heads of argument having been set –

CJ M. Mogoeng: Yes.

Judge S.M. Mbenenge: And filed.

CJ M. Mogoeng: Some I had for the whole day, others for five hours, well whole day, two days, three days.

Judge S.M. Mbenenge: Maybe it would be appropriate to limit the time for argument and control the roll in that way. Because the parties would have filed heads of argument anyway. So, that system in the Constitutional Court I believe should be adopted and possibly adapted even in the other courts of this land.

CJ M. Mogoeng: Thank you very much, Judge Mbenenge. I think we've kept you what, for almost three hours now.

Judge S.M. Mbenenge: Thank you CJ.

CJ M. Mogoeng: Thank you so much