



# JUDGES MATTER

## **Judicial Service Commission interviews**

**09 April 2018.**

### **Supreme Court of Appeal**

#### **Interview of Judge T M Makgoka**

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CJ M. Mogoeng: Good afternoon Judge Makgoka.

Judge T.M. Makgoka: Good afternoon Chief Justice and members of the esteemed Commissioners.

CJ M. Mogoeng: Are you well?

Judge T.M. Makgoka: I am well. Yourself Chief Justice? Thank you.

CJ M. Mogoeng: I am very well, thank you. What was your first degree? Your first degree?

Judge T.M. Makgoka: I have only one degree Chief Justice. BProc.

CJ M. Mogoeng: BProc?

Judge T.M. Makgoka: Yes.

CJ M. Mogoeng: For how many years did you practice law before your elevation to the Bench?

Judge T.M. Makgoka: About fifteen years.

CJ M. Mogoeng: Fifteen years. If you add up your acting stints for how long did you act as a High Court Judge? More or less? Before your permanent appointment?

Judge T.M. Makgoka: I acted almost two years except for a term before I was elevated.

CJ M. Mogoeng: Yes. Was a continuous acting stint or were there breaks in between?

Judge T.M. Makgoka: It was a continuous stint except one term.

CJ M. Mogoeng: Yes. When then were you permanently appointed to the High Court.

Judge T.M. Makgoka: I was appointed in August 2009, Chief Justice.

CJ M. Mogoeng: And in your own words more or less how many years has it been since your appointment to that court?

Judge T.M. Makgoka: That would be about eight years, Chief Justice.

CJ M. Mogoeng: Eight years. Now tell us about your acting stint at the Supreme Court of Appeal. For how long was it?

Judge T.M. Makgoka: So far, I have acted for four terms. I did two terms in 2016. One term in 2017 and I have just done a term now in 2018.

CJ M. Mogoeng: So it is four terms all and all.

Judge T.M. Makgoka: Yes.

CJ M. Mogoeng: That translates to how many months, more or less?

Judge T.M. Makgoka: Well a term is, a long-term in the Supreme Court of Appeal is a month and a half, and a short-term is a month. So it is – my mathematics is bad, but –

CJ M. Mogoeng: Sure. All right. Now how did you find the environment at the Supreme Court of Appeal upon arrival and during your stay was it welcoming? Was it conducive to ones acclimatisation to that environment? Or where there challenges? And if so what were the challenges? But those that you are comfortable to express. I say that because I know something's are better dealt with internally.

Judge T.M. Makgoka: Yes.

CJ M. Mogoeng: There are the so-called dirty linens that do not necessarily have to be flown open for everybody to see. There are more effectively addressed internally. So those that can be said.

Judge T.M. Makgoka: Thanks, Chief Justice. The Supreme Court of Appeal is different from where I have sat all along as Judge of the High Court. My experience is complex in the sense that on one hand I found some measure of empowerment and welcoming but at the same time, there was some coldness.

CJ M. Mogoeng: Let me just stop there. Where did the warmth and the welcoming come from? Which hand is that? And which hand was cold? In simple and easy to understand terms.

Judge T.M. Makgoka: There were colleagues who went out of their way to make sure that I feel welcome but there are certain colleagues which made you feel like you are not really welcome here.

CJ M. Mogoeng: Is it a correct statement to say that their attitude had nothing to do with race?

Judge T.M. Makgoka: Chief Justice, to some extent you are correct. Sometimes it has to do with intellectual superiority, I would imagine.

CJ M. Mogoeng: Actual or assumed?

Judge T.M. Makgoka: Assumed. In most instances assumed.

CJ M. Mogoeng: And in other respects?

Judge T.M. Makgoka: In other respects, there are other dynamics also. I mean apart from race. Race is a real factor in the Supreme Court of Appeal but there are other dynamics. Yes, some of them I might not need to talk about at this forum.

CJ M. Mogoeng: Yes.

Judge T.M. Makgoka: Yes.

CJ M. Mogoeng: Yes. So I assume that is the dirty linen part?

Judge T.M. Makgoka: Yes.

CJ M. Mogoeng: Are they of such a nature that you would share with the Head of the Court and if I out of interest want to know from you in private you would share them with me? And I raise the question because there are so many assumptions one that even where circumstances cry out for my intervention I am indifferent. I do not intervene when in fact people are not forthcoming with information. I often get shocked, like I was during the interview of President Maya about elements of racism

and prejudice at the Supreme Court of Appeal. They had never before been brought to my attention. So would you be keen, broadly speaking, to share some of the internal issues on the assumption that I am part of the internal?

Judge T.M. Makgoka: Is the Chief Justice inviting me to share them at this forum?

CJ M. Mogoeng: No. Would you be willing at some stage -

Judge T.M. Makgoka: Certainly.

CJ M. Mogoeng: -- Those that you are able to share?

Judge T.M. Makgoka: Certainly, Chief Justice, I would.

CJ M. Mogoeng: Now how then would you fit in when the situation is as challenging as it seems to be to the point where I got a sense that you were somewhat emotionally moved at some point when you had to respond. How then would you fit into that environment? What would make it possible for you to soldier on notwithstanding the unwelcoming challenges or attitudes displayed by one of the arms -

Judge T.M. Makgoka: Yes.

CJ M. Mogoeng: -- For want of a better expression.

Judge T.M. Makgoka: Thank you, Chief Justice. One has to be mentally strong about these things. Nothing has happened while I acted there that I could not deal with. But secondly, the appointment of Justice Maya as the President of that Court has heralded a new era. She is firm, she is fair, and I think this challenges which she is well aware of she would be able to deal with.

CJ M. Mogoeng: Yes. Now in your own words how ready are you for a role as a permanent Judge of the Supreme Court of Appeal should you be appointed? Very

briefly in your own words, the critical issues that you believe need to be highlighted before President Maya even puts questions to you.

Judge T.M. Makgoka: Chief Justice, I would say I feel ready to make a contribution to the Supreme Court of Appeal. My being a Judge in Pretoria I think has prepared me eminently for that Court. Pretoria High Court should arguably be the busiest Court in the country and for my eight years in Pretoria, I have dealt with a near full spectrum of matters that in most instances end up in the Supreme Court of Appeal. There are matters that there, in terms of the Law, only Pretoria can deal with as the Court of the first instance. For example, Patent matters. In terms of Section 8 of the Patents Act, the Commissioner of Patents is a Judge designated as such in Pretoria and I have been privileged to preside in some of those matters. So I feel eminently prepared for the continues there Chief Justice.

CJ M. Mogoeng: President Maya.

PRES M. Maya: Thank you, Chief Justice. Good afternoon Justice Makgoka.

Judge T.M. Makgoka: Good afternoon, President Maya.

PRES M. Maya: Just quick clarification. I am worried that our employer the taxpayer may think we spend half the year loafing around instead of working. The actual Court term when the Court is in session and hears Appeals may be the six weeks, and the four weeks here and there but throughout the rest of the year we are working reading the high volumes of records -

Judge T.M. Makgoka: Yes.

PRES M. Maya: --And dealing with the difference. You forgot to mention that.

Judge T.M. Makgoka: Yes. Thanks, President Maya.

PRES M. Maya: I am just a bit worried that you have not informed me that were experiencing problems in the Court. And I know that you have said nothing has

happened to you that you did not feel you could handle yourself, but it does not help the institution if people experience things in their own small corners and they deal with them there and they continue to fester and affect other people. So I ask you, as you know I keep an open-door policy, you are still going to be with us for another term; next term.

Judge T.M. Makgoka: Yes.

PRES M. Maya: If any incidents occur then please do inform me. Have you made use of the induction committee which I created to specifically look after Acting Judges and address their challenges and needs in the Court?

Judge T.M. Makgoka: When I became aware of it, this last term I was not invited. Apparently, because I had acted before. Yes. But I would use that opportunity and that platform, President.

PRES M. Maya: I am sorry you are not informed. Have you had any difficulty at all writing judgements? The SCA style as it is called?

Judge T.M. Makgoka: No, President Maya, I have not experienced any problems.

PRES M. Maya: And you have been able to produce your judgements promptly?

Judge T.M. Makgoka: Yes.

PRES M. Maya: Let me just mention that I have heard very good comments about your writing skills from senior colleagues.

Judge T.M. Makgoka: Thanks.

PRES M. Maya: Has the fact that you only have one law degree ever hindered you in the course of your judicial functions?

Judge T.M. Makgoka: No, there has never been a hindrance at all.

PRES M. Maya: Other than the concerns which you have already raised to the Chief Justice is there anything else that you think should be improved in the court?

Judge T.M. Makgoka: One thing that struck me when I arrived there is that the senior judges are in one wing and the junior judges and acting judges would be in one wing. I had thought there should be sort of a cross breed of senior judges and acting judges and junior judges so that that interaction can take place much more efficiently. But I think it is one of those things it is a matter of tradition it has been like that for some time. But that just struck me that this senior judges this side, junior judges this side.

PRES M. Maya: Point taken, Judge Makgoka. Anything else?

Judge T.M. Makgoka: No.

PRES M. Maya: I may just mention that though you would have noticed senior judges all fled to the new wing because it has new chambers -

Judge T.M. Makgoka: Yes.

PRES M. Maya: -- With bathrooms which the rest of the building does not have. So that may be the reason -

Judge T.M. Makgoka: Yes.

PRES M. Maya: -- For this uneven allocation of chambers. I am going to ask you my final question. I am going to ask you an unfair question which I put to Judge Govern. As you know there are three vacancies and there are four women candidates. The SCA is notorious for its low representatively in terms of gender. Now if at least three of the women candidates are found to qualify for appointment to that Court, what should we do? What would you advise us to do?

Judge T.M. Makgoka: Yes, President Maya that is true there is an acute shortage of women judges in the Supreme Court of Appeal, in particular, African woman and if I have to step back for an African woman to be appointed I would be prepared.

PRES M. Maya: Thank you, Judge Makgoka.

Judge T.M. Makgoka: Thank you.

CJ M. Mogoeng: Commissioner Msomi?

COMM M. Msomi: Thanks, Chief Justice. Good afternoon Judge.

Judge T.M. Makgoka: Good afternoon.

COMM M. Msomi: Looking at your profile it is quite an impressive profile. I see you acted as the Justice of the Lesotho High Court. It was their Constitutional Court. Are there any lessons that the South African Constitutional Court could learn from the Constitutional Court in Lesotho?

Judge T.M. Makgoka: It is called the Constitutional Division of the High Court. My acting stint there was not long enough to make a useful comparison. We went there on one matter that involved the Head of Court in Lesotho. So I wouldn't venture to make that comparison.

COMM M. Msomi: That is a fair answer. The second question I wanted to pose. I am not sure if I am going to pose it eloquently as I would like to. If you look at the Supreme Court of Appeal, I think it is regarded very much as a Court of Law, and there seems to be a perception that it is resisting to go beyond developing Common Law. And the most often cited case is that Vodacom case commonly known as "Please call me case". What is your assessment of the Supreme Court of Appeal? Are we able to balance issues of equity and strictly issues of Law? Thank you, that is my last question.

Judge T.M. Makgoka: Thank you. I think Commissioner Msomi that observation is correct. And it is supported by a number of cases that have gone from the Supreme Court of Appeal to the Constitutional Court and the Constitutional Court took a totally different view. For example, I mean, the Ermelo case – you remember that the Supreme Court of Appeal decided it on a particular basis and the first remark by the Constitutional Court was this is about Section 28 of the Constitution, which the Supreme Court of Appeal have not dealt with.

COMM M. Msomi: Justice it is a follow up question, sorry. Finally, in your entire career have you written any judgement that has developed Common Law for the benefit of the commission?

Judge T.M. Makgoka: No. Thank you.

CJ M. Mogeong: Thank you. Commissioner Norman?

COMM T. Norman: Chief Justice. Good afternoon Judge Makgoka.

Judge T.M. Makgoka: Good afternoon Commissioner.

COMM T. Norman: Sorry, my question really relates to one dissenting judgement that you wrote in the Indaba versus Indaba matter. The question that I have, but also, I just want to say that your dissenting judgement there actually gives insight into your personality and your strength as a Judge of appeal because you are differing from very senior colleagues in that matter. But what I want to understand is once you reach a point where you write a dissenting judgement is an environment at the SCA such that even if you differ with your senior colleagues you still feel comfortable at the end of the day and you feel that I have done my job? Or do you really get a sense that you are making your colleagues uncomfortable if you dissent? I just want to understand that. Thank you.

Judge T.M. Makgoka: Thank you. In Indaba, in particular, I felt strongly about it and I wrote separately. After I distributed my judgement the panel was headed by the President of the Court. He came to me and commended me on my judgement and

said; it is a well-written judgement, but I am never going to agree with you. But I had no sense that I had created animosity among my colleagues.

CJ M. Mogoeng: But should it matter? If you believe that you are doing the right things should the attitudes of others matter?

COMM T. Norman: It should not matter, Chief Justice. Yes, thanks.

CJ M. Mogoeng: Yes. Commissioner Singh?

COMM N. Singh: Thank you very much. One is a query and the other is a question. On page – good afternoon Judge.

Judge T.M. Makgoka: Good afternoon Commissioner Singh.

Male voice: On page 12 there are two judgements.

COMM N. Singh: It would have been delivered on the 18th of December. Have they since been delivered?

Judge T.M. Makgoka: They have been delivered. Yes, thank you.

COMM N. Singh: Thank you. Then there is another document we have here with the JCB heading and the list, there is an annexure, a list of judgements considered. I do not know if you have seen that. If I count the number of judgements that you have considered it is about thirty-five, reported and unreported?

Judge T.M. Makgoka: Yes.

COMM N. Singh: Would that be correct?

Judge T.M. Makgoka: It is not correct, Commissioner Singh. I have provided the Commission with a list of my reported judgements from pages 192 to 204. I have a

list of about two hundred and twenty-five. Those that are reported online and in your traditional Law Reports.

COMM N. Singh: Yes, because thirty-five were listed here and I was wondering, Chief Justice, of the thirty-five if it was thirty-five; ten were overturned on Appeal and that does not look very good as a ratio. Now can you just pick up one of those judgements that were overturned on Appeal and give us a sense of why you think anyone one of them, the more important one was overturned on Appeal?

Judge T.M. Makgoka: Maybe one can look at the Bengwenya matter. The two Bengwenya matters there were heard together. In one of the matters, of Bengwenya matter, I did not feel strong enough to make a substitution for the Minister, but the Supreme Court of Appeal went further. Set aside the Ministers determination and made a substitution. In other words, they substituted the order of the Minister with the Court's own order. I was not – I did not feel confident enough at that stage with what was before me to make that determination.

COMM N. Singh: Just to clarify again, so the information given through the Chief Justice by the JCB of the list of judgements considered is certainly not only thirty-five reported?

Judge T.M. Makgoka: No, I have written over four hundred judgements. As I said, two hundred and twenty-five of them I have listed them there. Nineteen of them have been reported in the Law Reports.

COMM N. Singh: Thank you, Chief Justice.

CJ M. Mogoeng: Thank you, Commissioner Singh. Commissioner Mpofu?

COMM J. Mpofu: Good afternoon, Judge Makgoka.

Judge T.M. Makgoka: Good afternoon, Commissioner Mpofu.

COMM J. Mpofu: Thank you. Sorry, I am going to ask you a difficult question which you are at liberty not to answer because it might have - it is quite a personal question. I am aware that after the application was made you sadly lost your wife and what I really wanted to know about that and you can just answer it as a yes or no question - by the way, please accept our condolences. Has that, those family circumstances will they have any effect if your application becomes successful? In terms of arrangements with the children and so on?

Judge T.M. Makgoka: Thanks Commissioner Mpofu. Should I be recommended and appointed it should not have any difficulty for my children. My children are fortunately not young anymore. My daughter is thirty-one she is a qualified chartered accountant. My son is twenty-one he is in his final year of LLB. So it would not change much.

COMM J. Mpofu: Thank you very much. The next question has to do with your - just where you come from. You know I don't believe that people come into this job without bringing their history and culture and all those things. Now I know you as a deeply religious person but also somebody who has spent maybe about twenty years as a member of the Black Consciousness Movement, NASAPO. How will those experiences or life experiences assist you in dealing with some of the complex questions that we are talking about here? About gender, racial transformation and so on? Have you found that that background assists you in dealing with those complexities?

Judge T.M. Makgoka: I think you are quite correct, Commissioner Mpofu. My background in the black Consciousness Movement has assisted me to be firm. Especially on matters of race. To make sure that nobody can undermine me because I am black. So that has assisted me a lot, yes. Thanks.

CJ M. Mogoeng: Commissioner Malema?

COMM J. Mpofu: Thank you CJ.

CJ M. Mogoeng: Oh, thank you. Thank you Commissioner Mpofu.

COMM J. Malema: No, thanks very much. Good afternoon Judge.

Judge T.M. Makgoka: Good afternoon Commissioner Malema.

COMM J. Malema: I just wanted to check one thing if you are appointed to the Supreme Court of Appeal will that be against the intention of transformation? Will it work against transformation? Your appointment to the Supreme Court?

Judge T.M. Makgoka: Definitely not. I think it would enhance it.

COMM J. Malema: Thank you.

CJ M. Mogoeng: Commissioner Nayambi?

COMM A.J. Nayambi: Thanks CJ. Afternoon Judge Makgoka.

Judge T.M. Makgoka: Good afternoon.

COMM A.J. Nayambi: I have got just one question. The Supreme Court of Appeal and the Constitutional Court have on various occasions confirmed your judgement so what in your view are the hallmarks of a well thought and good judgement?

Judge T.M. Makgoka: I think a good judgement is one that conveys the footprints of the Judge in a manner that is understandable. Firstly, to the litigants and to the public.

COMM A.J. Nayambi: Thank you CJ.

CJ M. Mogoeng: Thank you Commissioner Nayambi. Commissioner Nkosi-Thomas?

COMM Nkosi-Thomas: Thank you, Chief Justice. Good afternoon Justice Makgoka.

Judge T.M. Makgoka: Good afternoon Commissioner Nkosi-Thomas.

COMM Nkosi-Thomas: Condolences yet again from us as members of the JSC.

Judge T.M. Makgoka: Thank you.

COMM Nkosi-Thomas: I must disclose that you and I went to university together. So good to see you.

Judge T.M. Makgoka: I think High School and Varsity.

COMM Nkosi-Thomas: Yes, and I have had the pleasure of appearing before you in the SCA.

Judge T.M. Makgoka: Yes.

COMM Nkosi-Thomas: Very well. I just want to put to you a comment that was made by the JCB.

Judge T.M. Makgoka: Yes.

COMM Nkosi-Thomas: And that relates to the judgement that you penned in the matter Rand Water versus WakeVet. They say there, I do not know if you have had the opportunity of reading what -

Judge T.M. Makgoka: I have.

COMM Nkosi-Thomas: -- Has been said, but the criticize the quality of your judgement. Suggesting that the ratio is somewhat inconsistent and it yielded therefor a problematic judgement. Do you have any comments that you wish to make on that?

Judge T.M. Makgoka: Unfortunately I do not know the source of that comment.

COMM Nkosi-Thomas: Well if I may assist quickly, the GCB, the General Council of the Bar they tend to make their comments known to the commission before the interviews.

Judge T.M. Makgoka: I have seen that comment, but what I am saying is I do not know who the source of the comment is. It could well be a losing litigant in that matter. That judgement has not been taken on Appeal, yet. If it is taken on Appeal and it is overturned I would accept the criticism. I also note that an academic has also criticised the judgement but the same academic, Professor Sonnekus, has on occasion criticised the judgement of the Supreme Court of Appeal, so perhaps maybe let us wait until the judgement goes on appeal. Let us hear what the Appeal Court says.

COMM Nkosi-Thomas: Very well, thank you very much, Justice. Thanks, Chief Justice.

CJ M. Mogoeng: Thank you Commissioner Nkosi-Thomas. Justice Makgoka you are excused. I am sure you – my condolences were conveyed to you by the JP?

Judge T.M. Makgoka: Yes, they were, they were. Thanks, Chief Justice.

CJ M. Mogoeng: Thank you very much. You are excused.