



JUDGES MATTER

Judicial Service Commission interviews

04 October 2017

Gauteng High Court Division

Interview of Mr. T D Brenner

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CJ M. Mogoeng: Good morning Ms Brenner.

Ms T D Brenner: Good morning Chief Justice.

CJ M. Mogoeng: Are you well and relaxed?

Ms T D Brenner: Yes, I am actually.

CJ M. Mogoeng: Alright.

Ms T D Brenner: Yes.

CJ M. Mogoeng: Okay. Tell us why you believe you are ready for appointment to the high court.

Ms T D Brenner: Chief Justice, I've been practicing attorney, notary and conveyancer for the past 28 years, including my articles, I've been an attorney in practice hands-on for the past 30 years. I have a wealth breadth and depth of experience in a miscellany of fields of law. For example I was -- I acted for an engineering company, it's not in my papers, but I acted for a German engineering company in the Cape High Court in which a damages claim was instituted for -- arising from the -- a crane collapsing in Cape Town Harbour, and the case turned on an engineering term called a bending moment and that necessitated my -- exposing myself to a little bit of engineering law. And then I was in Cape Town again in the high court in a matter involving admiralty law and a fire that had actually taken place on Border Marine going vessel which was on its way to Houston Harbour. That ultimately entailed the inquiry as to the circumstances under which absolution from the instance should be granted. I'm -- I think I -- maybe I'm going into a bit too much detail. I've also as a notary public done quite a lot of notarial documents, notarial servitudes ANC's, antenuptial contracts that is, and as a conveyancer I have managed departments at several firms. At the firm Feinsteins I was in charge of the transfer department, the bond department and I also basically ran the litigation department there. It was during my tenure, my tenure at Feinsteins that I accumulated most of the major exposure in major litigation. I also for example handled a matter based on a letter of comfort which was supposed to be an actionable document but it was -- it fell short of a deed of suretyship because it was issued by an overseas company during the Apartheid Era and the overseas company did not want to reflect a deed of suretyship as a contingent liability on its balance sheet so -- but the wording of the letter of comfort could -- was arguably sufficient to constitute a suretyship. I have also, since inception of my exposure to law, I have been involved in a lot of pro bono law so when I started my articles in 1980, just bear with me, it's quite a while ago, in January 1987 I was given a cabinet full of personal injury matters and they were given to the firm by the Legal Aid Bureau and I regularly dealt with Pauline Lipson who ran the Legal Aid Bureau.

CJ M. Mogoeng: And you've also acted in the high court in Mafikeng, in --

Ms T D Brenner: Yes.

CJ M. Mogoeng: -- Johannesburg, in Pretoria. You don't have any reserve judgement; you don't have any part-head matter is that correct?

Ms T D Brenner: Chief Justice I have two reserved judgements.

CJ M. Mogoeng: To be written by other people isn't it?

Ms T D Brenner: No.

CJ M. Mogoeng: Am I mistaken I thought --

Ms T D Brenner: At the time I filled in my --

CJ M. Mogoeng: -- one is being referred to Judge Molahlehi, another I forgot to which judge. Are they your own reserved judgements?

Ms T D Brenner: Well, as matters stand now --

CJ M. Mogoeng: Who's the scribe?

Ms T D Brenner: Well, in relation to my application --

CJ M. Mogoeng: Yes.

Ms T D Brenner: -- what actually happened is that I handed down the one judgement --

CJ M. Mogoeng: Yes.

Ms T D Brenner: -- the Gosain judgement and then I took over handing down the other -- the judgement pertaining to, just bear with me, the Booysen and Cause judgement; I wrote that one as well. So, I wrote the Gosain one, I wrote the Booysen one and then Judge Molahlehi, I think it was yesterday, he handed down the Malema and RAF matter.

CJ M. Mogoeng: And are they not the June matters?

Ms T D Brenner: Sorry Chief Justice?

CJ M. Mogoeng: When were they heard; when was judgement reserved? I seem to recall seeing June somewhere there. When was it reserved?

Ms T D Brenner: It -- so, the Malema matter was reserved on the 5th of June.

CJ M. Mogoeng: Yes.

Ms T D Brenner: But yes, I wasn't the scribe there.

CJ M. Mogoeng: Sure.

Ms T D Brenner: Gosain was reserved on the 9th of June and I think I prepared it in July, early July --

CJ M. Mogoeng: Yes.

Ms T D Brenner: -- and it was handed down in early July.

CJ M. Mogoeng: So, you don't -- do you have new reserved judgements?

Ms T D Brenner: I do --

CJ M. Mogoeng: When were they --

Ms T D Brenner: -- Chief Justice.

CJ M. Mogoeng: -- reserved?

Ms T D Brenner: A couple of weeks ago.

CJ M. Mogoeng: Not months?

Ms T D Brenner: No, a couple of weeks ago --

CJ M. Mogoeng: Yes.

Ms T D Brenner: -- Chief Justice.

CJ M. Mogoeng: Alright. Are you -- do -- is it an uphill struggle to produce judgements or have you sort of found it a comfortable exercise to embark upon?

Ms T D Brenner: Chief Justice I subscribe to the 10,000 hour rule which is that the more you practice the better you get.

CJ M. Mogoeng: Yes.

Ms T D Brenner: And so I've gone out of my way to write as many judgements as I possibly can. And believe it or not I thoroughly enjoy writing judgements.

CJ M. Mogoeng: Yes. It's not a nightmare?

Ms T D Brenner: It's not a nightmare. I actually get excited and I lose perception of space and time.

CJ M. Mogoeng: Yes.

Ms T D Brenner: I get into account of alpha state when I'm writing a judgement because I'm a very focussed person.

CJ M. Mogoeng: Thank you. JP?

Judge President: Thank you CJ. Good morning Ms Brenner.

Ms T D Brenner: Good morning JP.

Judge President: Ms Brenner, I think the CJ has touched on your acting stints and that's my purpose here. I've put a spread sheet in front of you, I don't know if you have it, that shows the Commission all your acting stints.

Ms T D Brenner: Yes JP.

Judge President: Have you got it?

Ms T D Brenner: I've got it.

Judge President: I see you're the one who's done the most acting stints of all the candidates that we're interviewing today. Do you see that?

Ms T D Brenner: Well, I haven't seen the spread sheets of the other candidates.

Judge President: Oh okay. Take it from me; I won't lie to you. And you've also done work in the urgent court?

Ms T D Brenner: Yes, I have JP.

Judge President: And when did you do it; is it recently or a long time ago?

Ms T D Brenner: It was recently in the second term of 2017 in Johannesburg, and then in the third term of 2017 in Pretoria.

Judge President: Ja.

Ms T D Brenner: And then in the week just before I did urgency in Pretoria I had the benefit of a 500 page urgent matter that was allocated to me.

Judge President: Now, all I want to -- you to tell the Commission is your acting in the urgent court has been recent whilst you've acted for a long time. Do you know what the reason is for that?

Ms T D Brenner: JP, because I have never been asked to act in urgent court.

Judge President: I see. Now -- but if you study the rolls, the rosters it's unusual to put an acting judge in the urgent court isn't it?

Ms T D Brenner: Fairly unusual, yes.

Judge President: Okay.

Ms T D Brenner: Yes.

Judge President: But if an urgent -- an acting judge then finds himself or herself in an urgent court does it not say there's now confidence that the amount of acting stints you've done qualify you to sit at that court?

Ms T D Brenner: I would say so. I would say so JP and I thoroughly enjoyed myself in urgent court as well. Fortunately there weren't that many matters; I think altogether there were about 20 stretched over the week and in most instances I had the benefit of acquainting myself with the papers in advance of the hearings.

Judge President: Right. And I see you've done a solid nine weeks in the opposed motion courts throughout your acting stints.

Ms T D Brenner: Yes.

Judge President: That's a fairly difficult court isn't it?

Ms T D Brenner: It is a fairly difficult court but what is really nice about it is that one has the benefit of the papers beforehand and heads of argument so that the issues

are delineated to a certain extent, and that's a very useful form of assistance in preparing for opposed motion court.

Judge President: Ja. I just want you to go back to the question the Chief Justice asked you about handing down judgements. Talking about you doing nine week in the opposed motion and nine weeks in the appeals courts, and when I look at your spread sheet of judgements the most -- the longest time you've reserved is about five months.

Ms T D Brenner: Yes, that's correct.

Judge President: Now how do you manage to avoid being in my dog box in terms of reserved judgements?

Ms T D Brenner: Because I love what I do when I'm on the bench.

Judge President: Right. Okay.

Ms T D Brenner: I look forward to writing judgements and I'm trying very, very hard to truncate the period of time between the hearing of the matter and the date on which I hand down judgements.

Judge President: Yes.

Ms T D Brenner: And my practice, the fact that I've had 78 weeks altogether since 2004, it stood me in good stead because I'm now able with -- it's starting to become quite effortless to write judgements; that's not to say that I don't apply my mind to the facts and that I don't research the law, of course that stands to reason. It goes with the territory.

Judge President: In your practice, your own practice, the only litigation you've done in your more than 28 years' experience as well as acting have you done any constitutional work?

Ms T D Brenner: No. No, JP.

Judge President: You have never?

Ms T D Brenner: However I am familiar with the constitution. I'm familiar with a plethora of constitutional court judgements. In urgent court just a few days ago the PAJA Act and the doctrine of legality was argued in two review applications that came before me and the Kajima case was mentioned and the fact that that's going to the constitutional court. I'm also familiar with the recent judgement that was handed down by the constitutional court in the matter of the United Democratic Movement and the speaker of the National Assembly.

Judge President: Thank you Ms Brenner. Thank you Chief Justice. I've got no further questions.

CJ M. Mogoeng: Many thanks JP. MEC Lesufi?

MEC Lesufi: Thank you so much Chief Justice. Good morning Ms Brenner.

Ms T D Brenner: Good morning Commissioner.

MEC Lesufi: You have declared in your documents that you have never been part of any community organisation, what does that mean; it means you didn't have time or you didn't see the importance of participating in community structures take into consideration the history and where we come from as a country?

Ms T D Brenner: If you look at my provenance I was brought up with the perception that my parents created, that work was everything. Both my parents worked throughout their entire lives and they made it very plain to me from day one that if I failed any one year of my studies that that was the end of that then I'd need to stop studying. And you'll also notice that after I did my BA for three years I then took a break of two years; that was to pay back my study loans. I worked at Barclays Bank for the two years after that and then I resumed my studies at UCT again with the assistance of study loans. I do not come from a privileged background. I'm also a

sole proprietor since I've started practicing on my own, and I have always been the sole bread winner all my working life. So, it's been -- and I have dependents as well. So, it's been critically important for me that I have been kept hands-on in my business and done as much in practice as I possibly could. That's not to say that I haven't helped communities; during the course of my practice I most definitely have. In the late 80's I went to Ennerdale on several occasions, I was helping the Ennerdale Taxi Association on a pro bono basis. I'm currently helping to prepare the documents for Evangelical Outreach Ministries which is based in Eldorado Park, I was in Eldorado Park just the other day helping with fundraising. There are architects' contracts, building contracts, a contract with the owner of the land all of which have to be drawn up, all of that is going to be done pro bono. So, there are many other mechanisms by which I have actually contributed to the community but I define myself by what I have done more so than but what I have not done. And really it's been time constraints primarily that precluded me from belonging to any community organisations.

MEC Lesufi: Thanks Chief Justice.

CJ M. Mogoeng: Thank you MEC. Minister?

Minister: Good morning Ms Brenner.

Ms T D Brenner: Good morning Commissioner.

Minister: Just following on the line of questioning that the MEC pursued with you now. It seems to me that the angle from which you've made a contribution is in relation to providing your services pro bono etcetera but to what extent would you say you have contributed in the transformation of the profession itself by way of empowering historically disadvantaged persons in the legal profession itself. Have you had the opportunity --

Ms T D Brenner: Yes, I have.

Minister: -- and what have you done concretely?

Ms T D Brenner: I most definitely have. When I was acting in the criminal courts, and I basically started acting when I went on my own as a sole practitioner, when I acted in the criminal courts it was encouraged at that juncture for the -- for acting judges in particular to appoint assessors. The assessors I appointed were primarily black assessors. I worked with Desmond Nkonazi [?], I worked with Chris Mogaditwa [?] (inaudible 00:16:43) Mafikeng and in -- they sat with me in most of my criminal trials. In practice I have briefed advocate Nazeer Kassiem from time to time and I -- I've taken advantage of the criticism that was levelled at me at my first interview --

Minister: Pardon me Chief Justice.

Ms T D Brenner: -- five years ago.

Minister: Pardon me Chief Justice. I think the question really I'm trying to direct you to relates specifically to your area of proficiency as an attorney practicing in a highly specialised coveted area of the law that's probably highly lucrative. To what extent in that position have you been able to draw in say young black female disabled etcetera persons from historically disadvantaged background --

Ms T D Brenner: I have --

Minister: -- to empower them if at all?

Ms T D Brenner: Yes. I have been briefing black counsel Commissioner, I don't know if you want names.

Minister: No, no I'm not referring to you briefing council, I'm referring to you running a practice, possibly a lucrative practice as an attorney over such a long period of time -
-

Ms T D Brenner: Yes.

Minister: -- in areas which are considered to be exclusive and specialised to what extent have you been if at all?

Ms T D Brenner: Yes.

Minister: Of course if you haven't been it's also okay. I just want to know if in fact. I'm giving you the opportunity to --

Ms T D Brenner: Yes.

Minister: -- share that if you ...

Ms T D Brenner: Commissioner, the practice which was lucrative was not mine; that was Feinsteins. When I went out on my own I had to basically scratch around for work; I never took any clients with me when I went out on my own. And --

Minister: Pardon me Chief Justice.

Ms T D Brenner: It was not lucrative.

Minister: Yes.

Ms T D Brenner: Comparatively speaking Commissioner it was not a lucrative practice.

Minister: Apologies Ms Brenner. You were part of that firm. I'm not sure what status you held in that firm --

Ms T D Brenner: I was a director.

Minister: -- and what influence you had.

Ms T D Brenner: No influence.

Minister: But clearly the firm itself was in a lucrative space and you were --

Ms T D Brenner: Yes, of course.

Minister: -- part of it.

Ms T D Brenner: I had --

Minister: And I just want to understand if you played any role in that vantage position if it was to try and ensure that the firm itself actually played its role in contributing transformation? My apologies for keeping on interjecting.

Ms T D Brenner: No, it's --

Minister: I want to focus you to --

Ms T D Brenner: Yes.

Minister: -- to a specific issue.

Ms T D Brenner: Commissioner there was a disabled candidate attorney who I recommended to my boss at Feinsteins. I was very keen on her and he was not keen on her. I had several conversations with him about finding candidate attorneys who were black; he was not interested. He was a kind of person who subscribed to the principle that it's my way or the highway. I had no bargaining position at Feinsteins. And then when I started out on my own, as I say, I actually couldn't afford a candidate attorney until three years ago. I was -- it was not a lucrative practice; it was a practice that basically just made me enough income to sustain myself and help to support my parents. But as far as my contribution to transformation is concerned I do brief black council and I refer matters outside of the parameters of my expertise to other attorneys. So, for example for several years I've had a referral relationship with a criminal defence lawyer and I'll say to my client this is outside of my province of expertise can I refer you to Vicky Nkhwashu who is a criminal defence lawyer or Victor I mean and --

Minister: Anyway, that was not quite what I was focusing on. I -- but it's fine. The second point I wanted to raise with you relates to your exposure to constitutional law. You've conceded that you haven't practiced in that field but that you were -- are aware of what's going on in the light of the jurisprudence that's emerging or evolving. You allude specifically to a specific case, a recent case in the constitutional court; is there a specific reason why you allude to that court; is there a particular constitutional principle that you drew from that court that was particularly from that judgement that was particularly striking for you; do you want to share your perspective of it etcetera?

Ms T D Brenner: Yes. The -- that case hinged on separation of powers sensitivity. The relief that was sought in the case against the speaker of the national assembly was overreach. It was -- it included a mandamus to the speaker to hold -- conduct a secret ballot and the constitutional court in my mind took full cognisance of the necessity for recognising the principle of separation of powers. And it basically went so far as to spell out the legal position but then it remitted the decision making power back to the speaker of the national assembly.

Minister: Thank you Chief Justice.

CJ M. Mogoeng: Thank you Minister. Commissioner Mampuru?

Commissioner Mampuru: Thank you CJ. Thanks (inaudible 00:23:36). Once again, thank you CJ. Good morning Ms Brenner.

Ms T D Brenner: Good morning Commissioner.

Commissioner Mampuru: Are you well?

Ms T D Brenner: Yes, I'm great thank you. Are you well?

Commissioner Mampuru: No, I'm more than fine. I just want to know -- it is said that you obtained a certificate of good standing from The Law Society on 7 June 2017.

There have been to date no disciplinary proceedings in respect of you. How would you define discipline in your own words? Number two; do you believe that success depends more on what you do or on whom you know? Thank you CJ.

CJ M. Mogoeng: Thank you Commissioner.

Ms T D Brenner: Discipline in the sense of disciplinary proceedings against a practicing attorney?

Commissioner Mampuru: Yes, yes.

Ms T D Brenner: Yes. I have -- while acting as a judge I have dealt with several applications for the suspension of practicing attorneys or for the removal of practicing attorneys from the roll. In all of those instances they had perpetrated acts of chicanery. They had accessed their trust accounts without invoicing the clients or by producing fictitious invoices which weren't justified, and they had breached a level of trust which is implicit in the office of an attorney. An attorney is not just an attorney; an attorney is an officer of the court. And if an attorney accesses his trust account, his or her trust account without justification and without having raised an invoice or -- that is one of the worst breaches of trust. It's basically -- it's referred to euphemistically as misappropriation but it's basically professional theft and I believe that the courts should be very wary to guard the integrity of the legal profession. There are also disciplinary steps that are taken for example failure to answer correspondence. Failure to answer correspondence is a sign of disrespect by an attorney but it's -- to my mind it's not -- the sanction for that would -- should simply be a fine or a reprimand of some sort. So, there are various misdemeanours in the disciplinary process which may fall short of justifying a suspension or a striking off. It's -- I can answer the second question very, very easily because I'm speaking now from hard experience.

CJ M. Mogoeng: I'll appreciate that.

Ms T D Brenner: It's what you do. It's more what you do than who you know. As I say I come from a very modest background. My parents weren't connected with

people of influence; they were blue collar workers and I've got to the point where I am right now I think because primarily of what I do and not who I know.

Commissioner Mampuru: Thanks CJ.

CJ M. Mogoeng: Thank you Commissioner. Judge President Hlope?

JP Hlope: Thank you Chief Justice. Ms Brenner briefly, do you have any views on how indigenous African language is such as Setswana, Sesotho --

Ms T D Brenner: Yes.

JP Hlope: -- isiXhosa and so on can be developed so that ultimately they can be used in the courts in the same way as English is used to --

Ms T D Brenner: Yes.

JP Hlope: -- be as a language of record?

Ms T D Brenner: Yes.

JP Hlope: Thank you.

Ms T D Brenner: I firstly want to say that it is unacceptable for a South African, and I'm now speaking as a white South African. I was born in South Africa, I intend to die in South Africa. It's not acceptable for me not to have learnt a single black language. I accept that as the starting premise. I believe that steps -- that the dialogue that's been created by Commissioner Malema, excuse the pun, is actually very constructive because if you can -- two people can engage one another in the same language there's a commonality there; there's a coming together; there's unity and diversity as mentioned in the preamble to the constitution. And I believe that the failure of a lot of white people in this country, to learn a black language comes from the racist apartheid heritage, it most definitely does and attached to that this arrogance of white supremacy. And if we are -- if white people are committed to this

country I see absolutely no reason why they shouldn't try to learn a black language and the same principle should actually apply to all South Africans. So, in other words a person who speaks Setswana should maybe try and learn Sepedi or someone who speaks isiXhosa should -- well, that's close to Zulu, you know, should maybe consider learning Tsonga. But definitely communication in one language will do a lot towards creating a level of goodwill between the citizens of this country. There is also chapter nine institution in the constitution which is a commission for the protection of religion and linguistic skills. Maybe that commission would be a useful starting point to get the dialogue going. I really think that we should engage one another a lot more and get a profile out there about speaking one another's languages.

CJ M. Mogoeng: She hasn't answered your question?

JP Hlope: She has.

CJ M. Mogoeng: Okay, alright. Commissioner Norman?

Commissioner Norman: Thank you Chief Justice. Good morning Ms Brenner.

Ms T D Brenner: Good morning.

Commissioner Norman: From the period -- the period 1991 to 2002 when you were with the Feinsteins doing -- specialising in commercial litigation am I right?

Ms T D Brenner: Yes, that's correct.

Commissioner Norman: That's the period that you were with them.

Ms T D Brenner: That's correct.

Commissioner Norman: Did you during that period brief any black counsel?

Ms T D Brenner: No. Other than Nazeer Kassiem.

Commissioner Norman: Yes.

Ms T D Brenner: And the reason was although I was a director I held a nominal share, one share in that business.

Commissioner Norman: No, no. That is not what we're interested in.

Ms T D Brenner: I had no jurisdiction over who to brief.

Commissioner Norman: Okay.

Ms T D Brenner: My boss Ivan Levy, he was an autocrat and he would call me into his office and he would tell me in no uncertain terms you are briefing so and so.

Commissioner Norman: Yes. But you managed to brief Nazeer Kassiem?

Ms T D Brenner: Yes. Well, that was with Ivan Levy's input.

Commissioner Norman: Now, then the second question is in the matters that are listed in paragraph nine of your application which you have listed as matters where you were the instructing attorney which you regard as very important matters; did you in any of those matters brief black counsel?

Ms T D Brenner: What page are we on Commissioner?

Commissioner Norman: Sorry. I'm using the electronic version of your -- sorry, I'll just go up to the top. I'll tell you now. Page 52 of the paginated ...

Ms T D Brenner: My page 52 is one of my judgements.

Commissioner Norman: No. I'll get to it. Sorry, it just jumps, this thing.

Ms T D Brenner: Is it the actual application Commissioner?

Commissioner Norman: No. You -- yes, you've analysed the cases that are of importance and those that you had written and you then listed about ten cases which -- it starts from page -- thank you very much Commissioner Nkosi, from page seven. Sorry, I'm using the paginated bundle. From page seven. Thank you.

Ms T D Brenner: Okay. (Inaudible 00:33:18).

Commissioner Norman: It's going under paragraph 6.3.1.

Ms T D Brenner: Yes. (Inaudible 00:33:22) versus Minister of Home Affairs. No, the short answer is no black counsel were used.

Commissioner Norman: Thank you very much. Thank you Chief Justice.

Ms T D Brenner: No council were used.

Commissioner Norman: Thank you.

Ms T D Brenner: And most of these cases were during -- well, (inaudible 00:33:34) was when I was at Melamed & Hurwitz and they decided who to brief --

Commissioner Norman: Thank you.

Ms T D Brenner: -- and then Appleton onwards --

Commissioner Norman: No, you've answered me Ms Brenner. Thank you, I've got the answer. Thank you.

Ms T D Brenner: -- I was at Feinsteins.

Commissioner Norman: Thank you very much.

CJ M. Mogoeng: Ms Brenner do you want to reconsider the reference to your former employer as an autocrat or are you comfortable with that terminology? You don't have to I'm just wondering if you're comfortable.

Ms T D Brenner: Chief Justice several council would say to me that my boss ran a quasi-military operation.

CJ M. Mogoeng: Alright, okay. Commissioner Msomi?

Commissioner Msomi: Thank you CJ. Ms Brenner we -- there are six vacancies in Gauteng and there are ten people who have been shortlisted. Why should we give you a nod?

Ms T D Brenner: Because I've been -- I've got 78 weeks under my belt. My track record with writing judgements is relatively good getting them out timeously. The quality of the judgements would appear from feedback that I get from petitions that are dismissed at the supreme court of appeal; they appear to be of calibre. There is one matter where leave to appeal was granted to the full bench so that may still possibly be reversed but most importantly I've been hands-on in practice for 30 years including my articles. I've been on the cutting edge. I've been interacting with human beings particularly since I started my own practice; I didn't attract major work from large companies. I practice from home and I did work for the man in the street really and in a lot of instances it was pro bono; in a lot of cases if the client ran out of money I would see the case through to its logical conclusion. I went to Grahamstown the other day in a matter where the father hadn't seen his son for four years and for two years I had acted for him on a pro bono basis. I also have a wealth of experience so I'm an attorney, a notary and a conveyancer. I've run a conveyancing practice and I have been exposed to all different types of cases. I've dealt with a copyright case; I dealt with a case involving WK Hess and Aggliotti that was a matter involving fraud. I assisted the prosecution with preparing the papers for the criminal case and I was involved in the ultimate arbitration there; I've been exposed to labour law where section 197 was pronounced upon. I dealt with the spontaneous combustion issue in the control chemicals case. FHP and (inaudible 00:37:14) dealt with the voidability of a sale agreement where not all of the trustees

have signed a resolution to authorise the purchase of the property. Securefin and KPMG was a matter of great magnitude; it involved \$40 million US dollars. These were all at Feinsteins and then I have also done a lot of insolvency practice. So, --

Commissioner Msomi: You are more than qualified.

Ms T D Brenner: I have -- I've had a lot of exposure to a lot of fields of law and I've embraced that. So, for example trade mark law; I didn't know too much about it but Judge Kollapen asked me last year could I take an opposed motion involving trademarks and it was a pleasure for me to put myself on a learning curve and learn about trademarks. So, --

Commissioner Msomi: Now on the divide between what commentators and those who are in the know refer to as judicial activism vis-à-vis judicial restraint, on which line do you stand and why?

Ms T D Brenner: To my mind an example of justifiable judicial activism would be the recent example of what happened in the Cape High Court where two judges who had heard criminal reviews which had come from the magistrate's courts in Caledon and Montague and two other courts, noticed that there had been an inordinate delay in the prosecution of those reviews. In terms of section 304 of the criminal procedure act certain judgements of magistrates must be sent on review to a high court judge within seven days and these judges in the Cape High Court had actually observed that those judgements -- that the reviews were not being sent timeously and some of them were only being sent two years down the line. And they made an order directing the magistrates to give them a list of all the outstanding reviews. That to my mind is -- it's constitutional because it's a case of access to justice being denied to the people against whom those judgements are granted; the conviction and sentence. But where judicial restraint -- and also judicial activism is sanctioned in the constitution. The constitution of course is the supreme courts of the land and the constitution empowers a court; it gives a high court inherent jurisdiction and the -- in terms of section 173 and then a power in terms of section 172 to declare a particular section of a statute or a statute in its entirety to be unconstitutional subject to subsequent sanction by parliament or by the constitutional

court. So, there there is a level of ability for some activism to take place but all of that activism is re-activism as well because the case has got to come before the judge. The judges aren't -- can't go around looking for cases to handle. The dispute must come before the judge and then the judge has those powers under the constitution. As far as judicial restraint is concerned I've -- what's become quite topical is that that recent decision in the DA, the DA decision versus the President of the Republic of South Africa, it was an urgent review that was brought and certain -- an order was granted that the record of proceedings giving rise to the firing of the Minister of Finance and his Deputy and the reasons should be given. That decision is moot and I think ultimately it's going to land up in the constitutional court because there is a perception that that judgement may have constituted judicial overreach. But ultimately it's going to depend entirely on the constitutional court I would say to delineate circumstances under which judicial overreach is not sanctioned -- well, in circumstances in which there has been judicial overreach. The separation of powers doctrine is not an absolute doctrine and it's a good reason, there's a good reason behind that and that's because of the necessity for checks and balances because each organ of state that's the legislature, the parliament and the judiciary has to be reminded of the parameters of its powers. So, the --

CJ M. Mogoeng: Commissioner, it's always open to you to indicate if you've been answered for the sake of progress.

Commissioner Msomi: Yes, I've been answered.

CJ M. Mogoeng: But if you still need more answers obviously you are in charge of that leg of the interview.

Commissioner Msomi: No, no. I'm happy. I've been answered. I mean perhaps on a lighter note you have spoken about autocrats and quasi-military operations. Are you a quitter; do you stand up to tyranny and autocrats? Thank you.

Ms T D Brenner: I think it was insensitive of me to call my previous mentor and boss an autocrat. I don't think it's very constructive. It's ...

Commissioner Msomi: CJ?

Ms T D Brenner: I apologise for that. I actually apologise for that.

CJ M. Mogoeng: Commissioner Malema?

Commissioner Malema: Thank you very much CJ.

Ms T D Brenner: Yes, Commissioner I believe we share the same birth month. Well that's at least something we've got in common.

Commissioner Malema: Okay. No, thanks CJ I don't have any further questions.

CJ M. Mogoeng: Commissioner Schmidt?

Ms T D Brenner: *[Speaking Zulu]*. No, water. *[Speaking Zulu]*.

CJ M. Mogoeng: *[Speaking Zulu]*. Commissioner Schmidt?

Commissioner Schmidt: Thank you Mr Chair. I'd like to know why Mr Malema isn't asking his questions but if you could page to page two of your nomination form, paragraph six. You indicate a number of firms for which you worked in the past. I count six. With rapid periods of two years indicating your article clerkship, then approximate one year thereafter at Melamed and another one year thereafter with another eleven years where you apparently became a director and then despite those time periods, and I would like to ask why the short time period before you switch firms? The second question relates to why would you as a director of Feinsteins Attorneys, which you worked eleven years, then go to Stan Faranoff as a professional assistant? It does raise some questions which I think deserve some answers. Thank you.

Ms T D Brenner: Yes. I accept that it appears to show a level of instability however it was more a question of opportunities. At the first firm I specialised in personal injury law. I moved to Melamed & Hurwitz because I was -- I felt as -- that I wasn't being

stimulated sufficiently so -- because basically I was primarily dealing with personal injury cases. At Melamed & Hurwitz I came to learn a lot more about magistrate's court litigation during the course of which I made a lot of appearances in the magistrate's courts. And then a friend of mine who used to work at Melamed & Hurwitz moved to Miller Ziman and phoned me and basically head hunted me and said to me I'll get even better exposure because Miller Ziman was specialising in high court litigation. And then I decided to move to Feinsteins because I was offered a partnership at Miller Ziman but one of the requirements of becoming a partner was that I should sign surety for the overdraft and I wasn't willing to stay in surety for the overdraft of the practice. And so then at Feinsteins it was a lengthy period of time and I moved to Stan Fanaroff because I felt that I needed to have a little bit more latitude in the way in which I ran the practice and so that's why I went to Stan Fanaroff and then I left because I had the confidence to work -- start working on my own.

Commissioner Schmidt: I think you've answered basically the just of my question. The only outstanding issue seems to be the strange move from being a director to firm to becoming a professional assistant.

Ms T D Brenner: Commissioner, I was a director in name only. I had no say in that practice; none whatsoever.

Commissioner Schmidt: Thank you Chief Justice.

CJ M. Mogoeng: Thank you Commissioner Schmidt. Professor Ntlama?

Professor Ntlama: Thank you CJ and good morning colleagues. *[Speaking Zulu]*.

Ms T D Brenner: *[Speaking Zulu]*.

Professor Ntlama: Okay.

Ms T D Brenner: *[Speaking Zulu]*?

Professor Ntlama: Alright -- oh. *[Speaking Zulu]*.

Ms T D Brenner: *[Speaking Zulu]*.

CJ M. Mogoeng: I'm just wondering what the language of record is going to be.

Professor Ntlama: Okay, be that as it may. Good morning Ms Brenner.

Ms T D Brenner: Good morning Commissioner.

Professor Ntlama: Okay. One of the responses from the law bodies is that your gender will refract the gender representation of the judiciary other than your racial composition. Let's forget about that but as a woman what value will you bring to the judiciary? Let's forget about your race; let's forget about your gender but as a woman what value will you bring to the judiciary? Secondly, in your paragraph ten of your questionnaire you made reference to your diverse experience and in relation to that you also noted that in respect of these other fields that what gives you an oomph in relation to your contribution to the field. My question is the question that was asked about the JP you made mention of the fact that you are familiar with the constitution. So, in the 71 weeks that you have been at the acting judge how is that familiarity vis-à-vis the application that the judges are required by the constitution to apply constitutional law in the respective areas in which you have been exposed to; how do you strike a balance between familiarity and the requirement to actually apply the constitution in the fields in which you have been exposed or you are experienced? Thank you.

Ms T D Brenner: Okay. As a woman I -- and yes, as a woman I have done a lot of divorce work; I've practiced a lot of family dispute law so I am in a position to identify with situations where woman seek the comfort of the court in regard to aspects of maintenance, care, guardianship and in relation to divorce matters. So, as a woman I would -- am I not answering the question?

Professor Ntlama: Can we interfere on that one?

CJ M. Mogoeng: Yes.

Professor Ntlama: Okay. I just wanted just your personal qualities as a woman.

Ms T D Brenner: My personal qualities?

Professor Ntlama: Yes, not your --

Ms T D Brenner: Okay.

Professor Ntlama: -- technical abilities.

Ms T D Brenner: Oh, I see. My ability to interact with any person from any walk of life. I was learnt very -- I was taught very, very -- at a very young age to respect everybody and that's the creed that I've lived by all my life; and empathy, empathy for people and because my practice, my own practice has been one which attracts people with their own personal predicaments. I'm in a better position to empathise with them and to understand their position and these are people who as I say are people of all -- of different races, different religions, different sexual persuasions, across the board. Really, I have worked with so -- people from so many different areas, arenas in life and from a different economic strata as well. Did that answer ...

Professor Ntlama: (Inaudible 00:53:50).

Ms T D Brenner: My familiarity with the constitution came to the fore as an acting judge and that goes back to 2004 when section 35 was implemented in several of the criminal trials that I handled. And then more recently an unopposed motion court invariably one will see foreclosure applications which have to comply with the provisions of section 20(60) linked with the right to housing. I also in rule -- in an opposed rule 43 application the other day had occasion to refer to section 28 concerning the rights of children being paramount and then in the urgent court a few days ago there were two matters where PAJA was brought up and a debate was raised as to whether PAJA's -- whether in a review of an administrative action PAJA needs to be employed to the exclusion of the -- a review based on legality so that

argument came before me as well. I'm also familiar with the constitution in so far as the separation of powers is concerned. The constitution itself doesn't actually spell out that there are -- there's a separation of powers but there are sections in the constitution which actually specifically delineate what powers the legislature has; what powers parliament has and what powers the judiciary have. That's basically the -- what I can say about constitutional law and access to justice. That's another aspect that I have carried through for my entire practicing career. Access to justice; helping people who are indigent and who cannot afford legal fees to solve their problems and I've done a miscellany of different types of cases in regard to that kind of work.

CJ M. Mogoeng: Do you want another question the third one Prof? I must say as you are asking for it --

Professor Ntlama: Just a rephrase.

Ms T D Brenner: No, let me finish please.

Professor Ntlama: Sorry.

CJ M. Mogoeng: I have three more colleagues and we're beyond by 15 minutes already. Yes, Prof?

Professor Ntlama: I just need a rephrase CJ because you said that it's only when she acted --

CJ M. Mogoeng: Now put it to her in the interest of time.

Professor Ntlama: Okay. Your earlier response on constitutional law you said it's only when you started acting so I wanted to find out whether your long years before you acted where the constitution had never ever come to your doorstep of which you rephrased it with your last response. Thank you.

Ms T D Brenner: It -- I never had an opportunity to deal with any constitutional jurisprudence before I became an acting judge and I regret that but it's unfortunately the way it worked.

Professor Ntlama: Thank you Prof. Commissioner Fourie?

Commissioner Fourie: Thank you Chief Justice. Morning Ms Brenner.

Ms T D Brenner: Good morning Commissioner.

Commissioner Fourie: In the interest of time I will be brief. When you were last interviewed here in October of 2012, that's about five years ago you were a sole practitioner.

CJ M. Mogoeng: I think -- bring it a bit closer Commissioner. I suspect some might find it a bit difficult to hear you.

Commissioner Fourie: Sorry, I'll repeat. When you were last here in October of 2012 you were a sole practitioner, according to your questionnaire and CV you are still a sole practitioner.

Ms T D Brenner: Yes.

Commissioner Fourie: Now since you were last here I see that there's been a break of roughly four years where you were not acting; that's according to the document that was distributed to us this morning. And you've been acting again basically since October of 2016 for a period of 28 weeks so that's roughly seven months. Now when you were here in 2012 I took you to task as to how you managed your practice --

Ms T D Brenner: Yes.

Commissioner Fourie: -- being a sole practitioner --

Ms T D Brenner: I remember that, yes.

Commissioner Fourie: -- and spending all that time on the bench. Your answer at that time was that you had to keep your practice afloat and that you had to deal with your practice after hours and early in the morning. In fact your question was -- your answer was I had to do that; I had no option. I had to pay attention to both functions simultaneously. As a sole proprietor I had no other option. I could not delegate the work to anybody else. When you were inter alia referred to the provisions of section eleven you indicated that you were not aware of it. Now my question is since October 2016 for a period of about seven months still being a sole proprietor how have you this time around dealt with that?

Ms T D Brenner: Commissioner I've addressed all of the issues that were raised at my last interview. Firstly, when I acted, I engaged a locum and I actually started acting again in April 2016 so from April 2016 until recently I was acting. In the period 18 April to 20 May 2016 I engaged a locum then in the period from October onwards I had engaged a candidate attorney who became an admitted attorney in October 2016 and so she helped to run the practice. And one thing I can assure you of in no uncertain terms, and my books are open for this exercise, I never earned one cent during that period of time. Not one cent.

Commissioner Fourie: Thank you Chief Justice. Thank you Ms Brenner.

Ms T D Brenner: I just might mention that I can't find a counterpart to section eleven in the superior court act but that doesn't derogate from what I've just told you Commissioner.

Commissioner Fourie: Thank you.

President Maya: Commissioner Mpofu?

Commissioner Mpofu: Thank you very much President. Good morning Ms Brenner.

Ms T D Brenner: Yes, good morning Commissioner.

Commissioner Mpofu: Yes. Unfortunately for you I was born in September and not in March so I'm going to ask you questions. My first one is on language. The -- you were asked a question about language which I'm not sure if you understood but -- or be that as it may I think the question really is this; and I don't want to make a long preamble but I'll simply say this: Afrikaans in South Africa is of the official languages, it's the youngest language. It was only developed, and I've consulted some good authorities here next to me, probably in the late 1800s, early 1900s even then it was still diluted. But nevertheless within 50 years of its existence there were text books in it, there were medical text books, there were mathematics books, legal books and all sorts of things and that was because of deliberate intervention by the state and other agencies. Now given that history that we have what in your view, bringing it back now, back to our profession, what in your view can be done in the short-term, in the immediate term and in the long-term to develop the indigenous languages to such an extent that A, you are quite right, people must learn the language and so on for social purposes but that we should have these languages being used as language of record where there's written material and even bring -- being able to teach law in those languages. Obviously that's a broader question of access to justice and all that but what can be done practically to ensure that this happens in the shortest period of time?

Ms T D Brenner: That's a very interesting question Commissioner. I think it must start with the government. I think government needs to become aware of the importance of recognising our eleven official languages. And it's of cultural significance once again going back to that precept; united in our diversity. We must embrace diversity and we must embrace the different cultures because that makes us the rich nation that we are today. From my point of view maybe getting a voice out there, agitating for it but I think ultimately maybe it would be better for an act of parliament to be enacted which makes provision for the compulsory use of certain languages in certain areas. So, for example in Limpopo Sepedi would be spoken or maybe Venda and Tsonga and maybe at a provincial level; at the subordinate legislative level it could also be considered. But once again I think it's a question of dialogue and getting the word out there that it's not acceptable not to know an indigenous language, it really isn't. And as we speak if anybody's interested I will

meet them for a cup of coffee in six months' time and I promise you this, irrespective of the outcome of this interview, I will be speaking fluent Zulu.

Commissioner Mpofu: Ja. No, thank you. That's commendable. What I really want to know is what should be done in the legal field practically; like tomorrow what should we do first to ensure that one day the indigenous languages in South Africa can be used as -- in court just on the same basis as English and what was happening to Afrikaans. What should you do? You've sat in the criminal courts where this problem is probably most acutely visible. What can be done; what can we do starting next week to ensure that legal concepts are translated whatever needs to be done so that one day we reach that point?

Ms T D Brenner: Is this from a judicial point of view Commissioner?

Commissioner Mpofu: That's why I'm saying I'm confining it to our profession.

Ms T D Brenner: Yes.

Commissioner Mpofu: Ja.

Ms T D Brenner: Because it would be judicial overreach for a court to just mero motu make the decision. Some parties would need to come to the court and the court would then be empowered to adjudicate the dispute. Perhaps in -- by a way of a mechanism of a declarator. I can't think of any other solutions Commissioner.

Commissioner Mpofu: Okay.

Ms T D Brenner: Maybe you can --

Commissioner Mpofu: Thank you. Alright, thank you very much.

Ms T D Brenner: -- assist.

Commissioner Mpofu: Ja, that's fine. Alright, the second issue was -- is about briefing patterns. I know you've withdrawn the kind of strong language but whatever language you use why did you stay in a place where there were signs of not giving you the space and effectively you're being dictated to -- as to how you practice law and even with an element of racism from being prevented from briefing black people and so on? Wasn't it your duty to leave a place like that rather than stick around if, you know, whether we'll use your descriptive words or others but it was clearly a place where your professional latitude was being restricted?

Ms T D Brenner: Commissioner, I thoroughly enjoyed the calibre of work that the practice was attracting and it kept me incredibly busy so much so that I would be in the office at 05:00 in the morning and I would leave the office very -- 6, 7 o'clock at night; work on Saturdays and Sundays, most Sundays and I wanted to be kept busy and I wanted to learn as much as I possibly could. So, it put me on a learning curve and the learning curve went in an exponential direction and then after ten years I decided to call it a day?

Commissioner Mpofu: Thank you very much. Thank you CJ.

CJ M. Mogoeng: Thank you Commissioner Mpofu. Commissioner Cane?

Commissioner Cane: Thank you very much Chief Justice. Ms Brenner, my question relates to Commissioner Mpofu's question and it's this concern about whether you can hold your own as a woman. Now most of the issues raised in October 2012 have been addressed. There was one point during your interview where you were asked something about your body shape. Now if you were faced with that kind of question from anybody, even if they're an authority today what would your reaction be?

Ms T D Brenner: My body shape has got toto caelo nothing whatsoever to do with my aptitude.

Commissioner Mpofu: Thank you. Thank you.

CJ M. Mogoeng: Thank you very much Ms Brenner, you're excused.

Ms T D Brenner: Oh, thank you Chief Justice.