



JUDGES
MATTER

Judicial Service Commission interviews

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Electoral Court

Interview of Mr T Bailey

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CJ M. Mogoeng:

Mr T. Bailey: ... Society. I am in essence a private adjudicator and a regulatory lawyer.

CJ M. Mogoeng: Yes. Do you still appear in Court or not anymore?

Mr T. Bailey: Well in essence, I spend most of my time hearing cases. I don't know whether you'd had a detailed look at my CV, but perhaps I can just quickly run through.

CJ M. Mogoeng: No, no, you can just a few things that you believe, you know, stand out and are supportive of your candidacy.

Mr T. Bailey: Yes, indeed. Thank you, Chief Justice. Well, I want to start off by saying that I spent a lifetime working in the trenches of independent tribunals, which had been established to give meaning and content to Section 34 in the Bill of Rights of the Constitution. You're aware that that provides access – the right of access to Courts and independent tribunals. I sat in the special Electoral Court in 1994. I've been involved in Landlord Tenant Board, Consumer Affairs Courts, discussing heritage resources, appeal tribunals, senior Commissioners to the South African Local Government Bargaining Council, chaired the Gauteng Rental Housing Tribunal, CCMA Commissioner, a range of disciplinary committees, National Home Building Registration Council, Council for the Built Environment, the South African Council for Planners and in the public and private sector. Why do I say these things? Simply because I've spent, as I say I lifetime in the independent tribunals as provided for in the Constitution. All of those are a adjudicative bodies. They apply the constitution; they apply the Bill of Rights. They have a set of procedural rules which one must follow and of course they apply the law in those areas. I've simply handed down thousands of rulings, whether they're rescissions, condonations, awards, orders. I've had a range of Senior Counsel appear before me. As we currently speak I'm chairing the Appeals Committee of the Council for Medical Schemes which is a complicated area of the law. I drafted legislation; I trained members of the Gauteng Consumer Affairs Court and the Rental Housing Tribunals, amongst others. I've drawn manuals and trained people on how to present cases before judicative bodies and that runs to all the usual rules of evidence. I teach from time to time at Wits. I run – I've done impact assessments. I've made presentations to Parliament on aspects of the law. So, what I'm saying to you today is that yes, it's – it hasn't had the high profile necessarily of Courts. I've acted in the Labour Court. You would have picked that up and really what I want to say today is that my experience generally is it's actually a lot, lot tougher being down in those tribunals as opposed to being in the Courts for a range of reasons. The first thing is that Courts have – you have the protections of the office, the status, all of those things. You have appearing before you counsel and lawyers almost all the time. The law is being presented to you in a sanitised fashion. There is respect and so forth. Down in the tribunals and I really just want to say that if the Constitutional Court was the biggest judicial development in our transition and growth into democracy, the next biggest development has been the growth of independent tribunals. I've just listed

out the ones that I've been involved. There are – there's the Competition Tribunal and others. So, what I'm saying to you is that – what I've also done and really my interest in the law has always been and this goes back to early eighties when I joined – or the eighties when I joined the Legal Resources Centre as a Human Rights lawyer, is how does the law effect meaningfully the lives of people and as a result of looking at that what I've realised in time is that there's a complete imbalance of resources in our country. We know in our country that race still matters, that poverty and those things all still matter. It's not something that we can disregard and so too it is down at the level of the tribunals. It's that there you've got the average man and woman, in other words the little men and women coming before you. They come before you, because they may not know what the law is, but they know that they seek redress and simply what I've had to do over the last 20 odd years is essentially sanitise what the real issues are. You don't need to do that generally as a Judge, because it's being presented for you, but what's down at the tribunal level you have to interrogate and get to the issues and this is why I believe that I introduced a unique and special form of procedure in the Rental Housing Tribunal. It really came out of my observation that essentially the more resources that you had, the more likely you were to win, because partly the average man and woman does not know how to put versions to the particular – to the other witness and so often what would happen and we know as lawyers that it's effectively if versions are not being put then that can affect the outcome of a case. So, what I essentially did is I introduced what I would call a slightly inquisitorial procedure, but it was through a conversation with the parties. So, what it would mean, if you got to the Rental Housing Tribunal, for example – there are others – all you would need to do is fill in a form. You may not be particularly literate and educated, but you know that you seek justice and what I would do is through a facilitative conversation between the parties – what is your story? Just tell your story. Then say to the other side, now what do you for example say to that and I'll give you a fairly easy one in the context of evictions is that a tenant would come before the tribunal and say well, why are you here and they say well, we've been evicted. And then you would say, well could I perhaps have the Court order? I'd like to look at it and he would say no, I haven't got a Court order. Then you'd look to the Landlord and you could say, could you please provide me with a copy of the Court order, because we all know that under Section 26(3) of the Constitution you cannot be evicted without an order of Court. Well, what transpires

then is you say well, Mr Landlord, we're bound by the Constitution; we live in a Constitutional Democracy. You haven't presented it to us, that means we would have to put you back – we would have to put the tenants back in occupation of the lease. But it doesn't matter and that's what we have no choice and we will do it, but as a matter of interest please tell us why you evicted the tenant in the first place. Well, he said, well he didn't pay the rent? Did you send him a letter? No, he didn't and those things. Then you say to the tenant, did you not pay the rent and he says no, I didn't pay the rent and you said well why and invariably it's January, February of the year. People have that expenses and so forth and sometimes they'd been at funerals and those sorts of things and you say to them, you happy to pay the rent in due course and the tenant would say yes and what you then do is you end up putting together an order, which would be as follows and you would say the tenant is reinstated...

CJ M. Mogoeng: Let me just help you, Mr Bailey.

Mr T. Bailey: Yes.

CJ M. Mogoeng: It would help if you could tell us why you consider yourself to be the right person for a position in the Electoral Court, in other words, what is it that you know about the Electoral Court? How do you see yourself making a contribution in that Court? Upon reading the Electoral Act, what are the issues that you think needs to be highlighted to demonstrate your suitability for the position and so on and so forth? That as briefly as you can. I think that really would help. Over and above what you've already said, it would help if you could tell us, you know, even your observations about how the Court operates or has been operating over the years and what changes if any you think need to be brought about, the importance of the Court from your view point. If you could just briefly touch on those issues, then if there are questions, questions will be put to you? If there are no questions, then we'll excuse you.

Mr T. Bailey: Thank you, Chief Justice. Well first of all, I have a commitment to constitutional values and I have a commitment to human dignity, freedom, equality, fairness and you've got to apply them with empathy and compassion and I believe

that those two qualities I will bring to the Court. There's no doubt that you've got to have due regard to the concepts and the separation of powers and a vision for social transformation in this country. You've got to act independently and impartially and act ethically and honestly. I think in any Court you've got to have judicial temperament; humility, open mindedness, courtesy, patience, thoroughness, decisiveness and you've got to be industrious and you've got to be qualified in the relevant body of the law. So those are just the general judicial requirements that I think I would be able to bring to the Court. I think that the Court's heard 35 cases since it came into operation in the late 90s. Last year the Court heard five cases. It was significant and I think that obviously everyone knows about the high profile case of the Tlokwe judgment which simply certainly sets some parameters. Obviously they dealt with and this is the significant point, it's whatever this Court does, it's got to ensure that there is respect for the election process, because we all know that the elections run to the heart of our democracy. So, clearly in that sense you've got to have a very clear commitment to understand what the separation of powers are. I also think and all of us in this room – I sit before a mighty intellect – are aware of the issues that go on in our country and so forth and so I'm going to suggest to you and certainly say that the Court needs to act without fear or favour. It's got to be particularly mindful of what the separation of powers is. It's not an absolute issue. Clearly we live in a constitutional democracy and so forth. So, I would bring with me that set commitment to understanding what that separation of powers is, how far the Courts go. I don't believe the Electoral Court should get into opinions. I don't believe the Electoral Court should go wide. It needs to concentrate narrowly on the issues before it. What it also needs to do is, it doesn't matter what the noise is outside of the Court. There's an absolute commitment from my part to take that noise and ignore it to look narrowly at the issues, to properly read the papers and decide the case on the papers and what I would particularly be able to bring to the Court is my experiences doing investigations. One of the powers that the Court has is the ability to investigate, so I would be able to bring with me a methodology around investigation and certainly be able to be able to test the – how those investigations were carried out – affectively, are they reasonable, are the conclusions justifiable, all of those sort of things, test the methodology that was used so that the information that would perhaps be put before the Court is reliable and even to the extent that the Court itself needs to go out and investigate violations of the Electoral Act and the

Electoral Commission Act, then I would certainly be able to bring that to me. I see effectively one of the powers that the Court has is that if you don't comply timeously, then effectively you're barred, but of course you still have the right to apply for condonation. I deal with those issues on a daily basis. I'd be able to apply all the law in terms of requirements, the reason for lateness, prejudice to the parties, prospects of success and all of those things. I'm comfortably at a – I'm very, very comfortable at a procedural level to make calls where it needs to and I believe that what I would always do is if there's a discretion under the Electoral Act and in terms of the rules, to ensure that that discretion is always used for the purposes of freedom and fairness before the parties and I want to say this to you today, any party that leaves the Electoral Court if I have been sitting there would have been treated with courtesy. They will know that I have read the papers. I might challenge them, I might ask questions, but they will know that I will do all of those things and I will then be party to the – I'm happy to write the judgments of the Court if needs be. I will then apply my mind and they will see that there is, as is currently the case in any event, because the judgments are written by some very experienced people and they are clearly and reasonable, but I would try and contribute to that. And what is interesting for me and this can simply only be an observation, is if you look at the rules, it talks about dealing with matters in three days, getting your papers in and so forth. Then it seems to me that those appear to be – a period of time before the Court starts to sit... Now, I'm not saying it's a matter of criticism, that's just an observation that I simply picked up and it's that well, the rules clearly are indicating that things need to be done quickly and it's understandable, because by and large the Court will sit in and around elections, these violations are happening and around election time you've got to go to get it sorted out quite quickly. So, I don't make a – that's certainly not a comment criticism, but just appears to be an observation and so what does that perhaps mean? Much in our country is made around ability. I want to suggest to you that we also need to talk about availability and so I work for myself as a private adjudicator and a regulatory lawyer. Because I plan my diary, I will be able to make myself available when and as needs be. And the way the Court's likely to work in terms of its jurisprudence, I think the Tlokwe judgment handed down by the Constitution Court has laid down certain markers. I think there's still going to be quite a bit of debate around well, balance of convenience versus the requirements. I know that that has been tested, but I think it's going to come back in different guises

and different forms before that Court and so clearly what we're going to need to be doing is just simply be alive to what's being said. Start also just simply to look at what has been said at the Arbiter level of the court and I continue – I think simply continuing to build and enhance the Jurisprudence of the Court in and around the parameters that have – certainly that the Constitutional Court has laid down in terms of its markers.

CJ M. Mogoeng: Thank you very much. Judge President Shongwe?

JP J. Shongwe: Thank you, Chief Justice. Mr Bailey, are you a member of a political party?

Mr T. Bailey: No.

JP J. Shongwe: You're not? Never been?

Mr T. Bailey: Correct.

JP J. Shongwe: I take it you're familiar with the legislation, that is the Electoral Legislation, the Electoral Act, the Municipal Electoral Act, the Electoral Commission Act?

Mr T. Bailey: I can't stand here before you today and say that I have a deep, deep knowledge of it, but certainly I have some knowledge of it. It would be wrong for me to say that I have a deep knowledge of it.

JP J. Shongwe: Ja, I used the word familiar.

Mr T. Bailey: Ja. Yes.

JP J. Shongwe: Well in your practice, as an attorney, as a person who dealt with tribunals, dealing with rental issues, leasing issues, have you had experience in High Court practise?

Mr T. Bailey: I have. When I was practising law at the Legal Resources Centre, there effectively I joined them and I think this is important – in 1987, height of the state of emergency, at that point I was acting for detainees. We were trying to get them released. I was acting for parties – members of the public who were detained, who'd been beaten up. There was a range of damages claims at that level.

JP J. Shongwe: Yes, but what I mean is, in your practice, how would you see the percentage of your High Court practice, how would you put it in a percentage?

Mr T. Bailey: I am – certainly the last time I in fact had a matter in the High Court, was simply when I was acting for the National Consumer Tribunal in a matter and that would've been certainly about six, seven years ago. I haven't – and I in fact I have made a specific decision in and around my practices that I simply wouldn't be necessarily in the High Court, because I've spent, as I've indicated to you simply in the tribunals. What I want to simply say to you, Sir, is I don't believe that that's an impediment at all. I will come with a complete range of other skills. The other things is that if you're going to practise in the High Court it's all – as an attorney it's all about the rules. It's about knowing what those rules are. In every single tribunal which I've worked in I've been party to the writing up of those rules. Rules set out how you litigate. So, the short answer is, very little in the recent past.

JP J. Shongwe: Very well. Now, in your work as a person who deals with tribunals, you sit as a single person or you sit in a panel?

Mr T. Bailey: Ja, generally the tribunals are as a panel and often, depending between three and five. In almost all of the bodies that I have referred you to and even the disciplinary panels in which I sat and with the professional bodies and so forth I sit with a panel and one of the most fulfilling experiences, sir that I've had on these panels is simply working with a range of experts in these myriad number of industries in which I've had the privilege of operating and across whether they'd be race, gender, those sorts of lines, it's been a meaningful story of the new South Africa.

JP J. Shongwe: Sitting as an acting Judge in the Labour Court – I saw that you have sat as an acting Judge in the Labour Court. Now, how long have you sat as a Judge, acting Judge in the Labour Court?

Mr T. Bailey: I sat essentially there for about six or seven days. I was part of the professions contribution for the South African Society of Labour Lawyers that assists with the backlog and certainly all I want to say to you what that meant, the papers, when I arrived, essentially if you loaded them up they would have been for those seven days would've been higher than this desk. Also what I want to say around this is I found acting in the Labour Court easier than effectively in the tribunals for the range of reasons that I've already given because for the reasons that I have given already. I really want to say that to the extent that that is clearly going to be part of your applying of your minds around this Labour Court around the lack of High Court experience. I want to say to you today I don't believe it's going to be any impediment whatsoever. Let's think about the Electoral Court if I can – the Electoral Court rules essentially run to about five or six pages. It's a very simple procedure. Effectively as I looked at them I thought this is what I've been dealing with for many years. I've taught how to present cases, the law of evidence, whether it's on application or whether it's by way of action, it's applied throughout the tribunals and everything is essentially the same in that regard, so I'm saying to you that I think that that would bring a range of other skills that simply – and if I have been practising in the High Court that I would simply not have acquired in terms of the work that I've done at the lower level.

JP J. Shongwe: Now, in that period when you sat as an acting Judge, did you have an opportunity to write a judgment or judgments?

Mr T. Bailey: I think I ended up writing about nine.

JP J. Shongwe: Nine judgments?

Mr T. Bailey: Ja, I'm subject to correction, but essentially I was there for – there were five days. There were sometimes three a day. On one occasion it might have been four others, one and that depends.

JP J. Shongwe: So, in that period of six to seven days, you wrote about nine judgments?

Mr T. Bailey: Well, those are the ones that I've given yes, subject to correction. I haven't done an account, but in that arena.

JP J. Shongwe: I see. Now, the Electoral Court as you know is a specialised Court. You talked about the question of availability and it is basically, essentially an Urgent Court. I'm sure you've heard of the Urgent Court?

Mr T. Bailey: No, indeed I do. Rule 6 High Court Rules.

JP J. Shongwe: Now, the sittings may be such that you get papers today. You have mentioned about three days that the other party has in order to respond and the Court may sit a day or two thereafter and you say you'll available as and when you are called too?

Mr T. Bailey: By and large, I think the answer to that would be generally yes, I can control my diary and the other thing I do want to say to you is I sit also as a part-time Commissioner at the CCMA and I in fact have a very comfortable arrangement with the case managers there, so yes, I've spoken about availability and yes, I believe that I would be able to do that, yes.

JP J. Shongwe: Amongst other things that you mentioned in your CV is that some stage you were involved with the Independent Electoral Tribunal. Can you tell us a little bit what that tribunal is and what your position was in that tribunal?

Mr T. Bailey: Yes, that was – the tribunal was set up to oversee the 1994 elections and obviously I was appointed to that as a Commissioner. I set out in the – it was in fact a very interesting experience for me for a number of reasons. One because I'd spent all my time at the Legal Resources Centre in a sense fighting the system, so we were always on the other side of the bench so to speak and so here I find myself essentially heading off to the Germiston Springs Magistrate Court where these cases

had been held and it was an interesting experience for me. Here I was sitting with people who I would have perceived perhaps to be Apartheid magistrates and so forth and there I – and they were very, very gracious. I effectively was given the best Courts. I effectively heard two matters to the best of my recollection. A lot of that information is now sitting with the Legal Resources Centre, but I have to say to you, sir, that they were rather minor (indistinct) [0:26:24]. One related to – and between minor parties at the time, as you know there were lots of the parties. One related to statements that had been made what perceived to be defamatory between parties. The other one essentially related to some leaflets that parties felt were not true.

JP J. Shongwe: So, basically you sat as a Commissioner.

Mr T. Bailey: Yes, indeed. I'd heard the cases rather effectively. Yes, that's what I did.

JP J. Shongwe: Thank you, Chief Justice. No more questions.

CJ M. Mogoeng: Thank you very much, Judge President Shongwe. Commissioners, any questions? Thank you very much. You're excused, Mr Bailey.

Mr T. Bailey: Thank you very much for listening.

CJ M. Mogoeng: Thank you.