



**Judicial Service Commission Interviews**

**1 February 2022**

**5 Chief Justice Interviews**

**Interview of Justice Mbuyiseli Madlanga**

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**Justice Petse:**

**15 Good morning, Justice Madlanga.**

**Justice Madlanga:**

Good morning, President Petse, Chair.

**20 Justice Petse:**

Are you well this morning?

**Justice Madlanga:**

I am, thank you very much, President. Deputy President. Did I say President earlier?

**25**

**Justice Petse:**

Yes, you did.

**Justice Madlanga:**

I don't think it's bad to promote you but, Deputy President.

5 **Justice Petse:**

Thank you. I will afford you a few minutes to settle down and please give me a signal when you are ready. Then we will commence with the interview.

**Justice Madlanga:**

10 I am ready, Deputy President.

**Justice Petse:**

Thank you, Justice Madlanga.

15 **Justice Madlanga:**

Thank you.

**Justice Petse:**

20 Could we, first and foremost establish your true identity when the programme for today was prepared, I observed that your initials were M.R.W and when I queried that with the secretariat, before I had sight of the papers, I was told that the source of that was your curriculum vitae.

**Justice Madlanga:**

25 The W is one of my given names, Deputy President, but I discarded it in my ID, but I guess out of what, respect for my late father, we used to have a joke at home that he would give us names, the first name of a white person and that white person's surname. Like, fine I have my Xhosa name Mbuyiseli but then he also gave me the names Russel Wilberforce. And the firstborn at home is Faith Rosalind, then there is  
30 Windsor Winifred, Parksley Farewell and so on. So, we had that joke about first name and surname about white people.

**Justice Petse:**

Thank you, Justice Madlanga. I hope that the office of the Chief Justice has taken note of that and they should then convey that information to [inaudible – 0.15.19] Thank  
5 you. Could you please take a few seconds, look around this table and see if you know most, if not all, of the members of the Commission here present.

**Justice Madlanga:**

I've seen the faces; I don't really watch but I will sometimes have glimpses of the  
10 interviews. I have seen some of the faces but definitely do know some of the people of the Commissioners, I'm sorry. And I know some of them very well. And I'm sure that some of them are going to do what one of my teachers used to caution against when we, I am sorry to waste your time, Deputy President. When we were debating at Mariussel High School, and then when you came after your opponent, Sister  
15 Bernadette would say "moenie wraak neem nie, moenie wraak neem nie" which means don't revenge yourself against your opponent. So, I'm sure some of the Commissioners here will want to do that. And may I request the two at the corner please not to do that.

20 **Justice Petse:**

Thank you, Justice Madlanga. Speaking for myself, I have to declare that I have known you for some, I think, forty years.

**Justice Madlanga:**

25 That's a very long time.

**Justice Petse:**

And my first encounter with you was in the Mthatha Magistrate's Court where I  
30 appeared in a matter as the defense attorney were prosecuting and the presiding Magistrate Mr Houston Barnes, rebuked me for addressing you as my learned friend. And when I asked him why, his retort was that he is not learned. You must not address him as learned friend.

**Justice Madlanga:**

I remember that, Deputy President.

**Justice Petse:**

- 5 First and foremost, I want to mention that you are first of the four candidates nominated by the President of the Republic of South Africa in accordance with the dictates of the Constitution. We welcome you to the session of the JSC.

**Justice Madlanga:**

- 10 Thank you very much, Deputy President.

**Justice Petse:**

- 15 And we are tasked with the onerous duty and responsibility to interview you and the other candidates with a view to advising the President as to who he would consider to be eminently suitable for the vacant position of the Chief Justice.

**Justice Madlanga:**

Thank you.

- 20 **Justice Petse:**

You were born in 1962 and obviously by virtue of the position you hold, you are a South African citizen.

**Justice Madlanga:**

- 25 Yes, I am.

**Justice Petse:**

You are married with seven children?

**Justice Madlanga:**

Yes, Chair.

**Justice Petse:**

5 And you were appointed as a Justice of the Constitutional Court on 15 April 2013?

**Justice Madlanga:**

Although I took up office on the first of August 2013.

10 **Justice Petse:**

That's your official appointment?

**Justice Madlanga:**

That's the first initial date of assumption of office.

15

**Justice Petse:**

Thank you. And you have been a member of that court for eight years and ten months now.

20 **Justice Madlanga:**

Yes, Chair. No, this is the fifth month, I think.

**Justice Petse:**

25 Ok. Eight years, five months. Thank you. Section 176 (1) of the Constitution provides that and I quote "A Constitutional Court judge holds office for a non-renewable term of 12 years or until he or she attains the age of seventy, whichever occurs first". So, you have some three and half years before you reach the end of your term at the Constitutional Court.

**Justice Madlanga:**

I will accept that. I must say a case occurred was raised an issue that I also used to raise which is that maybe there is a possibility that I am entitled to a longer term. But I think there, isn't there an amendment to the Constitution that refers to the term  
5 being determined by heads of parliament because I think in the Act there is then a reference to twelve and fifteen years. The twelve years being in respect of judges appointed to the Constitutional Court having had the experience of at least three years. And then people without that experience being entitled to be at the Constitutional Court for fifteen years. I might be mistaken but that is my latest  
10 understanding. And it is on that basis then that there was a possible interpretation that because I was appointed directly from my practice as an advocate that my term could possibly be fifteen years. But on closer look, the possibility is that and that on textural level, the possibility is it could be the twelfth year. Sorry, the twelve-year period or twelve-year term in my case. Because I think the wording in a sense is  
15 neutral, a judge for three years, I had been a judge for five years before and then I resigned around May of twenty, 2001. So, short point after that long explanation. Short point is that I am willing to accept that six years, 3 months thereabout.

**Justice Petse:**

20 Thank you, Justice Madlanga. And when were you called to the bar and for how long did you remain as a practicing advocate.

**Justice Madlanga:**

1991 after serving a 6-month pupillage. I started in Mthatha at the bar in July 1991. I  
25 was not long at all at the bar. I was called to act to, at the Mthatha High Court in 1996 and then with effect from the 1<sup>st</sup> of September 1996 still, I was appointed permanently to that court.

**Justice Petse:**

30 Thank you. And apart from your practice, were you involved in any community work or took workshop of any of the lawyer's organizations?

**Justice Madlanga:**

I've been a member virtually of all, leaving aside the organized bar, or so-called  
35 organized bar. I was first a member of the BLA and then I switched over to NADEL

and then I was a member of NADEL for the longest time. And I was also a member of Advocates For Transformation and I even joined this organized body on the ticket of advocates for transformation but of course under the umbrella of the General Council of the Bar.

5

**Justice Petse:**

Thank you. Have you delivered any papers at various universities at both in South Africa and abroad?

10 **Justice Madlanga:**

South Africa, have I? In South Africa, what I have done is to offer my services, to lecture law students and offering my services for free. I contacted, when I was on long leave in 2018, second half of 2018, I contacted Fort Hare University and Walter Sisulu University and made an offer to both of them to go and lecture. And both  
15 universities accepted and appointed me as a visiting Professor. And I lectured at Walter Sisulu university, thereafter went to Fort Hare. Yes, I have delivered papers at Universities in the USA but outside of universities I have delivered papers. Like for example, maybe more of what, it was a paper, which I even converted to an article at Judge's seminar. One of these seminars for judicial education and that one was,  
20 you probably have seen, the GCB's comment touches on it. In fact, they deal with it quite extensively. And in paragraph 8.6 they even copiously from that. And the title of that was a feminist perspective in what, I forget my own title now, but it was a feminist's approach to adjudicate the process. That's what the instance was.

25 **Justice Petse:**

Thank you. Have you received any awards from lawyer's organizations or any other bodies here or abroad?

**Justice Madlanga:**

30 No.

**Justice Petse:**

Before you were permanently appointed to the Constitutional Court, you had occasion to act there, when was that?

**Justice Madlanga:**

This was the second half of 2000 and the first half of 2001. So, it was a total of 4 terms which in court terms would have amounted to a year.

5

**Justice Petse:**

And apart from the exponential workload of the Constitutional Court, have there been any major changes to speak of in relation to the practices and conventions that had been in place at the ConCourt 2000, 2001 when you had been permanently appointed in that court in 2013.

10

**Justice Madlanga:**

Two that readily come to mind, I do not remember, but I might be wrong, I do not remember that we did duty, I think the President and this was before the Chief Justiceship was transferred from the Supreme Court of Appeal to the Constitutional Court. I think the President, President Chaskalson did, basically did duty and would make the initial recommendations on what we should do with a new application. Do we set it down, do we dismiss outright, do we call for written submissions by way of directions and all that. And then we would come in at the stage, and as you have Acted at the Constitutional Court that's not how we handle new applications. Everybody with the exception of the Chief Justice does a duty. Then another one that I remember readily is, I'm sorry, we would go to conference to discuss how we saw a case immediately after argument. Again, as you are aware as your Acting seated at the Constitutional Court, you know that is no longer the case that we do now. The allocated scribe will, or has seven days within which to prepare a post hearing note which is circulated to all colleagues and colleagues must in turn comment on it within seven days. Those are the two that I remember at the top of my head. There may well be others. I have forgotten now if they are.

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30 **Justice Petse:**

Thank you. Justice Madlanga, I do not propose to take you to your judgements because I believe that your record speaks for itself. Unless of course you want to dispute that statement.

35 **Justice Madlanga:**

Let me take the credit President, Deputy President. Thank you.

**Justice Petse:**

5 Section 176 (3) of the Constitution allows that the salaries and benefits of judges may not be reduced. And there is a sentiment out there that if you do not raise the salary of judges incrementally, given the averages of inflation, this is an effect tantamount to reducing their salaries in each of Section 176 (3) thereby infringing on their independence. Do you have any thoughts on that topic that you can share with the committee?

10

**Justice Madlanga:**

15 It is not a subject that I have applied my mind to. I would imagine that as lawyers, my colleagues would have applied their minds thoroughly with it before I take a particular view, outside of the statement that you have put to me, I would prefer to first have sight of and assimilate the arguments on which this view is premised. So, I prefer to rather not go that way or the other way before I have Actually seen concrete arguments. But I am willing to accept, that colleagues have a basis for saying so. Otherwise I doubt they would be making that point.

20 **Justice Petse:**

I want to put a proposition to you that if the salaries of judges are not competitive, the judiciary is unlikely to attract the best amongst the lawyers to the bench. I'm not suggesting that the salaries of judges be comparative with those senior counsel command in private practice.

25

**Justice Madlanga:**

30 I will not argue against that at all, now you have added that right at the end because what you have cut across with that rider is exactly what I wanted to use to agree with that point. I wanted to say, the fees that are charged based on what I hear are quite high. I hear counsel can make R50,000 a day, R60,000 a day, R70,000 a day and maybe even more. R7,000, R5,000 and so on an hour but you put in the rider that that's not what you are talking about.

**Justice Petse:**

Thank you. Justice Madlanga, I do not wish to take up much time with you because all of the other members have questions too, to put to you. But there are topical issues that are already in the public domain. Some of which I would like to put to you, then invite you to tell us what you think of them, if anything should be done about those. I will give them to you all at the same time, if you can take note of them. Because the Constitutional Court has been under attack from certain borders about a host of things. Number 1, the extraordinary long delays in rendering judgements, the quality of the judgments, and some of the criticisms has not been charitable, namely in one instance, the person who was critiquing the judgements, said that it is a prickle of nonsense, some judgements are complete without incoherence and reasoning is all over the place. The other one is that the strong language used in the judgments. Either the main judgements or discerned or both which is viewed as being abrasive or combative, which is seen as reflecting adversely on the court. Perhaps I should just pause there, to afford you the opportunity to respond.

15

**Justice Madlanga:**

I have Actually prepared a long note on the delays. It would take a very long time for me to go through it. That would probably test the patience of the Commissioners but maybe let me just try to summarize what I see or understand to be the cause for delays. Let me just quickly some statistics that I have here, Chair. May the Commissioners please bear with me.

**Justice Petse:**

Please take your time, Justice Madlanga.

25

**Justice Madlanga:**

Thank you. I will rattle them off the top of my head, I can't find them now but for a long time from about 2009 and 2009 is a signpost because that is a time of the working procedures of the Constitutional Court were last refined. Around the time and even beyond up to 2013, new applications have reached 100, just over 100 in total. Then came with effect from 23 August 2013, a Constitutional amendment which afforded the Constitutional Court what we loosely called the general jurisdiction. The effect of which was that the Constitutional Court no longer adjudicates only Constitutional matters. As you know chair, it now even adjudicates matters of arguable points of law and general public important. It was to be expected that there would be a sudden deluge of applications. Indeed, there was an increase in 2013 already that is the year of the amendment but that year, the increase was

modest and it is understandable why because we were already in August and not much of the year was left still to run. And then in, so I think the figure was in the hundreds, but upper hundreds. And then in 2014 the figure shot up well over 200. And then since 2015 to today, new applications are averaging well over 300. Last year they were 394, so in no time we may get more than 400 new applications. To somebody sitting here, that may sound like a very small figure. Based on how the Constitutional Court works, that is Actually a very large figure. And this is a function of the Constitution how because how the Constitution is structured or how it provides. The Constitutional Court, unlike the Supreme Court of Appeal for example cannot decide cases in panels. At the Supreme Court of Appeal, two judges can dispose applications with leave to appeal without colleagues ever having sight of the application. At the Constitutional Court, because the court is Constitutionally defined to be eleven justices, subject to a column of eight, all eleven justices or at least eight must participate in every decision that the Constitutional Court takes. That means that each and every one of us must bring his or her mind to bear, to each one of the 393 applications that we received last year. That is the one thing and then added to that is how we used to work, or how we used to do applications, as you know from your time there, Chair. We used to have the duty week system. In terms of that duty week system, two judges would be on duty for a whole week. Those two judges would be the first port of call for new applications. If four applications come in that week, they split them in the middle or if an odd number comes in, the judge who took the first matter will get more matters, as a third matter for her or him. As a disadvantage in this, in fact at least two disadvantages, the first was that the weeks was hardly ever the same. In one week, there could and in fact there were far more applications than the following week. Let me be anecdotal and just give an example of one very unfortunate colleague Justice Mhlanga. I forget who she was paired with on both weeks, I am going to touch on the second week. She and her partner got something like 22 applications in one week. Then other colleagues came in and then after a few weeks she was back on duty again, she got another twenty something applications. Again, I forget who her duty partner was. Now the problem with the duty system was that there would be a deluge of applications all coming in at the same time. That had the effect of bogging you down, slowing you down in being able to deal with them expeditiously. That then a knock-on effect of everything that you do. In the same way that I explained about the decisions that we have to take and my focus of course being on your applications. With judgements as well, I earlier mentioned that the post hearing note that I said you are aware of. A scribing chamber will circulate a post hearing note on a judgement. A post hearing note Commissioners if I must explain, being just a summary by the allocated scribe of the approach that the scribe proposes to take in a particular manner, giving reasons why. As I said, colleagues must comment on that, so you have this deluge, and then down the line also, after 14 days from the deadline for comments, that colleague must then

circulate a draft judgement. So, you have a deluge of applications, but time has not stopped for you to have to comment on other colleagues on post hearing notes. And remember there are 11 of us, you must comment on 11 post hearing notes that are in circulation. And as drafts come in, draft judgments, you must comment on 10 by the way because you have your own. You must comment on 10 draft judgements and as I try to emphasize, you have this deluge of applications that has come in at the same time. That had a very negative impact on how we work. Did we throw our hands up in a volition manner [inaudible – 0.47.51] no we did not. Last year, in the second half of last year, a decision was taken by conference about we should do with this. Maybe I should just add that this, the knock-on effect on all this was judgements would be delayed because come the deadlines because there are set deadlines in the working procedures. 7 days for a post hearing note, 14 days for the first draft or 7 for comments on the post hearing note and 14 for the next draft and its always 7 days for comments on whatever. Now, the effect of that would be, come the deadline, colleagues would ask for extensions and extensions and that delayed the process. But as I said we didn't throw our hands up in the air. In the second half of last year, a decision was taken by conference. I'm sorry. Or that we should revise our working procedures. I was in the fortunate position of being one of the colleagues. The 2 colleagues chosen to perform that task. And the other Justice I was paired with was Acting Dhaya Pillay. We have produced a document and I must acknowledge the assistance of our law clerks in particular I want to single our Sarah Goldman who did a wonderful job on it. On what we came up with, we have not circulated the full document to colleagues when Justice Pillay left a couple of weeks back, we were still in the process of finalizing the document. I hope to have the document circulated. Maybe during the course of February but here is something I consider important which we did. One of the suggestions that we have put forward in the working documents is to do away with the duty week system. And because we identified the duty week system to be at the center of our problems. We took our suggestion which was suggesting to court to do away with the duty week system. We took it away from the rest of the document and fortunately the colleagues accepted it and we implemented it immediately. It took effect from 5 December 2021. How does this cycle system work? We list all the names of all the judges on there with the exception of the Acting Chief Justice and the first case that comes in is taken by the judge who is first on the list. And then the second one by the second judge and then so on until you get to the end. The effect of that is, one there is even distribution of new applications and two there isn't the problem of the deluge of applications that are coming in at the same time with the result of bogging you down. From the 5<sup>th</sup> of December to this day, I have received only 3 applications under the cycle system. One was now, a couple weeks in January. I have already finalized and circulated decisions on the first 2 that I received. That is a function of the very fact that you do not have that sudden deluge that just pins you down as it were. Now this is not just

about me, this is not just about me. I have spoken to my colleagues and asked them how they find the cycle system. They too say that it is quite a pleasure. It is a great improvement and how we are able today to finalize new applications.

5 **Justice Petse:**

Justice Madlanga, I have to interrupt you. The long and short of what you have just told the members of the Commission is that you have identified some of the factors that are contributing to the excessive delays that are experienced at the Constitutional Court and that you are in the process of putting measures in place to  
10 address or deal with those challenges.

**Justice Madlanga:**

Yes, yes. Now it's freeing up a lot of time. We will be able to attend much much quicker. To everything else that we have to, the comments on post hearing notes,  
15 the comments on draft judgements and so on. So much so that in the proposals, which to the extent that if there were something about a vision here. I would put that in as my vision. Of course, with my partner Judge Dhaya Pillay.

**Justice Petse:**

20 Could we perhaps deal with that?

**Justice Madlanga:**

Because your question was about judgements, let me perhaps just zoom in on that.

25 **Justice Petse:**

Yes.

**Justice Madlanga:**

30 So, with the freeing up on time, I believe that we are going to be able to deliver judgements much much quicker. I have a firm belief, a firm belief. The proposal has something concrete, but we are yet to put it to colleagues and that proposal is that we must deliver judgements, people who probably and perhaps Commissioners feel

that it is a very long time. We are putting down a proposal of 5 or 6 months for the delivery of judgements. We have done a comparison and this compares quite favourably with what happens in foreign jurisdictions. I would say that United Kingdom are outlier because there they deliver judgments within a few weeks after argument. That's an outlier. Some of the other comparators, in fact most of them those that we looked at, not know about those but those that we looked at was 6 months. And I am talking about apex courts of those other jurisdictions. So, five or six months, looking at what pertains internationally, do not think they were that bad as long as we do the best that we can to stick to that. And I believe that with the time being freed up it should be attainable.

**Justice Petse:**

Thank you, Justice Madlanga. Section 174 (2) of the Constitution provides that a need for the judiciary to reflect that broadly, the racial and gender composition of South Africa must be considered when appointed. And yet looking at the composition of the Constitutional Court, there is no white judge be it male or female. And the last appointment of a white judge was in 2009 or 12 years no white person has been appointed to the Constitutional Court, despite the fact that during that period, there has been about 7 vacancies. Would you want to weigh in?

20

**Justice Madlanga:**

I would throw that one back at this organizing body, Mr Chair. But more seriously, I think there is a point to be made about all of us as South Africans being made to feel that we all belong. So, I do not, speaking for myself, thinking that, maybe not put this in the negative, I think send a good signal if there could be an appointment from the sector of that community. But let me say this, Section 174 (2) is not so categorical, this is it. If there is X percentage of white people, then that is the representation that they should get at the various levels of the court. If there is that percentage of another, grouping even including outside of racial groupings or other possible groupings as well. LGBTQ+ and so on, the Constitution is not categorical in the sense that you just must have that kind of composition, but it is giving an indication that there must be an attempt at attaining that. And as I say, it would send a positive image to try as much as possible to go in that sort of direction. But as I say not to the extent of saying in the sense of it just has to be done. I would not go that far.

35

**Justice Petse:**

Justice Madlanga, we have now reached a stage where I must afford you half an hour to tell the members of this commission and the nation at large how you see the role of the Chief Justice in a Constitutional democracy and also share with us your vision of a functional, efficient, accountable and independent judiciary in South Africa.

5 Thank you.

**Justice Madlanga:**

Thank you, Chair. I must say you removed a chunk of what I had on here part of my vision which was the idea of dealing with what I consider to be the largest elephant  
10 in the room, which is what pertains to the Constitutional Court itself, so I was going to share there what I see as my vision. I believe I have already done so. What I also would also emphasized in the context of what I already debated in the context of new applications, what I would have emphasized was the fact that I think we now have a solution. Perhaps there could quite easily have been an impression out there  
15 that maybe we do not work hard enough. I had intended to dispel any such possible perception. I just wanted to, at a factual level, to make a point that we actually do work hard. In fact, very hard, and I even wanted to, anecdotally, share with the Commission that I was working on Christmas Day. I delivered a judgement on the 31<sup>st</sup> of December 2021. Those are the sort of times when people are having fun, when  
20 people are with their families, sharing time resting and again I want to emphasize this is not just about me, even though as a fact I wouldn't know when colleagues were working around this time, but I know that they were actually working. And I say this because there was a point in the festive season where my inbox, my email inbox had over 600 unopened emails from all my colleagues. So, the point I would have  
25 made was would be the reasons and I will try to zoom in on that. And I have shared my vision on addressing them and we have immediately effected part of it. May I also just again focus on the Constitutional Court. Say that one aspect that I feel conduces to a lot of injustice, which needs to be addressed is the problem of seating even numbers. I touched on the fact that the Constitution provides that decorum is a  
30 minimum of 8 judges. I remember when I acted at the Constitutional Court asking one of the colleagues, I forget who it was, why it is that the Constitution chose an even number for decorum and the colleagues felt that it was 9 was too high and that seven was too low. I am not sure that is a good enough reason because point is, in fact when I asked the question, I was not aware that the Constitutional Court was  
35 evenly split at that time. But the Commissioners sitting here, I'm sure you are aware that in recent times there have been quite a few times where we have been evenly tied. That is a very unfortunate outcome for litigants, because when you appeal, it is not just appealing for the sake of the appeal, you are Actually exercising a Constitutional right. Under the rebuke of a fair hearing, fair trial, you are also entitled  
40 to the right of appeal and now here's the injustice. Once we are evenly tied, the effect

of that is that the judgment appealed against stance. So, its as good as if you never appealed against all. So, it must be clear to everybody listening here that is an injustice. I want to approach the minister if appointed. I want to approach the minister to move that there be a Constitutional amendment and that we do away with decorum of 8 and that we decide it may be 7, it may be 8, I'm not that concerned  
5 what it should be but preferably 9 because 7 if we are a court of 11 justices. Maybe 7 indeed would be too low. I am quite comfortable of 9. But the even number just does not make sense for me. Then what adds to the problem, is that we ourselves outside of that minimum of 8 in terms of the Constitution, we ourselves do sit term  
10 and sitting term we have had 5/5 splits. Maybe that too would have to be addressed but unlike decorum it does not need a Constitutional amendment, it's something that could be dealt with in an ordinary Act of parliament. Or we ourselves could internally, could find a practical way of dealing with this for example in the late 90s, I also Acted in the Supreme Court of Appeal. I remember preparing very hard for my very first  
15 hearing at the Supreme Court of Appeal. And then 2 or so days before the hearing, Chief Justice Ismail Mohammed approached me and said his deputy had taken ill and was therefore not available to sit and so he asked me not to sit so that we were a panel of 5. So, that they could then sit as a panel of 3. Reluctantly, I had to say yes to that. So, because exactly you know, exactly because of that, at the SCA, they have  
20 that devised a practical way where there is no statutory or even Constitutional bar of problem. I think we too at a practical level, just do that. But I guess the issue is who do you take out and why out of 10 colleagues. But maybe we could just find a practical way, even rotating or whatever else. But perhaps the best would be an amendment to or rather a statutory amendment at whatever level. It might be at  
25 parliament, or might even be at the Constitution. And I would of course with regard to the decorum which requires Constitutional amendment request those members of parliament who sit here to support the movement and support that Constitutional amendment. Then, also there is the question of administrative functions of a Chief Justice, I must confess Chair, that I sitting outside of the leadership pf the court. I  
30 cannot claim to be aware of the functions that administrative functions of the Chief Justice outside of those that are Constitutional. Or even statutory in terms of the judicial service commission Act outside of those. I cannot claim to know what those are. But if appointed, I propose immediately to engage with other heads of court and the secretary general who is responsible for court administration called the office of  
35 the Chief Justice. The idea will be to establish the extent of the Chief Justice's involvement in administrative functions. In striking a balance between administrative and judicial functions, we must pay particular attention to the fact that first and foremost a Chief Justice is a judge, a jurist. As a judge and Constitutionally ordained head of the judiciary I believe that a Chief Justice must lead the judiciary from the  
40 front in terms of the creation of the country's worthy and lastly judice prudence. Depending on the nature of administrative functions that the Chief Justice currently

performs, one may have to look closely at them and see which ones if anyone may have to be relieved of. Of course, there are those that functions that are prescribed by the Constitution and other laws like the Judicial Services Act and the superior courts Act, the Chief Justice must and has no choice to perform those. I should not  
5 be misunderstood. I am not saying that outside of those that the Chief Justice must not perform administrative functions, what I am saying is that the Chief Justice must not be a super secretary general or a super director general. The office of the Chief Justice which is the office responsible for the administration of the judiciary is headed by the secretary general and my understanding is that, Me Sejosengwe has been  
10 performing a sterling job I might add. And as I understand for the past 3 or 4 years, CJ has had clean audits. All the more reason that a Chief Justice must not be a super secretary general but this does not mean that the Chief Justice must be in the dark to what is happening to regard to administration. There should be those necessary interactions between the Chief Justice and the secretary general. In the main, a Chief  
15 Justice must be a trendsetter in the creation of the country's juris prudence. That for me is the core function of a Chief Justice. That does not equate to the Chief Justice being in the dark. I've just made that point. A balance must be struck. Moving on, for a while now I have heard the idea of some court rules are no longer suited to today's circumstances. If appointed I will sit down with a thorough tooth comb, identify those  
20 rules and bring them to the attention of the rules board. Of course, this is not something that I can and will do alone. Because I am talking about rules in general, the uniform rules. There are even practice directives and so on, so I would definitely have to involve other heads of court in that process. I think of the example of rules, both in the magistrate courts and superior courts that require parties to have an  
25 address or service process on them within a specified limited radius from the seat of the court. Take the example of the poor self-representing person who lives in, and I am addressing your province Judge President Petse, take the example of a poor self-representing and I am taking the Northern Cape because it has the vastest land mass area in South Africa, at least that is my belief. Maybe Advocate Madonsela's province  
30 compares fairly but I think the Northern Cape has the largest vast land area. Take the example of a poor self-representing and who lives in Springbok, and lives in the Northern Cape and knows nobody in Kimberly where the seat of the High court is. Bear in mind that the distance between Springbok and Kimberly is between 780 kilometers. Where and how will that that poor person find an address within the  
35 stipulated radius. Also take Constitutional Court rule 1(3) that require the filing of 25 copies of all documents which include records which can be quite lengthy and very expensive to produce. What makes matters worse is that Rule 20(2)(h), says the lodging of electronic documents does not release the party concerned to lodge 25 hard copies. Rules, I had just taken out 2, but once it's done, one would be able to  
40 come up with many. But the point I want to highlight here is that rules of this nature are at odds with the right of access to court. But I must say that perhaps this and I

will qualify it shortly. This may be ameliorated by the roll out country wide of the court online system. The court online system was introduced by the heads of court at the instance of Chief Justice Mogoeng after he had observed its beneficial use elsewhere in the world. Heads of court decided to first run a pilot phase and Gauteng was chosen for that purpose. The system comprises 2 components which are called customer relationship management dynamics and the short that they use for that and I assure Commissioners it has nothing to do with the President of the country. They call it the CRM dynamics. The first component concerns what under the present system would be an interface with the registrars' offices, lodgment of papers, giving case numbers and so on. CRM now makes it possible to be done online. Now, the second component case lines is at the other end of the process that is what Actually happens in court, the documents that the judge will have before them. And what will also go into case lines as the hearing itself unfolds. And my understanding is that the pilot implementation at Gauteng took place under circumstances that were not the model circumstances that one would have wanted it to unfold. This is how it happened. Microsoft was engaged to set up the system and Microsoft with case lines that you can buy off the shelf. Is a system that's out there and readily available but the CRM dynamics as to be custom made and developed for a particular system, client. And that has just been finalized on my understanding and will again be run as part of the pilot project in Gauteng. But case lines, yes case lines, was implemented immediately after the license had been purchased. Now the problems were alluding to were because the system interface, you receive the documents everything on CRM dynamics. Then it has to interface with case lines, it had to be because you don't have the CRM dynamics. There had to be a lot of scanning scanning and so on. At huge expense for purposes of uploading to case lines. But Gauteng managed to get on top of that and they got it running. Now that CRM dynamics is ready tool interface and again the 2 will still run as a pilot in Gauteng but for a short time now. And there will be a roll out country wide but my understanding is that this will be a phased project. Not all at the same time. Phased because you need to see the support system whether the project is running smoothly. So an incoming Chief Justice will have to be on top of things, see how the process is running, make sure, or try to make sure that the phased in implementation is not delayed more than it should. I said there was something I was going to come back to shortly. So, when court online is fully operational, the idea is to be paperless. Of course, this will create problems of its own. A large number of South African population either does not have access to computers or is computer illiterate so the question remains as to how that Section of the population will be serviced. My understanding is that there will be kiosks at High courts to assist people who cannot upload documents to the system. There will also be a call center that will assist people over the phone. But Commissioners will see that if you are computer illiterate, there is nothing that somebody at the other end of a telephone, there is nothing they can do to help you. it takes us back to the

self-representing Springbok litigant who must travel to Kimberly to access the kiosks. If the litigant is computer illiterate but even an internet café close to home will be of assistance. All of this is a function of the situation in which South Africans find themselves. Deprived by the educational system, deprived by poverty so yes, the system is good, yes the system does have advantages but it will not be able to. At least not immediately., not even in the medium term. It will not be able to address these problems which are a function of disadvantage and deprivation. As I say, court online is definitely a welcomed innovation but in introducing it, it must be run in tandem with the interests of those who cannot access it. This is something that a new Chief Justice will have to look into closely. But as I say, there are certainly advantages and indeed comments from users have been quite positive. The judiciary is not only about superior courts, the magistrate is an integral part of it. I am aware that there are certain issues that the magistracy wants to be addressed. As I understand there are at least 2 issues that the magistracy is concerned about are its transfer from the department of justice to the, Minister, you will forgive me, I never know when to call it the department of justice and Constitutional development or department of justice and correctional services. And I am saying this because I have some references made to your one deputy that the CD is added whereas to you, the CD is not there. Anyway, if appointed I will engage the magistracy and see what needs to be done. Of course, since the magistracy is under a department headed by the Minister, the Minister would have to be engaged. I do understand that the question of the transfer of the magistracy has been on the table for quite a long time. If appointed, I would sit down with the minister and try and understand what the issues are, what the hold up is, and whether even the very idea of a transfer is accepted or not. If not, also ask for the reasons as to why not. But to me, sitting here, I think it makes a lot of sense that the magistracy and judges of superior courts do have to be under the same umbrella. We are all judicial officers. Because I had dwelled or delved on the issue I dealt with because you were questioning me about, I just noted other points, as cryptic bullet points as I had timed my address. I had done a speech on better and by the time that I had gotten to the point where I am not, if I had not cut out the point about delays at the Constitutional Court and my vision for addressing that, I would not have been able to reach these bullet points. But now that I think I still have a little bit of time let me deal with them. But as I said they are rather in the form of cryptic notes. I want to suggest that to me, there is something that is important and which I consider to go to the dignity of those that we interact with as the judiciary and this is something that is already highlighted or rather something that is highlighted in the article or address that I referred you to earlier, Commissioners. That is what I wrote at a seminar about a feminist approach to the adjudicative process. And it also goes to that, but also to a wider subject of sexuality sensitivity of courts. Let me just quote from the GCB of what I wrote, they say the candidate, and this is from Paragraph 6.8 of the GCB comments on me. They say that the candidate appears committed to

ensuring that the Constitutional Court juris prudence continues to contribute towards the attainment of quality by women. And then they quote me where I previously said that the end point, we should strive for is to dismantle the patriarchal sexist and misogynistic elements underlying our judgements. We can reach that end point if in our judgment writing we consciously embrace the truism that women are equal to men and that several phenomena affect women in a myriad of ways which are either not discernable or not readily discernable to men. These are issues that quite important to me. These are issues that go to the dignity of people. If a full article, I deal with quite at length with a number of cases that display sexist and patriarchal misogynistic attitudes of men towards women who appear before our courts as witnesses. In particular those women, and I cite quite a number of cases who are rape survivors. We need to be very careful and if I am appointed Chief Justice and as I said this was a paper, I delivered seminar for judicial education, and this was just a once off. But if I were to be appointed, this is something that I would take up more seriously and very energetically try to sell to all my colleagues. Then on the related aspect on sensitivity on questions on sexuality. There is something that we take for granted, yet it goes to the core to the rights, interests, and dignity of LGBTQ+ people. When I meet counsel, which I did for almost half a year last year as a presider, because for I think maybe close to 90% of the time, I presided over the Constitutional Court hearings. When I see a man or somebody who appears to be a man or looks like a man, and I am sure most of my colleagues to be the same, I will take that person to be a man. I will say Mr. so and so. But I have learnt that this is a sensitive issue to the LGBTQ+ community and we need to have a particular sensitivity to this and maybe it is time that the judiciary considered enquiring what a practitioner or even a litigant or witnesses preferred title or even no title at all. Who knows, what the preferred title is. Just because the person has a beard then you say Mr. so and so. We need to be those sensitive to those if we are to give true content to our Constitution and to the dignity it so seriously espouses. Then there are difficulties with regards to physically accessing costs, high costs, logistical difficulties, especially for those in rural areas but also those that are living just outside of cities for whom travel to the central hubs where courts are is difficult and expensive. A Chief Justice coming in, this again is an access to court issue and because in this context I have even referred to people living close to the city but for whom it is still quite expensive to travel to courts. I know South Africa right now has serious financial constraints, but these are aspects that should exercise our minds, these are aspects because access to courts is not something that should be taken lightly. These are things or issues that we should try to be apply our minds to, like for example instead of somebody who is poor and the only money they have is to buy a loaf of bread and to be able to have food together with his or her grandchildren. They do not, somebody like that does not have the luxury of taking a taxi from for example from Soweto to come to town in Johannesburg for a hearing. Is it not possible for the court in Protea

Soweto to have some screen for that person to go to, listen to the proceedings in Protea instead of coming to downtown Johannesburg? These are issues that some of us may see as insignificant but the fare to come from Soweto to Johannesburg and I will emphasize this, to somebody who is poor the difference between going to bed on an empty stomach or having food, even if it's a loaf of bread on your table. Now that we have seen that online hearings work smoothly, we may have to consider, in fact that would Actually be you know how these work, it could actually be a springboard for us to do what I have just referred to. People watch on YouTube. Something like that could be taken to the Soweto court. To Protea. Of course, I am just singling Soweto as an example. It could be taken to some community hall in some area and then people but maybe YouTube wouldn't work but that is an indicator that the technology is there. I would also move for an amendment of the judicial service commission Act with regards to the different levels at which the Chief Justice participates at judicial commission processes. The Chief Justice chairs the JSC but the Chief Justice also participates at the lower, if I may use that term, the lower processes of disciplining judges and then as a practical measure this is something that we did when I was part of this body for 2 years and at that time Chief Justice Ngcobo was the Justice at the time when the, or rather around this issue, what we decided that the Chief Justice do was rather to delegate that level and then to be able chair the JSC. Because once the Chief Justice participates at that level then the Chief Justice cannot again participate at the full judicial service commission. But I think rather than coming up with a practical solution, I think there needs to be specific provision on how this should be handled at the level of the Act itself. And then also what if appointed I would attempt to sell, is more use of Rule 41A on mediation. There are times when I think mediation would come in quote handy. Those of who are lawyers here would have had the experience of how strongly litigants feel about their cases. And unfortunately, sometimes we as lawyers would side firmly with our clients and make no attempt to make them see reason. If my client is, I am also in that fighting mood and unfortunately the litigant on that side and my opponent are in that same mood. I think the idea of a mediator, not the judge or the magistrate, a mediator who is going to engage the parties and coming in neutral that would I believe assist our judicial system in the sense that we have a lot of cases before the courts hence the backlogs that we have. If mediation were to work and get rid of cases that should not be litigated at all or at the very least cases that are settleable, it would relieve the court of a burden, that will enable it, not just the court system, not just a single court, the court system then enable it to deal with cases that it ought to deal with. And the reason article is, and I would if appointed is revisit it and look at the concrete reasons, there is an article written by one of the deputy judges President of Gauteng, deputy President Roland Sutherland, in which he is advocating for more use of the mediation system. What I also want to know is have a closer look at on case-flow management. And innovation that I think, has borne fruit and is an innovation brought in by Chief

Justice Mogoeng Mogoeng. Just one aspect that I think I want to look at and see if Judges President will find it acceptable and workable, because I have for example had sight of maybe one or two on the practices of case-flow management but what I have found is that it does not provide for the management of a case as it flows through the process by one judge. I understand maybe in the small divisions it may not be all that practical, I do not know but it is an idea that I would want to bounce of the judges President because if I do one little bit in the process of managing a case and then I'm off and a colleague comes in. That colleague will not have a clear idea of where I was going with a case, yes sometimes it may be clear where I am going. But if I do this, and a case comes to me next time, I know exactly why I did what I did earlier and from this point on know what I want. So, I think it would add something to the process that is already good. So, I put it no higher than saying that I would put it as a suggestion to judges President, see if they find it acceptable and workable. And then another aspect which is close to my heart is the question of arbitrations of commercial matters. There is a perception that wealthy South Africans for whom, or in respect for whom, in most parts you can read white are not comfortable with having their cases heard or adjudicated on upon by black judges. And the perception that they have is that they do not confidence in them. Which is why those matters are taken out of the judicial system and brought before private arbitration. I would want to get to the bottom of that. I would want to look at that very perception and to look at what needs to be done from our perspective as the judiciary, what shortcomings are there. Yes, I do know there are delays, yes, I do know it takes a long time for cases to come to the stage of a hearing and so on. But I would want to just have a look at what we would do to address whatever problems there are within our system. But of course, I think to a large extent case flow management has eaten into the delays that we have been having on matters coming to matters coming to court for hearing. So, at least there has been improvement in that regard. Then I would also want to say that nobody has the monopoly of knowledge, monopoly of wisdom, monopoly of ideas and intellect etc. so, I would approach and for me this would be the first port of call. I would approach all levels of the judiciary; this is something I would do immediately. I would meet the President of the Supreme Court of Appeal, I would meet the judges President, I would mee the Presidents of the court, I would meet the cluster heads of the magistracy at district level to get an idea of what the problems are from their perspective. And I believe that this would help inform the approach that I would take to improve our judicial system. And of course, I must acknowledge the fact that an incoming Chief Justice would not be coming in on a clean slate. The Chief Justices before have done a lot of sterling work and they set up templates so one would for example the case flow management, I mentioned the introduction of court online which is the 2 aspects that I referred to and the introduction of the code of conduct for judicial officers. So, a judge, a Chief Justice

would take in from that point and take the process forward. Those are my, if I was in court, I would say submissions Mr President.

**Justice Petse:**

- 5 Thank you, Justice Madlanga. I see you have exceeded your 30 minutes by almost 20 minutes. We are somewhat generous to afford you the opportunity to wrap up.

**Justice Madlanga:**

Thank you very much, Chair. Thank you, Deputy President.

10

**Justice Petse:**

I think this would be a convenient time to take the mid-morning adjournment. According to our schedule, it should be 20 minutes. I make it quarter to twelve now, shall we then resume at five past twelve.

15

**Justice Madlanga:**

Thank you, Chair.

**Justice Petse:**

- 20 Shall we resume with the business of our meeting? Thank you, Justice Madlanga, for your presentation.

**Justice Madlanga:**

Thank you, Chair.

25

**Justice Petse:**

- 30 At this juncture, I shall take a pause and allow the members of the commission to put such questions that they might have for you and fellow Commissioners, in accordance with the traditions of the commission, will those who wish to speak alert me and I allow them to do so in the order in which indication is made to me. Thank you, Honourable Minister.

**Justice Madlanga:**

Chair, may I just say that to the vision, there is no way that one cannot add the perennial problem of, perennial and systemic problem of delays and the finalization of both criminal and civil matters. That is a problem that I would also want to look at. I will not substantiate on that. Thank you.

**Justice Petse:**

Thank you, Justice Madlanga. Commissioner Malema, did you have your hand up? Ok thank you. Commissioner Nyambi, did you have your hand up? Ok, thank you. Advocate Cane, I have noted you. And you too Commissioner Tshepe. I have noted you too, Commissioner Matolo-Dlepu. Commissioner Shabangu, I have noted you. Professor Schlemmer. Commissioner Notyesi. I got you Commissioner Dodovu and you Commissioner. Commissioner Lucas.

15

**Commissioner Breytenbach:**

Deputy President, I have my hand up, virtually. It's Glynnis Breytenbach.

**Justice Petse:**

20 Thank you, Commissioner Breytenbach.

**Commissioner Breytenbach:**

[inaudible – 2.17.02]

25 **Justice Petse:**

Commissioner Barnard, I have noted you as well.

**Commissioner Malema:**

I would like to be noted as well.

30

**Justice Petse:**

Thank you, I have made note of all the members of the commission with questions for Justice Madlanga. Honourable Minister.

5 **Minister Lamola:**

Thank you very much Acting President of the Supreme Court of Appeal and good morning, still morning, afternoon Justice Madlanga.

**Justice Madlanga:**

10 Good afternoon, Minister.

**Minister Lamola:**

15 Thank you. My question relates to the separation of powers and the court administration. What do you see as the role of 3 arms of the state with regards to the separation of powers and in the development of court administration modern with the examples of benchmarks as yourself as a judiciary might have done and what would be the role of the Chief Justice to ensure that these administrations model does materialize?

20 **Justice Madlanga:**

Minister, to maybe because you preface your question with a broader question of separation of powers, I would say that Constitutionally all the various, the 3 arms of state have carefully delineated their powers and in general and I emphasize in general, each one of them must stay within its lane. Why do I say in general, I say in  
25 general because in more than one judgement of the Constitutional Court on the top of my head, I can think of the judgement in the matter of the Heath I think there was an earlier judgement which was penned by Judge Ackerman. I forget the name of that one. There may be one or two others. The Constitutional Court said that even though there is this separation our model is such that you can never talk of 100%  
30 separation. There may be that area of confluence or that area of a bit of mixing up, and how did this arise in the context of the Heath matter it arose to the matter if a judge could head up the investigative unity which at the time it was named the Heath special investigative unit. And the Constitutional Court said no, that cannot happen but in other contexts the issue of issuing warrants of arrest which in a way some  
35 might view as more what executive as judicial functions. The court said no no no, but

because that requires the sort of application of the mind which in a sense is the exercise of a judicial function, there allowance can be made for a judiciary to perform those sorts of functions. But going back to the broader issue of separation and the last part of the question that you zoomed in on, of there to be a clear understanding of the separateness of the judiciary there was a need and I do subscribe to the idea for the administrative support to the judiciary to the entity to be identified with the judiciary and that resulted in the creation of the office of the Chief Justice which is nothing other than a government department which services the judiciary. That in my mind does accord with the broad idea of the Constitutional separation and not only that, even the need for it to be seen to Actually exist. Then with regard to the participation of the Chief Justice in that landscape. I think I did earlier, I did touch on my vision to sort of Chief Justice that I would like to see. A Chief Justice who leads the judiciary in terms of setting up a worthy and lasting juris prudence. I did touch on the fact that in my view a Chief Justice should not be a super secretary general. Those administrative functions that for example was under the department of justice were performed by the department of justice under a director general. Those functions must be performed by the office of the Chief Justice under the directorship and headship of the secretary general which is terrain that the Chief Justice should not stray on to. And I might even mention that there might be certain administrative functions that we as judges sometimes approach the office of the Chief Justice on and not being aware of the nitty gritty prescripts applicable to them. And the SG never waivers and she say judge, the prescripts do not allow that. I respect that and that is something if I am appointed, I will honor. But I will as I said earlier, I would want to know, and I think the SG does cooperate in this regard I would want to know what is happening, what must I know, what must I be told, for example I would not want to see something that has been out there for a while and learn of it for the first time from the media.

**Minister Lamola:**

My question second one relates to the matter you spoke about case line and the modernization of it, and I heard you speaking about it only being done as a pilot in Gauteng. Has there been any efforts you have been involved in with ConCourt or in your role at the judicial institute to infuse modernization and digitization of the court and administration? And, if not what will be your role as the Chief Justice to ensure that this is harmonized for all judges and magistrates and the entire processes of the judiciary.

**Justice Madlanga:**

We are now in the fortunate position that as I indicated to you Minister. The process is right at the tail end of the project. Once, the CRM dynamics comes in, is interfaced with case lines and it is for a very short time to interfacing in Gauteng. My understanding is that in a few months thereafter rolled out to a few high courts, maybe even 5. That is my understanding, I may not be accurate on that information. And the question may then be why not to all high courts at the same time, my information is that you do not want to go to a whole lot at the same time, because you want the support people who attend to the Actual roll out in physical terms are of a limited number. And you want to be able to grapple with a smaller number and then once it is in place in the 5 plus Gauteng then you roll out to a few more until you are done with the High court with the explanation that I have been given. Which is why the phased roll out. I think I must accept that; I must settle with that. And then also my understanding is that implementation is that to be to take part simultaneously with the first roll out to some of the High courts. I must confer at this stage minister that based on the information that I have, I am not aware of the intended processes with regards to the roll out to the magistracy but if appointed and with the advantage of the system already being in existence, that is both the CRM and case lines, I will be on top of things with regard to how do we get this to all of the courts in South Africa, to all of the nitty gritty. It's something that I believe that I can be on top of.

**Minister Lamola:**

Thank you, Judge President.

**Justice Petse:**

Thank you, Honourable Minister. JP Tlaletsi.

**Judge President Tlaletsi:**

Thank you, Acting President and good afternoon, Justice Madlanga. We spent the whole year together but only meet for the first time physically today.

**Justice Madlanga:**

That's terrible.

**Judge President Tlaetsi:**

That's terrible, yes. You have covered most of the issues I wanted to raise. But for information on the case flow management model that is being used, it was envisaged that the allocation of cases to judges would enable them to go through those specific cases up until they are trial ready and those judges would not be the ones to do the trial. In the divisions, not smaller but with fewer judges, like in the Northern Cape, that system is operating at the moment and I can say it's a success.

**Justice Madlanga:**

Thank you then I am happy that I had an idea of pushing for something that actually the courts have already thought of. I was not completely off the rails on that one. Thank you, Judge.

**Judge President Tlaetsi:**

Then on that issue of the super DG or super SG I think that's a very important aspect as there seems to be a lot of misinformation that the Chief Justice can do as he or she pleases or interferes. And obviously public services commission Act does not apply to the Chief Justice and the judiciary so there are people who are officials who deal with that as a support structure to the judiciary. Then my next question is, have you considered the informally of course, conducted a case audit of the Constitutional Court in particular the judiciary particularly the superior high court in general where we could be lacking and how we could improve.

**Justice Madlanga:**

Formal skills definite.

**Judge President Tlaetsi:**

Informal.

**Justice Madlanga:**

Oh, I'm so sorry. Even informally I must confer, that it not something I have done. But maybe what I could say of the top of my head and based on my experience as a legal practitioner which of course feeds into the judiciary is that maybe the initial

stages when a colleague comes to the bench and let me be specific and say black. I could even go further and say women. At the initial stages of coming to the bench they would be a disadvantage, a disadvantage in the sense of, let me take a few steps back and go to my university days and I must immediately apologize to the  
5 Commissioners to the extent that I will now sound like I am blowing my own horn. At Rhodes university, we were quite a small faculty in my years. I think we were around 25. I can without fear of contradiction say I am certain that I was within the top 3. Students who gave me a run for my money were Bid Harris and Myron Rodnick. The few distinctions that I got at Rhodes university would qualify for what is know as  
10 commercial law but when I went to practice did, I ever get commercial work? No, I did not. And we all know what that is a function of. It is a function of the you know South African economic situation, who holds the money, in whose hands are the wealth and therefore and who generates that commercial work. It's obvious. So, the closest I got, before going to that. so, if I had performed as well as I did in my LLB in  
15 university, including in commercial subjects, what would have stopped me from excelling commercial practice? I do not believe that anything would have stopped me. I did not get that work in commercial practice. The one case that could have qualified as commercial work. Listen, I was in practice for years and years and years, and I am talking about one that I remember of the top of my head was a matter in  
20 which I was led by the late Justice Skhweyiya the closest we got to commercial work was matters involving the law of contract and debt collection. You will remember your colleague Mr Humphrey Lusu, he gave us a lot of work from the company that owned Spargs Holdings, it was called RNE Holdings and of course we got a lot of work from you Acting President and many other attorneys. But it did not truly qualify as  
25 commercial work. Where am I going with this? When you were, we did mainly administrative, Constitutional law work so when you come in and also other colleagues in practice RAF work. Other colleagues did only criminal work. Now you come to the bench, you will at the initial stages, you will definitely be disadvantaged but take for example the Constitutional Court, we had the matter of Ascendis versus  
30 Merk you hear these concepts about inutility and lack of innovation. This and that. You have to sit down apply your mind seriously as you can and try to get on top of things. You have to try and do that. But you are at a disadvantage because somebody who has practiced that kind of law, they already know what that concept is, they already know what that other concept is and they start far ahead of you. You start  
35 way behind. But I emphasized the point that initially you are at a disadvantage because with time and as you get exposed to this kind of work more and more and if you apply yourself hard enough you can catch up. You should be able to catch up. I don't know to what extent I have answered your question, Judge President.

40 **Judge President Tlaetsi:**

5 You did and maybe even SAJEI can play a role as part of judicial training to empower them so they are not disadvantaged for purposes of promotion within the judiciary. On a side issue, you did mention that at least for the latter part of last year you did sort of manage leadership of the court, Constitutional Court you were presiding in most matters.

**Justice Madlanga:**

10 And I chaired virtually all conferences. I actually performed, you are quite right, Judge President. I performed without any title, not even as an Acting Deputy Chief Justice. I performed the functions of a Chief Justice.

**Judge President Tlaletsi:**

15 That should have given you an indication about the respect and the command you have over your colleagues and the court. Can you say anything about that?

**Justice Madlanga:**

20 I believe that I do command the respect of my colleagues, both permanent and acting colleagues do approach me on the side for my views, sometimes just on process matters but in particular on cases themselves, judgements. And if I will not embarrass you, you were actually one of those colleagues who approached me on what I think. And I might even sit on record Judge President, that where maybe and I guess because where problems or issues are associated with the delays where maybe there has been a delay on my part to comment on a colleague's judgement on occasion some colleagues, will approach me on the side and literally ask for, I don't want to put it higher than that and say demand but you know ask with a bit of insistence for my views on draft judgements so I would say that as an indication. And I want to emphasize that this is not just acting colleagues but permanent colleagues as well. I want to say that this does speak to the respect that I command from colleagues.

30 **Judge President Tlaletsi:**

Just to clear the air and eliminate any form of confusion. These are matters that you with a colleague have presided on?

**Justice Madlanga:**

Yes. Quite right. In fact, that I must say though this is something that has been happening even before I started presiding you know, for a while now colleagues have sort of been there approaching me for my views. And of course, this has continued even when I was presiding.

5

**Judge President Tlaetsi:**

I see. Something I do not recall you mentioning in your vision, how would you propose in dealing with the media?

10 **Justice Madlanga:**

Now you want to put me on the spot Judge. This is a subject that raises Constitutional issues. Section 16 of the Constitution to be particular, from both sides, that is the one side being the people who raise issues against the judiciary in the media. And the other side being how if at all, the judiciary should respond and all these as I say, that turn on what the Constitution says and Section 16 as you know guarantees each and every one of us the right of freedom, of expression. So, we should never lose sight of the fact that people are entitled to criticize us. We are not beyond criticism and criticism can and must be robust and we just must take it on the chin. But such should also not be lost that the fact is we perform an important Constitutional function. We are all after all, the ultimate arbiters of what is lawful, as to what is constitutional, and all of this turns on the rule of law. For South Africa to continue being a country that respects and subscribes the idea of the rule of law, courts should continue to function as courts and in the manner in which they should be expected to perform. Where am I going with this? The criticism which I immediately acknowledge as I did at the beginning, the criticism should never go to a level at which it will bring the courts to a state where they no longer enjoy the respect that they should enjoy from the general populous. Because once that stage is reached then one may just as well say that the rule of law in South Africa gone out through the window. So, the judiciary should enjoy a legitimacy and confidence that it should have in order for the rule of law to continue functioning properly. So, as much as I accept that there should be criticisms, it should be criticism, one that is fact based and two it should not be criticism for when it is for no other reason, not being fact based and calculated and bring the entire edifice of the judiciary into disrepute. After all, as both Chief Justice Mohammed, speaking extracurially or speaking outside of court or Justice Kriegler speaking in court in the matter of Mamabolo the judiciary does not have a purse, it does not have police, it does not have an army, it depends on the legitimacy that it enjoys the confidence, once a level is reached where people criticize it in a manner calculated to bring it into disrepute that takes away the one thing that makes it

possible to operate. Now let me come into the last part of your question, what should we do. There is a lot of learning on the subject and that learning does say that, well judges also, I think I said in my preface who enjoy freedom of expression. But for them, there are certain limits and for good reason. Those limits are for example at 2  
5 levels, the first level being a judge should be careful, for example not to comment on court going matters which would give an impression of a judge being biased. That should be clear to everybody and in a sense, it is related to the first. Both these issues go to the question of the independence of the judiciary and the need for it to conduct itself in an impartial manner. So, the second aspect is provided for in the code of  
10 conduct and its judges should not comment on political control process. This is easier said than done as the expression goes. In practice, it's not quite easy to grapple with. But maybe it is quite easy actually. The Constitution is such that there are lots and lots of political implications around it. The very idea that it lies with the courts to invalidate Acts of parliament. Acts of parliament come about as a result of a political  
15 process. The very idea that courts can invalidate the executive starting from the President to ministers. That conduct is something that happens in a political context. And even when outside of that, even when you look at the Constitution, take for example your socio-economic rights. Those in inheres the nature of those rights that there will be policy laden issues because ordinarily when you take the rationality  
20 principle, you don't question the reasonableness of the conduct of parliament for example or whoever the actor was. But when you come to socio-economic rights it is in built in those rights where you actually look at what is reasonable. So, a court can actually question the reasonableness of what another arm of state parliament or the executive has done with regard to something that impacts on socio-economic  
25 rights. So, I am touching on all of this in the context of the judges commenting on political matters and what is the relevance of all this background that I have given, it is this. In the context of the adjudicative process and the deciding whether or not the conduct of parliament or the conduct of the executive or even issues arising from what was done by the other arms of state in terms of socio-economic rights is  
30 reasonable. The issue of political questions is there throughout, therefore in that context because you are adjudicating a live case before you, you cannot avoid innocence but of course what does the Constitution say and if where it takes you to knock out or invalidate a political act then so be it. It is fine, that is our Constitutional architecture. But outside of that, that is where then issues arise, but we are in the  
35 fortunate position that the code of conduct says stay clear of that, stay clear of that. Now, back to the broader question, what do we as judges say in the face of for example, the criticisms that I said may get to a level that is unacceptable. What do we as judges do, I said there is a lot of learning on this? And there are differing approaches. And the one approach is that it may be something that should be dealt  
40 with at a leadership level and that is an approach for example that Chief Justice Mogoeng Mogoeng used together with the or accompanied by Deputy Chief Justice

Moseneke and accompanied by Mpati, if I am not mistaken. They approached the President Zuma at the time, at the level of Chief Justice Mogoeng at the head of one level of state and President Zuma as the other head of state. And out of that process came out a joint statement in which there was agreement of what is acceptable criticism and what is not acceptable criticism. Now, I am sure that a follow up question would be is that the only possible approach on the learning that I have gone through, it is said that a leader of the court may be entitled at times, we cannot all the time run to the media, run to the media all the time, but there is a lot of learning that says. In a lot of certain circumstances, the head of the judiciary, it may be perfectly proper for the head of the judiciary under circumstances to go out there and address head on, the unacceptable criticisms. The sort of criticisms that if allowed to go on and on, might have the effect that I earlier outlined being or potentially being injuries to the very rule of law.

15 **Judge President Tlaetsi:**

Thank you and then at another level or the second link of the question would be there is a lot of misinformation of the functioning of the courts and how cases are decided, and one cannot expect the Chief Justice or the leader of the judiciary to be addressing the media from time to time. These are the minor issues but so important to the public to understand what is happening. An establishment of an office within the heads of court, chaired safe by a retired judge who will deal with all these minor issues to concertize the public of the functioning and what is happening in the courts. Can that not be of assistance? It's just a thought that came to me.

25 **Justice Madlanga:**

As I am speaking, I will not reject that all judge President. But I will add this and say that my understanding has always been that within the OCJ, there is an arm that handles the media and I think they have a certain expertise with dealing with the media. Perhaps imagine your idea with what is already in place, that focal point that you prefer, rather you suggest, you don't prefer, you suggest should be a judge, what about that focal point be, getting all these issues and then with an experience of what us judges do and then filtering it through to the OCJ, for the OCJ to then be the entity that then goes out. I see no problem with that because the OCJ is its own entity, it is an entity that exists to support us as the judiciary. I don't know how you think....

35

**Judge President Tlaetsi:**

That's what I had in mind actually. You always react to what is there in the public, but we don't take proactive action as the judiciary to public education.

**Justice Madlanga:**

- 5 But as you say, caution should be exercised, we cannot all the time, we run and we try to react to that. We should be careful not to do that.

**Judge President Tlaletsi:**

Thank you, Acting President.

10

**Justice Petse:**

- Thank you, JP Tlaletsi. Justice Madlanga, could I ask you please to be concise in your answers bearing in mind that I still have a long list about 20 members of the commission who have indicated they have questions for you, while at the same time adequately responding to the questions.
- 15

**Justice Madlanga:**

I will try to do my best.

- 20 **Justice Petse:**

Do your best to be concise. Thank you.

**Justice Petse:**

Thank you, Acting President. Commissioner Dodovu?

25

**Commissioner Dodovu:**

Thank you very much Commissioner. Good morning, Justice Madlanga.

**Justice Madlanga:**

Good afternoon, Commissioner.

**Commissioner Dodovu:**

Are you good?

5

**Justice Madlanga:**

I am good, thank you very much. How you are, Commissioner?

**Commissioner Dodovu:**

10 Firstly, let me start by saying I looked at your profile, at your record throughout your career. It is quite impressive. You were admitted at a very young age as an SC as a judge, you resigned, you chaired important commissions, or you were part of the important commissions in this country and ultimately you became a judge at the Con Court. Very much impressive, I also read some of your judgments.

15

**Justice Madlanga:**

Thank you Commissioner.

**Commissioner Dodovu:**

20 I missed something and I wanted to allay my concerns. Out of all of this, I don't see your leadership role. And this position, you are applying for is leading the judiciary in this country. What is your take on that?

**Justice Madlanga:**

25 I would say that there is demonstrable evidence Acting President, please, please, forgive me as it goes to the core of why I am here. I will not be able to be brief, please please, allow me. Thank you, Acting President. I Actually, there is demonstrable evidence of my leadership skills and have led various levels and let me emphasize upfront that I have led a court. I was Acting judge President in Umtata. Let me quickly  
30 itemize what I have done in leadership positions. I was for years, a member of the executive committee of the Transkei of Advocates, the Transkei Society of Advocates and then second, I later become its chairperson for 2 terms. I could have only been

retained if there was a feeling that I could lead. Third, for 3 years, deputy Chairperson of the Competition Tribunal, that is an entity that is as good as a court. Fourth, before my appointment to the Constitutional Court, I was Chief evidence leader in the Marikana Commission, leading a team of 7 counsel, 3 of whom including myself were senior counsel. And what I must highlight in this regard is that it was not only about the leadership of my 7, we were a total of 7 counsel. Leadership of my team, but I also exercised functions that related to the entire operation of the commission. That is outside of the chairing part, and I think I Advocate Mpofu will support me in this. He will remember that I used to chair meetings and there were quite many of all those legal teams. We were far more than the people gathered here. Many advocates and attorneys. Those that remember will remember us sitting on stage when we were still in Rustenburg. When we came to Pretoria, you couldn't quite see because the attorneys and advocates would be mixed up with everyone in the gallery. I chaired all those meetings and lawyers being what they are. But I think I did my job well. But of course, it is Advocate Mpofu who would be able to comment on whether if he agrees with that. Of course, he and I at the level of counsel now, we had our skirmishes and boxing matches. Fifth, I am now in my fifth year as editor in chief of the South African Judicial Education journal. A demanding job. Sixth, I am currently co-editing with Judge Dambuza, a book to be published to mark 10 years of the existence of the existence of SAJEI and I am heading that team and contributions are going to come, that is chapter contributions to the book are going to come from fellow judges. Seventh and most importantly, I did lead a court as Acting judge President of the Transkei High court with tangible with tangible results. Tangible results. A leader, all that a leader needs to do is to come in and do 2 things in the main. There may be a whole lot of others. Number 1 decide where you want to take the institution and 2 identify problem areas and identify solutions for those problem areas. And then next step we should also implement immediately. I came up, I did not Act for a long time, but I came up with tangible results and one worth highlighting is that they used to be bottlenecks at circuit courts at the Transkei high courts. Circuit was done, circuit would only be for a week. And judges ever hardly finalize cases, they would pick up part-heard, part-heards, part-heards, I came in and immediately identified this is a serious problem and I decided then and there to increase circuits to 2 weeks. Yes, 2 weeks is not that much from 1 week but because we were a small division it would have been difficult for purposes of what happens at the center in Umtata itself and to have judges out on circuit for long periods of time. But that one small change did bear fruit and it did so immediately. Judges were better able to finalize cases and picked up lesser part-heards.

**Commissioner Dodovu:**

Ok, I am clarified. I want to follow up that question.

**Justice Petse:**

Ok. Yes.

5 **Commissioner Dodovu:**

Yes. People who will ultimately, who occupy the position you applied for must possess a modicum of good temperament. A modicum of good judgement. Do you think that you have a good state in that respect?

10 **Justice Madlanga:**

I believe I do, and I think that people who have worked closely with me before would attest to that. Acting President Petse, I think Justice Tlaetsi there and even as advocates, Advocate Mpofu and Advocate Madonsela who I even lead. All of them will attest to that I believe.

15

**Commissioner Dodovu:**

Ok, now all of the points that Justice Petse raised on the ConCourt, is that of the quality of judgments and he says those who criticize the ConCourts says sometimes you were incoherent, your judgements lack reasoning and you use strong language and sometimes you are very combative and I want to check with you do you believe in that and if so, how can we improve and mitigate that sort of situation?

20

**Justice Madlanga:**

Let me say that it's very difficult at the level of the comments about incoherence and so on. It's difficult to grapple with that not knowing the specifics but to the extent that there is a basis for criticism. I want to say that with the new system that we have introduced and which I believe is going to free up a lot of time for us. We are going to be able to better able to focus at what we do, attend with a bit more detail to our judgements and even the editorial errors citations and so on that we even have been criticized for and quite correctly. I think with a lot more time on our hands we will be able to address that. On language, there again I would prefer to have specifics. I thought we are fairly collegial towards each other. Yes, sometimes you may be strong in your opposition but yeah, I think I would prefer specifics.

30

**Justice Petse:**

Apologies, I'm sorry to intrude Commissioner Dodovu, I just want to ask Justice Madlanga to pull the mic closer because some Commissioners are battling to hear you.

5

**Justice Madlanga:**

Oh, I am so sorry. Is it better now Commissioner? My apologies, my apologies.

**Commissioner Dodovu:**

10 Ok, now when you share your vision for the judiciary you mentioned how you can improve case-flow management, emphasize on issues of mediation and a system that can be put in place and so on. In short, just share with us your vision for a transformative judiciary that takes into account the realities of our country. Just brief.

15

**Justice Madlanga:**

That is an issue that is linked to a whole lot of facets of the South African economic social or perhaps socio-economic situation and right now when you maybe have ideas around certain things there are also right now the problems because they cannot be done right now because there are no resources. I raise this in this context, it is a reality unfortunate though it may be somebody that is not legally represented will not be able to marshal their case in the same manner as their opponent if their opponent is legally represented. Now, if we did not have resource constraints, there could be a way of trying to make justice or access to justice to be a reality. Yes, it is so on the criminal front there is legal aid South Africa which comes in automatically for criminal trials but for civil cases there is a need for or the need test and the vast majority of South Africans do not qualify under that. somebody who could be classified as poor, will easily be said that no no no, you are too rich for us to be able to assist you so they fall off the net. As long as you do not meet their needs test. So, whatever ideas one might have with regard to trying to address the problem and even out legal representation with us, you will always be hit with the problem of resources in South Africa. And I must admit that I am unable as I sit here now, how do you practically address that.

35

**Commissioner Dodovu:**

My last question, criticism versus attack. How do you separate that? For me, it is a thin line or it depends on how you view it. I would not distinguish between the 2.

**Justice Madlanga:**

- 5 For me it would be more the content, it's more the content. Some people may say this is an attack when all this is criticism. It's more the impact, does it reach the level that I earlier referred to when I was responding to judge President Tlaletsi.

**Commissioner Dodovu:**

- 10 What I wanted to establish was since the advent of our new democratic order of 1994. The transformation of the judiciary, do you think the participation of historically disadvantaged individuals have improved the situation of transforming the judiciary as it ought to be or not?

15 **Justice Madlanga:**

- The short answer is yes. This is also a subject that I have written and published an article for. Out of several points I make in that article, transformation is not for transformation's sake. It's not just about having the different colors or different races. A person's outlook on life brings something to the table. I as a black person, as  
20 a woman may have perspective or an idea about a matter that may be totally different to. In the case of a woman to a man. Or in the case of a black person to a white person. And a case can Actually turn on those perspectives. And as a man, I may completely miss something that a woman would see. And as a white person may completely miss something as black person would see. And vice versa. And I won't  
25 use the vice versa when I'm addressing the women. Because we as men and how we have been brought up, we view them as patriarchy, misogyny, sexism, there may be a certain idea about women and because and I'm not apologetic about this because as I have said, I have written about it and written against it. Women may see things differently from us and I am advocating for us to push ourselves as hard as possible  
30 to also see things the right way. So, yes there have been transformation and not just that, practical value added.

**Commissioner Dodovu:**

Thank you very much. Thank you very much, Justice.

35

**Justice Petse:**

Thank you, Commissioner Dodovu.

**Minister Lamola:**

5 Follow up Justice, please. Petse, Lamola.

**Justice Petse:**

Yes, you may proceed Honourable minister.

10 **Minister Lamola:**

Thank you, Justice. When you answered JP Tlaletsi, I understood you but now when you answered Commissioner Dodovu, you have left me a bit confused on the topic of criticism and attack. I want to get your view, what is in your view to be deemed or viewed as constructive criticism or criticism personal attack or even insults to a certain extent and who shall determine it.

**Justice Madlanga:**

Minister, I think the point I was trying to make was that I'm not sure that I want to focus on the tags. It is more one the effect and two, the content. Classified as an attack or criticism but its more the content. For example, something that is factually, completely factually unfounded but because people are not aware, and people will not all go to the source material and not be able to interrogate it but just take it at the level that it has been said. It is also quite important who says it you know. So, the impact it will have, the possible impact that it brings the judiciary into disrepute in a manner in which it may adversely affect the rule of law. That for me is the issue. Whether you call it attack or you call it criticism. And I think when I was talking or rather responding to Judge President Tlaletsi, we were talking about criticism throughout.

30 **Minister Lamola:**

Thank you.

**Commissioner Malema:**

Just a follow up.

**Justice Madlanga:**

5 Thank you, Minister.

**Justice Petse:**

Commissioner Malema?

10 **Commissioner Malema:**

No, I did not come in now, but you raised a point earlier about, which was raised by the Acting President about the huge criticism on the Constitutional Court, it's inability to deliver judgements on time. And you came here and said, well you are correct we are unable to deliver on time, but this is going through. So, if I say the Constitutional  
15 Court doesn't deliver judgements on time and I am a layman, I am not inside there, will I be attacking the court or will I be justifiable in saying the Constitutional Court is delayed in delivering its judgement. Would it not take a good judge, good leadership to say you are correct? But the reality of the situation is that what we are confronted with. Some short-sighted politicians may say that's an attack on the judicial. I liked  
20 what you said earlier on, you are correct. We take long, but this is what we have been subjected to. And in responding to that, this is what we are coming up with to resolve that problem. But some myopic leaders are Actually taking those that say the Constitutional Court takes long to deliver judgements, is that an attack or a constructive criticism?

25

**Justice Madlanga:**

That is constructive criticism, that has not been taken off my script on my vision my Acting President in asking me questions that relate to this. In my note here, in my opener dealing with that, I say this is fact and I accept it without question. So, I take  
30 that as constructive criticism. Thank you.

**Justice Petse:**

Thank you, Commissioner Malema. Commissioner Magwanishe?

**Commissioner Magwanishe:**

Thank you, Acting President. Good afternoon, Justice Madlanga.

5 **Justice Madlanga:**

Good afternoon, Commissioner.

**Commissioner Magwanishe:**

10 I just have a few questions. One bearing in mind that your vision must be built into strategy and plans and in that process, there might be resistance to change. Will your vision be implemented in three and a half years?

**Justice Madlanga:**

15 My view is that just more than 3, all depending on when the President makes an appointment. 3 years and about 6 months in my view is Actually a very long time. And I want to say please just bear with me Commissioner. Where is this here. I do not for example, I do not think my vision will there are things that are so what, unrealistic they are unlikely to meet up with a lot of resistance. But as I said right at the end or at the beginning, nobody has the monopoly of wisdom. I am going to  
20 consult with the heads of courts with the ideas I have and as part of my vision, I have also said, I will get ideas even from the heads of courts themselves so what comes from them, in a sense part of my vision. Logically, therefore they will not, or it will be unlikely that there will be any resistance with regard to ideas that come from the heads of courts. And by heads of courts, I am referring to all levels. From the Supreme  
25 Court of Appeal to the district magistrate's court. And with regard to my own ideas, I will try to push for them. I could spin your question Commissioner and say a point that you bring to the table because you are saying if there is resistance and no acceptance. I could say you may have 12 years as Chief Justice, but that does not guarantee you that which is seen as unacceptable will suddenly become acceptable  
30 just because you have 12 years. So, I come in with ideas, I try as hard as possible to sell them and I implement immediately. And I want to say in countering this idea that 3 years is short, I want to say that there are examples of people who want to have turned around courts or improved on them in less than a year. I will give an example of somebody who is well known to this august body. Judge President Mbenenge, who  
35 is the judge President of the Eastern Cape who has made the Eastern Cape to be one of the better performing courts. I have also said that I myself as a leader of a court,

even in an Acting capacity within a very short space of time, bring about changes. 3 years is a very long time as I said in response to a question earlier. All that you need when you come in is to decide where do you want to take this institution and what are the problem areas, how do you address them, and you implement them immediately. When you depart after 3 years 6 months or whatever the period is, templates are there. And those templates are not likely to be thrown out by your successors just because they were made by you. If those are good templates, those will have lasting effect. Chief Justice Mogoeng is the one who brought in case management, he's the one who introduced court online, he's the one that put together the norms and standards. We are not just going overnight and throw them away because they were introduced by him. Question is, will I in that pre-period put that on the table the templates that are workable that will have a lasting effect. Thank you, Commissioner.

15 **Commissioner Magwanishe:**

Thank you, Justice Madlanga. Have you lead in a situation where there are different stakeholders with competing interests and how have you protected the interests of your organization whilst promoting sound relations with the other stakeholders.

20 **Justice Madlanga:**

You might have seen in my CV that I actually lead an entity that was called The Exchange control amnesty unit. At the beginning we were 9 but grew to 25 as earnest unit members but the entity itself had a staff compliment of around 100 which I lead with success. It had different interest groups in the sense of half of the officials were from SARS and half were from the South African reserve bank and yes it was project push from both sides but the interest was not always the same and I lead that with success and at the end the deputy minister of finance then Jabu Mloketi spoke very highly of how I had led that process. I Actually have the quote of what I said, somewhere here but I will not go into that.

30

**Commissioner Magwanishe:**

Thank you very much, Justice Madlanga. SADC is faced with a serious threat of terrorism. Do you think that this might have an impact on our juris prudence for an example on individual rights versus national security?

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**Justice Madlanga:**

I must admit that it is not a question that I have supplied my mind to, but I do not at the moment see how it would affect individual rights at least in South Africa and not at this stage.

5 **Commissioner Magwanishe:**

I think the last one, how will you strengthen relations between the judiciary and parliament, in particular the portfolio committee of justice and correctional services?

**Justice Madlanga:**

10 I would say that nothing beats interaction, Commissioner. And I understand that you chair that committee right now. Nothing beats interaction. I would definitely try to engage when there is a need to engage and discuss matters of common interest of which there are many because your committee and the judiciary are concerned with justice. So.

15

**Commissioner Magwanishe:**

Thank you very much President. Thank you very much Justice Madlanga.

**Justice Madlanga:**

20 Thank you, Commissioner.

**Justice Xola Petse:**

Thank you, Commissioner Magwanishe. Commissioner Singh?

25 **Commissioner Singh:**

Just before lunch, Acting President. Thank you very much, good afternoon, Justice Madlanga.

**Justice Madlanga:**

30 Good afternoon, Commissioner.

**Commissioner Singh:**

I want to start my first question with what the Honourable Minister asked at the beginning about the arms of state and we know what the 3 arms of state are and to the extent that a vote 27 was established, proclaimed by the President in 2010, the office of the Chief Justice. My view and you can tell me if I'm wrong, is that one would think that vote came about and to give the judiciary and the office of the Chief Justice its independence because it is an independent arm of state. Now I heard your responses to the question by the JP and the Minister. And maybe the Minister won't like your answer, depending on the answer you give. Because my view is the budget of that vote should be directly under the control of the Chief Justice. With the secretary general being the accounting officer and the reason, I say that is there is a reason he who pays the piper calls the tune. So, I would just like your view on how the independence of the judiciary can be established if the budget that controls the vote 27 places the minister as the executive authority of that budget.

**Justice Madlanga:**

I must say, I maybe because of how I have been schooled, as a lawyer, I just instinctively have problems as one as a judge and two if I am appointed as a Chief Justice, to the very idea that there is a budget that is under me. And if it is under me, it places me in a position of, yes you say the accounting officer will be the SG, but the notion of you know, this budget is under me, I think it places, of courses I am thinking of the cuff, I'm thinking of the cuff, instinctively I just find that a bit difficult for me in a sense of something to do with. Even if I am not controlling it, but the very idea that you are the, I am sort of in the same position as the minister, with regard to that budget, I have difficulty with but it's something if appointed that I would try and apply my mind to. I am not outright dismissing it, but this is my instinctive reaction.

**Commissioner Singh:**

Thank you for that, that you're not dismissing it. I think it's something that needs to be engaged with.

**Justice Madlanga:**

And I guess that there is also the so-called international best practice. So, one could even look at what other jurisdictions do in this regard and could help inform what decision one takes ultimately, Commissioner.

**Commissioner Singh:**

5 The reason I raise this is it's also applicable in another arena where we serve. And the Honourable Speaker would know about this where the executive cabinet is accountable to parliament. Yet the budget of parliament falls under an executive member which is the minister of finance. So, there is a bit of who controls who. Parliament should have its own budget and be able to manage its own budget and not be constrained by what the executive has to tell us in terms of how much money we get. But I will leave it at that one. The second question is about the delays and I think Honourable Commissioner Malema spoke about the delays. Now, justice delayed is justice denied. And yes, I know of some, well I was informed of a case Masuku and Others versus the South African Human rights Commission for which the last 2 and a half years, hasn't been a judgement.

15 **Justice Madlanga:**

The initial hold up on that one was the Qwelane matter, mind you I did not sit in that matter. I recused myself due to a prior engagement as counsel in another matter a while ago but the issues were related, I am not mentioning that to say no no, don't blame me. Not at all. But, the reason for the initial hold up, was in Masuku, on my understanding, there was no Constitutional attack. It was more about the utterances themselves. Whereas in Qwelane there was a Constitutional attack. Now, if Masuku had been sided, out it this way, if Qwelane to invalidate which it partly did the Act an issue then it had an impact or a bearing on the Masuku matter. So, the Masuku matter was shelved until the Qwelane matter was decided. So, it was only after Qwelane had been decided and I do understand in practical terms that it would have cost a fortune to start writing the judgement, you start writing the judgement in which direction you know if Qwelane is still being written, it's in the pipeline. That is my understanding in the delay of, well at least as I say, part of it, part of it.

30 **Commissioner Singh:**

Thank you for that Judge. And you see it brings me to the question of modernization of the judiciary. Now you are in the hot seat and I am sure you are thinking about the day that you will sit in the seat of the Chief Justice, if the President approves your appointment. Have you given any thought to how you would like judiciary to be modernized, in keeping with other countries, African countries and countries outside of Africa, so that perhaps COVID might have been a good thing and a bad thing because it brought with it the virtual sittings? Have you any idea of how you would

like courts to function in the future so that these delays don't take place and you make it more friendly for law practitioners or litigants etc. Have you had any ideas? Do you have any ideas that you can place on the table in that regard?

5 **Justice Madlanga:**

If we did not have the 2 seriously different, I will loosely say communities in South Africa in the sense of the haves and the have nots. One would have said the best is the court online that I described earlier, and I won't go into detail on that. but I immediately said there are problem areas there for reasons that I highlighted in the so-called developed world. This court online it works like a jam. Even the youngest child is computer savvy and all of those things. And also, they do have the resources, everybody has access to all of these things. So, with us the problem always goes back to resources, access to money and the use of the, but as you said, even at the level of judges, my understanding is that was resistance was court online, but uptake increased as a result of COVID. So, in a sense COVID had a positive result but because there has been an initial uptake and acceptance, it should be much, much, easier for other courts to accept the system. But one would have to apply one's mind on how do you address these two worlds but the problem is and I think it is quite fundamental and will probably go back to resources again.

20

**Commissioner Singh:**

Thank you. I have heard the word resources many times, I think we have all heard the word resources many times and we understand constrained resources that the county is facing. But if we want to deliver a judicial system to the people out there who don't have to wait for years and don't have to languish in prison, bail for years on end, without the matters coming before court, then Honourable Minister, we need to do something about resources. And you have got parliamentarians here that will support an increase in that budget. So, we just hope that if you are appointed as Chief Justice, a serious engagement about resources with the Honourable Minister. My last question relates to the safety of the, there are concerns about safety of judges, of witnesses, witness protection. What ideas do you have? What can be done to ensure that there is a relative degree of safety of judicial officers and people who are whistleblowers?

35 **Justice Madlanga:**

Commissioner, let me not even try to pretend to be clever. That is an issue that I have not applied my mind to that. I will not pretend to have any answers or pretend to think off the cuff.

5 **Commissioner Singh:**

Thank you, Acting President.

**Justice Madlanga:**

10 But certainly, it is something, now that you have raised it with me, I would definitely apply my mind to.

**Commissioner Singh:**

Thank you.

15 **Justice Petse:**

Thank you, Commissioner Singh. Is it perhaps?

**Commissioner Malema:**

20 Follow up. Justice Madlanga, I don't think you need to apply anything. You are there, you are in the space. Let me put it differently, is there a security threat on judges?

**Justice Madlanga:**

25 I am aware that there have been incidents which have not been and could not be publicized but, on my understanding, quite a few. But if there is, there are a few, that in itself should be a cause for concern. But I must confess that I am not aware of the details.

**Justice Petse:**

30 Thank you, Commissioner Malema. Could we take just one Commissioner before we adjourn for lunch and that will be Commissioner Nyambi.

**Commissioner Nyambi:**

Thank you, Acting President. Good afternoon, Justice Madlanga.

5 **Justice Madlanga:**

Good afternoon, Commissioner.

**Commissioner Nyambi:**

Let me also join Commissioner Dodovu to commend you for your achievement.

10

**Justice Madlanga:**

Thank you, Commissioner.

**Commissioner Nyambi:**

15 But also as somebody that was once a Commissioner that used to interview people in the past, I think you are too modest about your achievement. And don't be apologetic, you are marketing yourself you know very well that we are spoilt for choice. We have the crème de la crème of jurists in South Africa for the entire week, so don't be apologetic for the 18 that will be coming after myself.

20

**Justice Madlanga:**

Thank you, Commissioner, thank you.

**Commissioner Nyambi:**

25 The first question is, as we know is a leadership position, we are talking about somebody who will be in charge of judiciary. Not just judiciary but also the very same body that is interviewing you. Somebody that will be chairing the JSC. If you can share with us, your understanding of immediate challenges facing judiciary in South Africa that needs some special immediate attention.

30

**Justice Madlanga:**

I would say, Commissioner, that the main one, one of the main, what the Commissioner Singh touched on, and I think also when we came back after tea as the Acting President was beginning to say that he was going to call on Commissioners for their questions, I said I just want to add something and that something was something that Commissioner Singh touched on. Was the question of delays but there's a useful phrase that justice delayed is justice denied. That is, an issue with every judge, every judicial officer, everybody who is associated with the law. Even ordinary observers, that is something that is quite a problem and that needs urgent, urgent attention.

**Commissioner Nyambi:**

Thank you, Justice Madlanga, the second question is maybe if you can make some of us to understand your view about the value of a dissenting judgement.

**Justice Madlanga:**

There's a saying in legal circles that a dissenting judgement of today may become a majority judgement of tomorrow. Let me very uncomfortably say this, you will recall that on 31<sup>st</sup> December 2021, I delivered a judgement. In that judgement I covered copiously from descending judgements by Justice Mokoro and Justice Kate Oregon, and Justice Albie Sacks. Those were dissenting judgments, but it is those judgements that I agree with quote copiously from and I reach the same outcome that they said were not in the minority. Were we not a dissenting voice? This is the outcome we would have reached. And in my judgement, I reached the same outcome that was reached in a dissenting judgement. On short point, there is value in dissenting judgements but an important rider, we should never descend for the sake of it. You write a descend because you simply cannot agree with what the majority says. But my own belief, there is something that we call "n huis besoek" at the Constitutional Court for those that, I do not know Afrikaans myself but I will know the odd term here and there. We call it "huis besoek" so when we were still operating from the court, where you have a disagreement with a colleague, you just get up and go to that colleague's office and you discuss back and forth and you discuss your views, your colleagues' views and see if you cannot reach common ground. And my experience is that on quite a number of times you were able to find common ground. So, in those instances, where will be dissents, I believe it is on those occasions where colleagues cannot find each other. And for the reasons I gave, there is value in that dissents.

**Commissioner Nyambi:**

Thank you, Judge Madlanga. My last question, it's the issue of quorum at the Constitutional Court. You know you will have our own sessions where we will be doing deliberations. Normally, say in the absence of information, sometimes perceptions become a reality so I don't want to have my own understanding of it when you said if you can be appointed, you can be able to assist because it has led to an injustice in the past. Why would you wait for an appointment to be Chief Justice while there is an injustice happening?

10

**Justice Madlanga:**

As they say, nobody does have an answer to a good question. Perhaps let me say appointed or not appointed, you are quite right it is an issue that we must address. Minister as I understand is the person, I must address would move a bill on this sort of subject. You have heard the problem and let us take this as a formal tabling. I am not a parliamentarian, but I will use the language and take it as a formal tabling issue before you for you to please do something about it. And the other Commissioners are also here and I hope this is something they can support.

20 **Commissioner Nyambi:**

Thank you, Justice Madlanga. Thank you Acting President.

**Justice Madlanga:**

Thank you very much, Commissioner.

25

**Justice Petse:**

Thank you, Commissioner Nyambi. Justice Madlanga, perhaps just as a follow up. The provision of the Constitution says the matter before the Constitutional Court must be heard by at least 8 judges. And the problem that you alluded to, in my view, could be resolved just by adopting a rule of practice. It's 9 or 11.

30

**Justice Madlanga:**

With regard to about 11, above 8, if you remember I separated my response to those situations where I said we internally could find a practical way of resolving it. And I said maybe an amendment may not even be necessary or it could be done you know just as a matter of extreme caution perhaps to have it stated statutorily. I even said  
5 it does not have to be a Constitutional amendment but the Constitutional states this for a reason. It has said 8, do we as the Judges of the Constitutional Court have the right to say, we are now 8 we cannot sit, come after a year or whatever when we will be able to sit more than 8, something does need to be done with the 8. We cannot just continue or on a continuous basis continue operating at a level of a practical  
10 situation where there is a Constitutional provision. I think something does need to be done about it. But otherwise, as I say I do accept the idea of practical resolution or dealing with it practically.

**Justice Petse:**

15 Thank you, Justice Madlanga I do accept that an amendment would be necessarily. Because you might have a litigant who is difficult, who insists if there are 8 judges you must sit.

**Justice Madlanga:**

20 You must sit.

**Justice Petse:**

Yes.

25 **Justice Madlanga:**

And especially, say for example the litigant who gained from that who gained from if the judgement court appealed against will stand if there is an even split. That litigant could easily say no no no, the Constitution says so please please, go ahead. Don't tell me about postponing to another date.

30

**Justice Petse:**

Thank you, Justice Madlanga. JP Tlaletsi has a follow up question.

**Justice Madlanga:**

Thank you, thank you.

**Judge President Tlaetsi:**

5 Just a follow up on this question. I think every judge of the Constitutional Court has the right to sit in a matter and now if you decide amongst yourselves who are you going to exclude and what impact will it have. If judge so and so was in that matter, then I lost my case. Thank you.

10 **Justice Madlanga:**

Thank you very much for that. Those are other considerations as well. Well, I may not have articulated as well as you Judge President, but I did say earlier that there will be the issue of who do you knock out and on what basis. But I think you articulated even better. Thank you, Judge President.

15

**Commissioner Schlemmer:**

Chair, may I please have a follow up on this?

**Justice Petse:**

20 Please do, Professor Schlemmer.

**Commissioner Schlemmer:**

Thank you. Good afternoon, Justice.

25 **Justice Madlanga:**

Good afternoon, Professor.

**Commissioner Schlemmer:**

Nice to see you again.

30

**Justice Madlanga:**

Thank you very much. I am happy to see you.

**Commissioner Schlemmer:**

5 The question that I have in this regard is do you think there is still, or the reason  
initially why the minimum of 8 judges was put into the Constitution exist anymore?  
And the reason why I am asking this is initially when the Constitution was drafted,  
the Constitutional Court was a new court, established to create Constitutional law.  
Now the Constitutional Court has open jurisdiction where anyone can bring an appeal  
10 to the Constitutional Court. Does that reason of having such a big bench since you  
are not dealing with the development of new law in the sense of initially with the  
Constitution and Constitutional precedence, which we now have but we also have  
that you are dealing with a lot of appeals from the Supreme Court of Appeal which  
also causes me to ask why suddenly are people not happy with the judgements that  
15 come from the Supreme Court of Appeal and on what basis? I would like to hear your  
view on this.

**Justice Madlanga:**

On the, I don't think, let me start with the last part. I don't think its people being  
20 unhappy more than they otherwise were. People will always take an avenue that  
they see now that can appeal against judgements of the Supreme Court of Appeal.  
They will take advantage of that. And with regards to the earlier part of your  
question. For as long as the, how should I put it, for a court of 11, or let me say there  
is value, there is value in apex court, speaking with one voice and in this sense, one  
25 voice I do not mean in an individual case, judgements being unanimous, no. One  
voice in the sense that there is a majority judgement in this case, majority judgement  
in that one and so on. So, there is value in that sense, that one voice in that sense.  
Yes, I know there is a criticism that we sometimes ignore, or we don't take into  
account. Our own precedent and so on, all things being equal, what should ordinarily  
30 happen is if you sit and bunk on all 11 of us or even 8, we have that precedent if all  
things are equal, we should follow all the way through. Unlike if we sit at panels. Yes,  
I know as a lawyer you will immediately say in particular is an academic  
Commissioner. You will immediately say but no no no, you should be aware that  
panel A, they decided a case that way and panel X decided another one that way. The  
35 problem with that is if that panel decided that way, as much as we should all be  
disciplined only to depart from earlier judgements if they are, what's the term we  
use, clearly wrong. Even though there is that, but there is that fundamental thing that  
human beings being what they are on. I was not part of that panel but I think they

decided that case wrongly. It may even be easier for another panel to say that was clearly wrong. Let me give you a case in point. Justice Mhlantla when she was still at the Supreme Court of Appeal, she decided a case or rather wrote for the majority, deciding that way. Exactly a year later, same date, a year later, a different panel of which she was not a part, decided another case on the same point, completely differently. And I think that this was exactly the function of the same point of the fact that the Supreme Court of Appeal sits in panels. I doubt that within a year that if they sit and bunk as the Constitutional Court does, they would have kicked away their own judgement within a year. I doubt it. So, there is that value in sitting in bunk. But I understand the point, if we sit in panels, we would go through work much much quicker.

**Justice Petse:**

Thank you, Professor Schlemmer. At this stage, we will take the lunch adjournment, according to our schedule is was supposed to be one hour long. Do we still stick to that? I make it 2 o'clock which means we will resume at 3 o'clock.

**Commissioner Madonsela:**

I propose that we come back at quarter to 3. It's me, it's Madonsela.

**Justice Petse:**

Yes, I have noted you, Commissioner Madonsela. I am just looking around to see if there is any discerning voices and it doesn't appear.

**Commissioner Malema:**

I don't agree with that. We hold very difficult responsibilities. And when you call us to come here for a week, we do so. But during lunch time, we try and satisfy other responsibilities. So, when we allocate an hour, we also put other appointments in that hour so that we don't lose time. So, I think that we have adopted the programme as is, so that we are able to perform certain duties in between, as they are important responsibilities.

**Justice Petse:**

I take your point, Commissioner Malema. You need not say more, we will adjourn at this stage and resume at 3 o'clock. Thank you.

**Commissioner Mpofu:**

5 That concerned me about one of your answers. Maybe preface it like this, at least in  
my book the 3 broad areas that would qualify one for this position, would be judicial  
skills and experience, and I am quite satisfied in that regard, that involves things like  
industry, independence, integrity and so on. Then the second broad area is  
leadership and people skills. And again, you have said a lot about that, you've been  
10 questioned about that. Particularly managing lawyers is not an easy task, and I can  
imagine managing judges is even worse. Of all different persuasions. So, the area that  
I want to talk about is the third area, administrative and management skills and  
experience. You, I take your point about not being a super SG as you say, and that  
you also don't like budgets very much. But unfortunately, this position will require  
15 those things. You are in a way, a person who is in charge of for lack of a better word,  
an organization or department. So, do you have those skills, are you, if you don't will  
you be able to develop them? And by that I don't mean do a B.Comm or anything like  
that, but just to be able to manage a budget and an organization. Management in my  
book would involve, or rather leadership and management would also involve your  
20 position as Chairing the JSC, so it's not just sitting on the Chair. It's about organizing  
the meetings and dates, managing all of us here and all that and interacting with the  
administrative staff. So, if we talk about the kind of dry side of things, not the forensic  
skills and all that, where do you stand on that?

25 **Justice Madlanga:**

Commissioner Mpofu, if I created the impression that I'm saying all that my focus  
would be, would more be leading in terms of what I said, leading in terms of crafting  
a lasting and credible juris prudence, that is not what I meant. What I did say, to me,  
is key. But I by no means meant that it should then take away the need for a Chief  
30 Justice to be a leader. I did not mean to say that, if I gave that impression, I do  
apologize for that. I would want to take issue with regard to the question of the  
Actual management of the budget. Yes, of course, you as the leader of the judiciary,  
will know what the courts need and other aspects closely related to the courts. So,  
you will have to have an input, assisted by others of course, heads of courts at all  
35 levels at what input should go to the budget. But without literally managing it  
yourself. I think as Commissioner Singh said, the accounting officer, even on the  
model that the Commissioner was suggesting would remain the secretary general, so  
I would just want to qualify that one aspect. But, focusing more on your point about

leadership and administrative skills. Here's something that I would want to emphasize, I have touched on a good few occasions on the aspect of me having  
Actually led a court. I just want to again go back to the other aspect which was not  
leading a court but leading a relatively sizable entity which as I said comprised  
5 about 100 people. Let me emphasize this about that. And it Actually goes to the core  
of one of the things that I highlighted with regard to what I think a leader should do.  
A leader in general, being able to come in and decide where you want to take the  
institution and 2 and if it is an institution that exists to identify problem areas and  
come up with solutions. Now, the entity I am referring to is that exchange control  
10 amnesty unit. That was set up by an Act of parliament which gave the tag Chairperson  
to the leader and that I was appointed. But effectively when you went through the  
Act, it gave the effect that the Chairperson was the Chief Executive Officer of that  
entity. Now, what do we get in terms of facilities? National treasury gave us a floor,  
literally empty floor. So, I together with the other amnesty unit members, started  
15 that entity from scratch. So, this is where my notion of identifying where you want  
to take an entity to. So, at a strategic level, we as the amnesty unit, under my  
leadership, decided where we wanted to that the entity. And at the initial stages, we  
ourselves, because we did not have any support staff at beginning had to take  
decisions even on mundane issues like what sort of even office furniture do we want,  
20 this and that, other facilities, your computers and then blah blah blah. And then of  
course, we had to take decisions at a strategic level. And there was resistance to this  
because people were suspicious of it. And I had to go out to the public and sell the  
idea. I also invited interested groups, we received advocates, we received attorneys,  
there are clients of course nowhere in sight. And they would ask hypothetical  
25 questions like how are you going to do that and we had to sell that. And, at the end  
of it all, it was a resounding success and I want to look for what I said is on there,  
which I said I wanted to quote from. Please just bear with me Commissioner. But the  
emphasis I am making is that throughout the demonstrate cannot only run with an  
existing entity, but I also can start an entity from scratch. Here is what deputy  
30 minister of finance said, Honourable Jabu Mlokoti said at the conclusion of the  
process, "I would like to take this opportunity to thank the amnesty unit for their  
sterling work. When the unit was initially announced, we did not anticipate the huge  
task that they would be faced with. Both in the number of applications received, we  
received in excess of 43,000 applications and the associated logistics and I might add  
35 that we did not have a single review application and we did dismiss some of the  
applications. We did not receive a single review application. It has through the  
exceptional efforts and meticulous approach of our unit that other countries, and I  
want to emphasize this, now seek to use our amnesty as an international benchmark.  
I wish to specifically thank the chairperson, Advocate Mbuyiseli Madlanga who has  
40 led the amnesty unit impeccably and with great enthusiasm." So, I think that amply  
demonstrates that I do have leadership and administrative skills and I want to

complete this response Commissioner Mpofu by saying to those that seek to emphasize, and this is something I have seen quite a lot of in the media. Those, it's the media people commenting and saying so in the media. To those who seek to emphasize the idea that I lack leadership, I don't, I don't. and have started an entity like this from scratch in an area and I emphasize this again, in an area that was completely foreign to me. And I led it to success, how much more will I be able to perform in an area where I have grown up? I have grown up in the judiciary and have been associated with the judiciary for 40 years. Anybody who wants to suggest that just because they have not been a judge President for 4 years, 5 years, 6 years, or at any other leadership of the judiciary for an extended period therefore I am not suited, I do not agree. I do not agree.

**Commissioner Mpofu:**

Thank you very much. In fact, that last part is exactly why I asked you the question because I know you are all humble and collegial. But ultimately this is a competition.

**Justice Madlanga:**

One of the colleagues, one of the Commissioners, I think it was you, sorry for pointing at you, said I should sell myself. I guess, I am warming up.

20

**Commissioner Mpofu:**

He didn't mean that much. On a serious note, that is the point you have currently alluded to. The fact that the other candidates that you are competing have demonstrable leadership, pedigrees within the judiciary. But I agree with you that leadership is a much wider, a much wider concept. And by the way, I attest to the way you led us in the Marikana Commission.

25

**Justice Madlanga:**

Thank you, Commissioner.

30

**Commissioner Mpofu:**

Now, the next area I want to ask you on is transformation. You, I don't have to give you any long introductions. You occupied the seat that I am occupying here in the JSE for advocates for transformation. So, you don't need to be lectured about the

imperatives of transformation, but I want to link that to your feminism. You said that you are a feminist. I am a feminist too. But you know that there are different types of feminists, and I am probably a radical and socialist feminist. I don't know what type you are but at least that's one thing is common. Which is the idea that the, its  
5 no longer about quality but taking Active steps to ensure that women occupy their place in society and not just in the profession. But let's come back to the profession. What have you done or more importantly what would you do, forget about what you have done, what would you do as Chief Justice to ensure that the idea of the quality is not just lip service and not a numbers game? It's about qualitative change and  
10 bringing and infusing certain ideas or rather killing certain ideas that might be pervasive within the profession in particular along the lines of, in other words what would we gain by having a feminist Chief Justice, like you?

**Justice Madlanga:**

15 The practical difficulties is that, it is more the profession itself which should fight those battles itself. It is my organization, I will still own it, even if I am no longer in it, Advocates For Transformation in which you are, organizations like PABASA it is even in the attorney's profession, BLA and NADEL, the need to fight those battles. I know a retort might be, but we have been fighting them but we are still where we are. But  
20 that's a fight that should never ever end. If anything, it should be intensified. The problem is always briefing patterns. I touched on it in my, not just myself of course but I used myself as an example. The problem is it is a perennial problem, it is a systemic problem. But as a Chief Justice what can you do, maybe more engagement with the profession itself. Maybe selling the idea of getting the profession at all levels  
25 to do some of the things for example that I, as an advocate at a transformative level, in practical terms was able to do, so much that Advocate Ntsaluba SC in a letter of motivation, at the nomination stage before the President, wrote this about me, he said, "I do not only speak about transformation at public platforms or on podiums" and he says I and I quote "live transformation". And what did he mean by that? what  
30 I used to do as an advocate, was to try, to a limited extent of course, as an individual you can only do so much. For example, in Johannesburg, I contacted him, and I asked if there would be any problem if I mentioned his name and he said not. In my Johannesburg chambers and for an extended period, I accommodated Advocate Emmanuel Mukutu, he is now senior counsel. I am not claiming credit, for the fact  
35 that he is senior counsel. But he had just started in the profession, and you will know that bayous are the greatest area to entry or to entering the profession. And in my Umtata chambers, I did the same. I accommodated Mququ, him as well for an extended period. And how was this possible? This was possible because my practice took me all over the country so it wasn't as if I was there and I am feeling cramped  
40 up. I was all over the country so basically my chambers was literally theirs.

**Commissioner Mpofu:**

Thank you, can I interrupt you?

5 **Justice Madlanga:**

Yes.

**Commissioner Mpofu:**

Maybe because I know some of the stories. I am quite satisfied with what you.

10

**Justice Madlanga:**

Ok let me, yes, may I zoom in on your question? I was merely.

**Commissioner Mpofu:**

15 Before you do that. Sorry, Justice.

**Justice Madlanga:**

I'm sorry, Commissioner.

20 **Commissioner Mpofu:**

Before you do that. I should focus the question. I will give you a practical example. Mogoeng Mogoeng for an example and I think to some extent JP Mlambo, always told us here or told the candidates from the bench perspective, we have our gripes about transformation and the lack thereof. But from the perspective of the bench, Chief Justice Mogoeng would lament the frequency with which the state in the Constitutional Court is represented by white counsel, white males at that. And we have all been sent to find ways in which the judiciary can intervene. Of course, you are right, PABAS, AFT must do it. But there must be a role for the judiciary itself and for example JP Mlambo itself initiated a system where they would take, literally take names of who appears in which matter. I don't know what happened to that project.

30

In a way, obviously you can't just say brief that one and brief this one. But you are trying to nudge the balance.

**Justice Madlanga:**

5 I was with that illustration, thank you very much, Commissioner Mpofu. With that illustrative, what I was trying to make is other or rather to, the point I was trying to make was the bar itself can do certain things and as Chief Justice, I would be willing if appointed, to interact with the bar. Not just at, I mean the lament of the Chief Justice Mogoeng is a lament shared with all of us. At tea we would just whisper and  
10 look at his head and what is happening in there? It strikes us all; it strikes us at the core all of us. So, at that level engage the leadership of all the professional bodies, those that I have referred to. Even the statutory bodies as well led by you, Commissioner Dlepu and engage them. And raise these concerns and see if it is possible to come up with practical ways, as you were saying about Chief Justice  
15 Mogoeng, we as the bench, we cannot tell whoever whom or who not to brief. We can't do it but at that level of profession. But the Minister is her with us from the side of the state, I do not know but Minister knows better at the level of you know in practical terms. I know in the context of certain judgement; I wrote a descent. A figure was given that they set aside for black practitioners is 75% that was what was  
20 said in one of the documents that served before us. But as I say, at the level of implementation, whether or not that is happening is something else. Those are the sort of issues that a Chief Justice would one engage the professions about and possibly even the minister.

25 **Commissioner Mpofu:**

Thank you, Acting President.

**Justice Petse:**

Thank you, Commissioner Mpofu.

30

**Commissioner Mpofu:**

Thank you, Justice Madlanga.

**Justice Madlanga:**

Thank you, Commissioner.

**Justice Petse:**

Advocate Madonsela?

5

**Commissioner Madonsela:**

Good afternoon, Justice Madlanga.

**Justice Madlanga:**

10 Good afternoon, Commissioner.

**Commissioner Madonsela:**

I must put forward the disclaimer that you and I speak frequently, and you and I are friends. And it is on that note, that I have to declare that I know you very well.

15

**Justice Madlanga:**

Thank you.

**Commissioner Madonsela:**

20 But that won't help you. You have expressed yourself very firmly on the idea of the Chief Justice being an intellectual leader of the judiciary.

**Justice Madlanga:**

I consciously avoided that term.

25

**Commissioner Madonsela:**

Well, that's the impression you left in my mind. But I certainly think you are right about that. That the Chief Justice should be an intellectual leader of the bench of the entire bench. But we as the public, have no idea whether you're really an intellectual

leader. And you are, or you measure up to that standard. The only way anyone is likely to be able to ascertain that, as a matter of assessment with regard to what your colleagues say about you. And that will arise more readily from the dissent, or the judgements being written concurred to by other judges. Or in the number of instances where other judges differ with you. On an average, are you able to indicate, with reference to the judgements you have written as a member of the constitutional court, how many times or how frequently have your colleagues concurred to your judgements firstly? And what is the regularity of them descending on your judgements, and which of the judgements you have delivered which you regard as groundbreaking. And if I may say, pretty much authoritative in their breath and ambit as to set you apart from all other judges in the country.

**Justice Madlanga:**

The last part is quite an ask about setting me apart, at the level at which this was pitched. But I am happy that I did not do an exercise myself but I am happy that the general counsel of the bar, they Actually do a very detailed breakdown on the question you asked about no descends and majority judgements and so on. And what comes out of those comments is that by far, most of my judgements are majority judgements. I think by quite a substantial percentage. Where there are differing views in judgements, mine by far in percentages are in the majority. And what is worth noting in that comment is that they say I have written descents in only 4 matters. Which means I was not able to command majority in only 4 matters, as I said I did not do the exercise myself but that is what the GCB says. Then on groundbreaking judgements, I would say Paulsen is, in this sense.

25

**Commissioner Madonsela:**

Is that Paulsen versus Slipknot.

**Justice Madlanga:**

30 Yes.

**Commissioner Madonsela:**

That dealt with the in *duplum* rule?

**Justice Madlanga:**

Let's leave out the in *duplum*. That was the very first case, that dealt with our general jurisdiction. It chartered the path as to exactly how we engage with the idea of our general jurisdiction. And that is the judgement that the Constitutional Court quotes day in and day out on our general jurisdiction. I would also say, the judgement in new national movement is also a landmark judgement because it is a judgement

**Commissioner Madonsela:**

Independent of, independent electorate?

10

**Justice Madlanga:**

Yes. It changes our, to an extent of course, our electoral system. It introduces the change that you mentioned. And I would say also that the Bwanya judgement that I delivered on the 31<sup>st</sup> December 2021, I think it is.

15

**Commissioner Madonsela:**

The next question is in relation to that case. The minister, the Master of the High Court case, I think I suspect it must have been the first time that Constitutional Court ever overruled its earlier decision. Directly. And I want to ask the question on that topic because I am thinking of the parties in the Fox versus Robinson in the case that you overruled. How they feel about the outcome of the judgement now that.

**Justice Madlanga:**

They were a few years earlier.

25

**Commissioner Madonsela:**

Yes. You have written before as a judge of the Constitutional Court about the importance of *stare desis*, the cases as foundational to the rule of law, in that case Tembile Jackson case, which is also so quoted, often in our quotes. As an apex court, as I said, you should speak authoritatively, in a manner that chants the legal position of the courts below you. At the SCA, the High Court, even the Magistrate's court. All the courts. And, what do you think should be the circumstances in which the court ready overrides, overrules it's own earlier decision?

**Justice Madlanga:**

Commissioner, I will latch on to 2 adjectives that you have used. At the beginning of this question, you said we, did you say directly, oh yes you said directly overruled.  
5 And what was the last one, you said right at the end.

**Commissioner Madonsela:**

I'm sorry Justice Madlanga, I used so many adjectives.

10 **Justice Madlanga:**

Ok, anyway let me just answer the point of substance. Maybe one will say it was all fancy footwork. But I do not read or understand my judgment in Bwanya to be directly overruling Fox versus Robinson. But yes, I immediately accept that the outcome does in essence, have that affect. Because the outcome is the direct  
15 opposite for what Fox V Robinson held. Why do I say it was, I did not directly overrule Fox V Robinson it is because I say one, before us, in this case, there was something factual, something evidentiary and I say Fox V Robinson cannot bind us now on factual matters? So, bringing my mind to bear on the factual issues before us now, I am led to a different direction. That's the first aspect. Then the second aspect is I also  
20 said, I also said I read in the Phatshawu judgement by Chachalia JA, a development of the common law, which was not there when my view on it. Yeah, it's a matter of some magnitude. I am not ducking the question hopefully.

**Commissioner Madonsela:**

25 Well, my recollection is that the incident of increasing the jurisdiction had to do with personalities of who were in the office at the time.

**Justice Madlanga:**

Oh ok.

30

**Commissioner Madonsela:**

The strongest personalities, the one having the Supreme Court of Appeal and the other having the Constitutional Court.

**Justice Madlanga:**

Thank you, Commissioner. I would just say, it is something that one would have to sit down and on and apply one's mind to. As I say, it's a huge policy issue. One cannot  
5 give an off the cuff response to.

**Commissioner Madonsela:**

Thank you, Justice Madlanga.

10 **Justice Madlanga:**

Thank you, Commissioner.

**Commissioner Madonsela:**

Thank you, Chairperson.

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**Justice Petse:**

Good morning, Commissioner Madonsela.

**Minister Lamola:**

20 I have a follow up question. It's Lamola.

**Justice Petse:**

You may proceed Honourable Minister.

25 **Minister Lamola:**

Thank you. On the same point that he has raised. I am on the flip side of it. It was Justice Mathopo he suggested that to collapse the Supreme Court of Appeal and make some chamber in the ConCourt and make one apex court. It's almost an opposite of what Madonsela was asking. What would be your view to that?

**Justice Madlanga:**

Because it is all that Minister, because it raises an issue that is closely bound up with another issue. On that as well, I would say that something one would have to sit down and apply your mind to. It is so, that the point that you raise is not a new issue. And I am sure that when my colleague, Justice Mathopo raised it, he raised it well aware of the discussions around it. When the late Chief Justice Ismail Mohammed, was still alive leading the Supreme Court of Appeal and I was Acting there, he was for the idea of a chambered apex court, one chamber exercising general jurisdiction and the other chamber exercising constitutional jurisdiction and I perhaps may be speaking out of turn here. I do not think the transfer for example of the Chief Justiceship from Bloemfontein from Braamfontein would have been as easy as it was if he had not unfortunately passed on as quickly as he did. That battle of chambers probably would have gone on for quite a while. Maybe who knows, maybe it might still not have been resolved even now and maybe the Chief Justice probably would have retired by now. So, the short point I am making Minister is, this is quite a complex issue.

**Justice Petse:**

Thank you, Honourable Minister. Justice Madlanga, don't you think over and above the workload of the constitutional court, some of the systems or practices of that court are also contributors to judgments, taking longer to be delivered?

**Justice Madlanga:**

I agree, in my note now, after you had asked me, you said things that are related to the delays. I could not because I would have been repetitive, go right to the beginning of my vision, go all the way down with it. I Actually, do have something that touches on the practices. For example, I say on there and it is one of the proposals I am making, but I am here to table for colleagues, but it is already in the document that I said is final and maybe circulated in October or latest early March. And one of those is, I have repeatedly mentioned the question of a post hearing put to you Commissioners. And then a first draft by an allocated scribe. One thing, I think is wrong which we do, and I suggest in the revised working procedures we should do away with, we quite early on, there will be a colleague who indicates at the post hearing note do not agree with an approach by the allocated scribe. But we rarely have the disagreeing colleague write at that stage. An opposing draft usually comes in after the second, sometimes even after the third draft. Now remember, I talked about comments, comments, comments at every stage. If an opposing judgement

comes in after the second or third draft, now remember that there are going to be comments, comments, comments on that as well. And there will be a few drafts on that one as well. So, it does lengthen the time quite considerably. Short point, I agree with what you say, the processes themselves also do contribute. What do I suggest in the revised working procedures? I say, right at the start, colleagues if there is disagreement, must engage each other as seriously and as heatedly. But I do not mean collegially as possible. Even outside of emails, because you know when you Acted there, usually express your disagreement by email, but based on the proposal that I am putting forward, you may even go beyond just responding by emails. Because in emails you can talk past each other. You pick up the phone because you are now physically not at court. You engage each other once you see that there is no way that you will find each other, then the opposing colleague must have the exact same deadlines as the allocated scribe. Then the timing of the judgement and even the final judgement and as you know on average, we have 3 drafts. So, the third draft being what we call the read through draft. So, it means even the opposing draft, the deadline for read through and all will be the same end point. That will reduce the time quite considerably. Short point, I agree with you, yes, our processes do contribute. At least in regard to this one. There is a proposal that I am going to be putting on the table and it is exactly what I have said to you now.

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**Justice Petse:**

Thank you, in fact the one I had in mind now when I posed my question to you and which I had occasion to raise during my stint. The unnecessary delays that happen after a judgment has been read through by the judges. I remember an instance where a judgement took almost 2 months after the read through to be handed down.

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**Justice Madlanga:**

I do not, because, I do not know why it was delayed that much. Because as you know what follows after the judges read through what are called clerk processes. So, the clerks just do editorial work, dotting the T's, just checking you know and even citations and things like those. And at the most it takes, maybe about 2 weeks thereabout, give or take. So, I have no explanation at all, I do not even know which matter that was. It should not be, that is not part of our processes. I do not know what went wrong there. It should not be like that.

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**Justice Petse:**

Thank you. Advocate Cane?

**Commissioner Cane:**

Thank you, Acting President. Good afternoon, Justice Madlanga.

5 **Justice Madlanga:**

Good afternoon, Commissioner.

**Commissioner Cane:**

10 I am one of the Commissioners on this Commission, that represents the practicing  
Advocates. So, I obviously want to take up a few things of out the GCB's very glowing  
review of your work. The first aspect which you said you took very seriously was the  
question in the way women are addressed and how matters may affect them. And I  
thought that was laudable. My question relates to how the position of Chief Justice,  
15 if it were given to you, would be able to take steps to enhance the dignity and the  
independence of women, over and above the laudable manner in which you set  
about expressing yourself in relation to women. Let me premise it by this, much of  
what you have said has impressed enormously as to, you referred to yourself as a  
trendsetter in writing judgements, my colleague referred to you as an intellectual  
20 leader. And that's a role that you are already fulfilling and playing so why is it that we  
should appoint you as Chief Justice, what would that position enable you to do, firstly  
in relation to women which you have already done?

**Justice Madlanga:**

25 I think with regards to trendsetter, it was more forward looking than factual now. It's  
the other one that may be taken as factual. But anyway, I would say if you come in  
with those qualities and if you remember in those very same comments you referred  
to the GCB, refers to quotes from my article, a feminist approach to the adjudicative  
process and it says in so many words, we will come back to this and then when they  
30 deal with my Bwanya judgement, they quote copiously towards the end if I am not  
mistaken, and then they make the point now we take you back to the quotation. This  
judgement shows that he is just not paying lip service to sensitivity on feminist issues.  
He actually even in his judgements shows that this is something that he truly believes  
in. Now, coming in or zooming in as Chief Justice and you actually as the bar says, you  
leave this thing and issues. It's not lip service to you, I think you will be able, you will  
35 be able to address the issue that you are raising. I think that is what you will be able  
to do on that table, at least on that score.

**Commissioner Cane:**

Thank you. Let me give you another example and ask you to deal with it also. The GCB review of you refers to the other article that you wrote on judging according to personal attributes and refers to you saying that diversity in the judiciary is important to achieve a just outcome. And you yourself explained what you meant earlier. Now as Chief Justice, if you were to be given that position, how would you cope with the diversity of views and also the need for certainty in law and clear guidance and clear precedent by the legal community and the community at large?

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**Justice Madlanga:**

I address the issue of diversity in the context of that article to show that there is functional value in diversity. Yes, it is important when this ogas body complies with Section 174 (2), for all sections of our community to feel represented, to feel that the judiciary is theirs to own it. So, the composition of how it looks that is important but, in that article, I also emphasized that is now beyond judgement, how does it look, I emphasized the functional value. So, here comes diversity and its functional value. Maybe I can best illustrate that, please forgive me Acting President, maybe I can best address this or illustrate this by referring to a judgement by Justice Kurkwood Marshall in the United States of America in the matter of Kras, where in ringingly, rebuking language fought with the Justice Kurkwood Marshall was African American, I should say that and the only one on the Supreme Court bench. And the case arose out of something on the face of it was quite small and it was if I am to try and understand the American system, in a manner that makes sense to me, it was about paying a fee to be able to lodge civil proceedings. Which probably would have been the equivalent of using revenue stamps that used to be attached to process in South Africa, a small modest amount. And Mr Kras was not able to pay that. This was an issue that was litigated to the Supreme Court of Appeal and the white justices...

30 **Commissioner Matolo-Dlepu:**

Refreshing article but I need a better insight.

**Justice Madlanga:**

I think the very fact, in fact that article Commissioner, I don't see the first part, I have always known you as Commissioner Dlepu. My apologies. The very, that article rather, was converted to an article from an address I made, being invited to go and

address judges at an educational seminar for judges. I converted it to an article. I think it is something that would have to be used. I could do it myself as well, you know to go to all levels of the judiciary. For example, if you saw, about 3, I think it is even 4 cases on rape. Where the most outrageous language is used on the women survivors of rape. Those 4 cases I think were at the Magistrate's court level and or course there are High Court judgements as well. So, the very fact that this was raised at the level of speaking into or attempting to educate colleagues, one can take it from there and take it to spread it to the rest of us within the judiciary and maybe even one could try to broaden it as much as possible.

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**Commissioner Matolo-Dlepu:**

I think Justice Madlanga, a further follow up I think on Page 49 of that article, I took the liberty of actually downloading it, just to try and understand because it really excited me. You said, the same project has been undertaken in Canada, the UK and Australia, do you think and you said you wish, one wishes that there would be such a project in South Africa. Do you think it can be followed up or not to try and address these issues of gender violence?

20 **Justice Madlanga:**

I think it is something that could and maybe should be taken up, just to put other Commissioners in the picture, what Commissioner Dlepu is referring to is what lawyers in the countries that the Commissioner refers to is, they will take a case that raised concerns around issues affecting women as women, a case where a judgement has already been delivered and that for whatever reasons is just insensitive to gender issues. They will take it and run it sort of as a mock case and even write a judgment, an alternative process of sorts. And then get to the sort of judgement ought to have been delivered in a case of that nature. That is something that could actually play a very vital role in the education process in addition to whatever processes may be in existence. You know, taking actual life cases and saying they got it completely wrong. How should it have been done and doing it in a manner that is gender sensitive.

**Commissioner Tshepe:**

For you, there could be seen as follow up. The first one relates to acting President Petse raised regarding the 2 issues at the Constitutional Court. 1 being you answered the issues on delay. But Commissioner Dodovu asked you on the second issue on the

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quality of judgements of the court. You answered the question on the issue of the delay and quality of judgements, you said you require details. And I want to give you an opportunity as Commissioner Nyambi said you must take up these opportunities and respond to them. With the first one on the delays, you didn't ask for specification. On this one, you did. And I want to believe that you would know whether there are issues or not. With regard to quality of judgements and if you think they are not, it's also ok to say you don't think they are or if they are, how should we resolve them? That's the best question.

10 **Justice Madlanga:**

Maybe let me say this. I have written a judgement which has been roundly criticized, judgement in the matter of SETA versus Gijima, a roundly criticized judgement, roundly criticized. And reading the criticisms, there is a lot of substance in them. But of course, I think one of those that wrote the articles went overboard and wrote to the extent of basically saying you know, we cannot even think and I would be surprised if the Commissioners sitting here listening to me speak from the morning can ever have the impression that I cannot think, I would be very very surprised. And I think academic went to far as to say that, in fact he goes so far as to say that we don't care to think. And is this as a result of Gijima or is this because of all the judgements I have written. And if that was the case, can people who live closer to what we do, like the organized profession. The BLA has written a glowing report about me, if I couldn't think I don't think they would have done that. NADEL has written a lengthy comment glowing laudatory comment about me. The same with the GCB, they have written, I mean they itemized and said we going to discuss each candidate under 9 topics. I think from the first topic, all the way to the ninth topic. All the things that the GCB says about me are positive. So, yes, we all do make mistakes but to then say, those people cannot even think. That's nothing but you know gratuitous insults. I will accept that I do make mistakes and I will accept that even some of colleagues do make mistakes.

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**Commissioner Tshepe:**

Justice Madlanga, may I just correct this maybe I may not have come across as clear. I didn't understand Acting President Petse's question to be about you personally. It was a general question about the standard and quality...

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**Justice Madlanga:**

I understood you. I understood you perfectly. I just chose to make it about myself, because you said am I not aware perhaps and I say I have read academic comment, academic criticisms on my judgement in Gijima. And there is a lot of substance, there is a lot of substance in it you know. So, I guess indirectly that answers your question.

5 I chose to use my judgement instead of using other colleague's judgements.

**Commissioner Tshepe:**

Just to follow up on that.

10 **Justice Madlanga:**

And I am not necessarily saying oh yes, I was wrong so colleagues can then come and overrule me. All I am saying, I put it no higher than saying there is a lot of substance in the criticism.

15 **Commissioner Tshepe:**

Thank you, Justice Madlanga. And I guess the question comes in the context of the position of a Chief Justice who will be responsible for the judiciary and in relation to criticism of that nature, how do we resolve those issue so that there is certainty in relation to judgements that come from our court.

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**Justice Madlanga:**

I will say, I will say, we will never and not in a single country, we will never reach that level for as long as we are human beings. We are fallible, and yes fine we are an apex court, and people may yes even you can be wrong then what, but we are only human.

25 We are fallible like anyone else, in the world over, in all jurisdictions. One can never be able to say that other apex courts in other countries can never get it wrong. It just does not happen. That's an impossibility.

**Commissioner Tshepe:**

30 Thank you, Justice Madlanga. My second and last question is Justice Madlanga, when asked about your experience in leadership, you gave a very lovely summary of a leader in any institution should be. And you did it twice, the first one you determine where you want to take the institution and if it's an existing institution, if there are problems would be and then implement. I would like you, in a way of a closing

remark. You, would you be appointed and taking over the role of the judiciary, the head of the Constitutional Court and the Chairperson of the JSE, I would like to hear from you what, where would you like to take the judiciary, the Constitutional Court, then JSE, just on that summary. What would be the priority problems and what would be the solutions and how you would implement it, in a summary. I want to be able to leave here and having gotten that from you. And when we deliberate, I am able to get that, if you don't mind. Thank you, Justice Madlanga.

**Justice Madlanga:**

10 Yes. As I said, from me the large, large, large, elephant in the room, in the Constitutional Court itself. And my vision is important to me because the Constitutional Court is the apex court. My vision is to have a Constitutional Court that is running like a well-oiled machine, finalizing matters on time, delivering judgements on time, in accordance with whatever timeline that we will agree to. As I said, I have suggested 5 or 6 months to colleagues, I hope they will accept that or not, whatever we settle on. What we agree to should be what we try to live by. Also, I did touch on delays and now not just the Constitutional Court but the broader judiciary as a whole. Trials taking long, want matters to come to trial, both civil and criminal and case line. No, not case lines now but case flow management. A process has made or introduced or brought about great changes in that regard. So, one would just have to look more closely and see what needs to be done. Maybe introducing improvements to make sure that there are lesser and lesser delays in the process. And of course, there is the question of court online which is only going to be implemented after the second stage of the pilot project in Gauteng. And the Chief Justice coming in will have to preside over the roll out of that and also some of the judicial officers are not computer savvy themselves you know and may have a resistance to this notion and I doubt just because of COVID that there has been take up by all judicial officers, one would have to sell the idea. Let me give a quick example by myself, I was forced by this organization to go online when I came to JSC meetings I used to pull a huge suitcase and I why I stopped, I used to pay a lot of money I could not pass on that, I felt guilty, I could not pass that on to the JSC. I used to pay a lot of money to SAA. Then I was forced to use my computer and to use paper online. So, we can easily find ways of making colleagues by in and for this project to be a success. One would also have to find ways and emphasized earlier that this is acceptable or rather accessible to a certain component of our society. But it is unacceptable to another component. One would have to find ways of making sure that it, it's for them as well. For example, I gave the example of why not take a virtual court closer to the places where people live. Not have a physical structure no, within the available resources. For example, have a screen, have people testifying in Protea but their case is a High Court case in Johannesburg. Again, a cross type of case, the United States case I referred to,

5 somebody an old lady and an old man who lives with grandchildren and all their income is the old age social grant. And to say travel every day to downtown Johannesburg to give evidence everyday is quite a toll on somebody like that. Whereas all they need to do is go to a court in Protea, listen and watch proceedings and participate in proceedings through a screen set up closer to where people live. One can come up with a whole lot of innovations to make just truly accessible and make Section 34, access to court meaningful for people, in particular our vulnerable and poor people.

10 **Commissioner Tshepe:**

Thank you, Acting President. Thank you, Justice.

**Justice Madlanga:**

Thank you very much, Commissioner.

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**Justice Petse:**

Thank you, Commissioner Tshepe. Commissioner Matolo-Dlepu?

**Commissioner Matolo-Dlepu:**

20 Thank you, Justice Madlanga. I think in the morning, I think earlier you expressed your vision, if you were to be appointed as Chief Justice and fortunately one of the things we asked you, about you explaining the access to justice issue, especially the self-representing litigants but I think you have done it just now. But then the other one I need clarity on, is the high costs of litigation especially since we have SC's in the  
25 room. You know and how do you think we can deal with it. And lastly the use of mediation, I just want a better explanation to how, what is your vision regarding that.

**Justice Madlanga:**

30 One can think about ways in reduction but not reduction of counsel's fees. I cannot see how I can possibly, all Commissioners will probably see the direction in which I am looking. One cannot even begin to think of saying to counsel, please don't charge X amount of money. It will be more their clients who would have a cloud in that regard. What could happen is, rather more issues that could cut down on costs like for example I think the very idea now of hearings that on a relatively large scale have

taken place online should in itself cut down costs. I said I travelled all over the country you know in my practice. Imagine the disbursements from the travelling costs, the hotel costs and maybe sometimes you are there for a whole week. All of that gets past on to the poor litigant. But now, counsel 1 will be in Cape Town and another one  
5 in Durban and so on. There will be such disbursements and maybe there is a need for, as part of this revamping the systems and pushing for an online system that reel down to the benefit of the ordinary person in the street. But of course, as I have said, there is always the problem of accessibility and so on and so forth, maybe with a serious application of the mind, solutions can be found. I did give the example of the  
10 one possible solution that I gave. But the very idea to cut off the disbursements and you are left with the legal fees, the consult fees, the fees for arguing in court and so on. And those disbursements are not an insignificant amount.

**Commissioner Matolo-Dlepu:**

15 I think the second one is the use of mediation. I think you said it should exclude judges, tell me if I am wrong. How did you say it?

**Justice Madlanga:**

20 It was, the point I was making for, if it is used more and used effectively, matters that don't really have to be litigated, the process may hopefully have the effect of taking them out of our system and then therefore assisting the courts to focus better on those matters that truly have to be litigated. That would be the benefit to the courts system. And my understanding from the article I referred to, penned by Judge President Roland Sutherland, is that it is not used optimally at the moment.

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**Commissioner Matolo-Dlepu:**

Ok, thank you, thank you Judge President.

**Justice Petse:**

30 Thank you, Commissioner Matolo-Dlepu. Justice Madlanga.

**Justice Madlanga:**

I am very sorry. I whispered something, I was saying.

**Justice Petse:**

I heard you, Justice Madlanga. So, I think maybe

5 **Justice Madlanga:**

I hope this will not be a meme.

**Justice Petse:**

Perhaps we should then take just a 5 minute's comfort break.

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**Justice Madlanga:**

Thank you very much.

**Justice Petse:**

15 Fellow Commissioners. We are still left with about 11 members of the Commission. I will appeal to the remaining Commissioners to try and adhere to their allocated time. And once more, Justice Madlanga, please keep your responses and answers short.

**Justice Madlanga:**

20 Thank you, President.

**Justice Petse:**

Commissioner Shabangu-Mndawe?

25 **Commissioner Shabangu-Mndawe:**

Thank you, Acting President. Good afternoon, Justice Madlanga.

**Justice Madlanga:**

Good afternoon, Commissioner.

**Commissioner Shabangu-Mndawe:**

5 I think 98% of my questions have been covered by other Commissioners. But I only  
have 2 that I have clarity on. Access to justice, it's very close to my heart. From what  
you have already alluded at, do you have any idea as to how you can improve on that  
so even a woman who is in Mbuzini or Kwamhlaba uhlangene can be able to access  
to justice. Someone who even doesn't have a screen that you made example on. As  
to how can they access justice. Can I also just throw in the second one so you can be  
10 able to answer it as one so as to not waste time. There is a concern from the GBV  
activists, you spoke about sexual offences, the concern is the cases on sexual offences  
took time, or take time to be heard in court, be it lower court and high court. How  
can you as Chief Justice assist that these cases be speedily heard so that they can give  
closure to the victims? Thank you.

15 **Justice Madlanga:**

Thank you very much, Commissioner. You refer to a person from an area that I think  
is like my own very rural area. I was born and raised in rural village outside some  
kilometres out of a rural town and you instance a situation where this person does  
not have a screen and you refer to my example. My example was attempting to make  
20 a point that the screen should not be that off the person on the other end. The idea  
was more of the person you are referring to because sometimes it can be long  
distances between for example the area that you are referring to and the seat of the  
court. Say for example it's the High court they are using an even longer distance. At  
least with district courts, there will be a district in the town where they live even if  
25 they live in a rural area outside the town itself. So, for that person to travel all the  
way from some rural area outside of Pietermaritzburg, so my idea of the screen, was  
that the screens, which are not or should not belong to the people. But the screens  
be brought closer to the people are at state expense. But of course, you and I know  
that the idea of resources, especially now, will be thrown back at us. But the idea,  
30 that is what the idea is and Commissioner Singh said if something must be done to  
make sure that our judicial system works, you know. Funds must just be found  
somewhere. And one hopes that you know because it is pilot roots funds. So, one  
hopes that with ideas like those, parliamentarians speaking as parliamentarians and  
pushing each other, the resources can some be found. If it will materialize, I do not  
35 know. I will not lie and say that I am at the moment as I sit know whether there are  
specialized courts that deal with sexual violence or offences involving sexual  
violence. An idea is that I have, in case there are no such courts, there is no reason  
why, in the same sense in the big centers, you have a specialized commercial court,  
there is no reason why you cannot have specialized criminal courts that deal with

cases of this nature and the hope of course is that there will be no hold ups at the investigative stage. And then once a matter lands in the hands of the specialized sexual offences court, it gets dealt with expeditiously and the advantage of that is, once the court is a specialized court, there is going to be expertise within that court and that will add to the sufficiency.

**Commissioner Shabangu-Mndawe:**

Thank you, Justice Madlanga. Thank you.

10 **Justice Madlanga:**

Thank you, Commissioner.

**Justice Petse:**

Thank you, Commissioner Shabangu-Mndawe. Professor Schlemmer?

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**Professor Schlemmer:**

Thank you, Acting President. Justice Madlanga, when you spoke about your vision, you indicated that you are concerned about the commercial cases that go on arbitration. You answered questions on the quality of the judgement of the Constitutional Court and if you read the news, you would have realized that remembered in the interviews in April that we spoke a lot, or maybe I did, that we spoke about the scholarliness of judgments and the reason for that was eventually also indicated as a lack of funding. Due to the fact that researchers could not be appointed to all the High courts or enough researchers. So, all of this leads to the one question I have and that is that seems to be the problems with the judgements and the quality of some of the judgements. How do you foresee, if you were appointed as the Chief Justice, to address these matters, not only in the Constitutional Court because I think the issue is way way broader than at the Constitutional Court.

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30 **Justice Madlanga:**

Yes. It is a great pity that I would want to take this not one but many steps back. Judicial education, without in any way expressing a vote of no confidence, and it by no means because if I did not have confidence in the process, I myself would not have participated in it. I gave an example of participating in seminars, at judicial education,

but judicial education can only do so much. If you have not been exposed to a very large extent during practice, to various areas of the law. Yes, I did say and I will not contradict myself, if you apply yourself seriously enough, even at the level of judiciary, it is possible, it is quite possible to catch up and reach a level at which you can deliver judgements that are an acceptable level. But it may take time for you to reach that level and going to a seminar over one week cannot really say or have the same effect as growing up as a practitioner that is exposed to sufficient work. You cannot grow with those 1 week there, 1 week there, you will not grow as the same way as you would have grown as a practitioner. When you have grown as a practitioner and you have the right level of experience, you to use the hacked term you hit the ground running as it were. And you are able to do everything but as I want to emphasize that I am not going back on the point I made earlier. This goes back to an issue, that in some ways maybe outside the hands of the Chief Justice, the briefings pattern but a systemic, perennial problem. We need to have our people exposed to work at the right point which is practice. There are various stakeholders, I touched on that, to the extent that I may be able to, I am quite willing to play a role and engage with all the role players in that regard. Let people grow at the level of practice. That's the best way you can cut your teeth and by the time you get to the bench, you are ready. That would go some way in terms of eliminating some of the problems that you referred to, Commissioner.

**Professor Schlemmer:**

I agree 100% with you. And, on that note, if you had a chance to change the way in which judges are appointed, what would you do?

25

**Justice Madlanga:**

That's a very difficult one, Professor. I think as I did in response to another question from one of the Commissioner's that side. It's something, if appointed, it's something that I would have to apply my mind to. One, is that necessary and if it is necessary, what route should we go. I would not pretend that it is something that I have thought of because I have not.

30

**Professor Schlemmer:**

The reason I am asking that question is one often hears that people say that the JSC does not always have the interest of the judiciary in mind or properly in mind, when recommendations for the appointment of judges. What is your take on that?

35

**Justice Madlanga:**

When I say, I thought we did and you will recall earlier I said, I hardly ever watch the proceedings. It would just be glimpses here and glimpses there of what happens in  
5 during the processes here. So, its very difficult not having seen candidates before you perform. For me to say nah, they should have taken candidate A instead of candidate B is very difficult for me to say. But I am willing to say when I was part of this body, I believe we did. And by saying that, at the time of saying here we did, that is not at all a pronouncement that at the moment the JSC is not necessarily doing that. A lot does  
10 turn on what happens here because sometimes you may know somebody to be a very good lawyer in terms of forensic skills and so on and so on but once people come here, a lot more gets asked about issues that are considered to be relevant and people might come short on those things. And because I never as I say, except for short glimpses watch what happens, what questions people get asked, it's difficult  
15 for me to pass judgement.

**Professor Schlemmer:**

Thank you. Thank you, Chair.

20 **Justice Madlanga:**

Thank you very much, Professor Schlemmer.

**Justice Petse:**

Thank you, Professor Schlemmer. Commissioner Notyesi?

25

**Commissioner Notyesi:**

Thank you, Acting President. Good afternoon, Judge Madlanga.

**Justice Madlanga:**

30 Good afternoon, Commissioner Notyesi.

**Commissioner Notyesi:**

I am trying to start on the very point that everybody have asked you about, the issue of leadership. In Umtata, in the Transkei as it was then called, you presided over 6 judges, in fact there were 5 judges, you were the 6<sup>th</sup> judge there. When you were the acting President of that division. You outlined what you have to do as the acting Judge President of the division. That's what you just shared with us.

**Justice Madlanga:**

I said I should share.

10 **Commissioner Notyesi:**

That's what you just said, what it is that you have to do as acting President of that division. But this is what to me, more important, that you don't share. You become a Judge in 1996, it was a time of tension with few black, one of the first few black judges that were appointed to the bench. And if you calculate from 1996 to the time that you were appointed as the acting Judge President. That experience is what we would like you to share with us because we would like to see how you were integrated into the new system and how you brought all those judges together and how that enhanced your leadership as a Judge, as a leader.

20 **Justice Madlanga:**

I must say that came in in the footsteps of Judge President Somyalo and so I think at the time that I came in, the court was an integrated court. The relations were good amongst all colleagues. In fact, I think we were quite fortunate even when I came in and the leadership was still a white colleague, Judge President Beck, if I could use the term, he affected the, he literally used a funny term, in a sense he headhunted me as it were. Relations were quite cordial, so to come closer to what you asking, everything ran smoothly and it was easy for me to bring in whatever innovations I wanted to bring in. Everything was accepted, easily.

30 **Commissioner Notyesi:**

In the period before 1994, that is before the elections, first elections, before we had any black judges. What is clear to me is that black people, in particular black practitioners such as yourself have a decision to make that is, are you either on the side of the people, that is the black, the oppressed, majority of the people are black people or for convenience, for your own convenience, you are part of the oppressive

system and from the list of people that we work with, Skhweyiya, Morane, all those that were resisting the system, to me, how would you not categorize such decisions on leadership on their own. Because you had the choice to say oh well, I'm a lawyer, I can just concentrate on my lawyer ship, but now you make a conscious decision to say, I align with the oppressed people. It wasn't fashionable at the time, very few take such decisions. How do you judge that it doesn't count as part of your leadership?

**Justice Madlanga:**

10 I guess I came in at a time when the sort of cases did were sort of, were towards the tail end but I did get involved in a few. For example, I am sure you know because he is your home boy, Leonidas commonly known as Leo Xathula who killed by security operatives.

15 **Commissioner Notyesi:**

At Bhizana.

**Justice Madlanga:**

20 Yes, I represented his family when they instituted a dependence claim against the government. Also, there is the well known case, the children of Mpendulo, the children of Mr Mpendulo who were gunned down at North Crest in Umtata, again by security operatives. And the floor was all blood throughout, there as well, I represented the Mpendulo family and briefed by ubhuti Dumisa Ntsebeza. You know how strong he is, but when we consulted ubhuti Dumisa was almost in tears. So, even  
25 though I came in at the tail end, I did get involved in those sorts of cases.

**Commissioner Notyesi:**

Now, I see from your CV.

30 **Justice Madlanga:**

Of course, I never went to the stage of a trial, but I drafted the particulars of claiming the Mpendulo case.

**Commissioner Notyesi:**

I see in your CV, as part of your reference, this is what you write, you write, your first reference is former Chief Justice PN Langa, former Chief Justice of South Africa and then this is what you write “although he has since departed, I cannot bring myself to delete him, call me sentimental”. Can you explain why you felt it important to make reference or make reference to former Chief Justice Langa?

**Justice Madlanga:**

I am today, in the comfortable position that the references are never used. Even if they were, I doubt that I would remove igama lika bhut Pius from there. That is all to translate that I would remove Pius’s name from there. I think, don’t I have 3 references?

**Commissioner Notyesi:**

Ja, you do.

**Justice Madlanga:**

I could live with the 2 and still keep his name on there. Ndandimthanda. Ndandimthanda. I was close to the man, I liked him. And just as I say there, I could not bring myself to delete him. Once I put him on there, even before he became Chief Justice, he stayed on my CV forever. And I will keep his name on my CV until I die.

**Commissioner Notyesi:**

This to me, is very important to mention when you deal with someone.

**Justice Madlanga:**

5 And maybe, if I could add. The circumstances in which I met him actually the same  
context that you referred to and I quoted these other 2 cases. It's just that I forget  
the case name of this one, but that too was a security related matter in which he and  
I were representing two, he was representing his own witness and I was representing  
a witness. The so called recalcitrant witnesses who would not testify and you as an  
10 advocate would have a watching brief, that's where he and I first met. And then we  
continued interacting thereafter.

**Commissioner Notyesi:**

I want to believe, correct me if I am wrong, that since 1994 amongst the present  
15 Justices, not only in the Constitutional Court, even some but correct me where I am  
wrong. You are one of the few that have worked with Ishmael Mohammed, worked  
with Pius Langa, worked with Author Chaskalson, all these Chief Justices, you can just  
tell which Chief Justices who you haven't worked with. As I understand, you have  
worked with all of them and when you answer that question, could that be divorced  
20 to succession planning, exposure, understanding where we are coming from, the  
approach in terms of stacking up this Constitutional dispensation.

**Justice Madlanga:**

I would say the exposure to several and different leaders at that level. Certainly, does  
25 add to one's own outlook on the leadership of the judiciary.

**Commissioner Notyesi:**

I'm sure I am left 2 minutes in my chair. The point I would like also to draw your  
attention to, that you have dealt with this question, I must go to the next one. This  
30 issue of Judges calling for press conferences to answer matters they find  
objectionable. Perhaps if you don't feel comfortable with that question, I think I will  
deal with other candidates who can answer, you can say so. But my point is the calling  
of press conferences by Judges to respond to political rhetorics and statements which  
they perceive to be attacks and criticisms. How would you respond to it, if you can?

**Justice Madlanga:**

I attempted, Commissioner to deal fairly at length with, oh yes, I guess you are teasing out just the question of a press conference now specifically. I think I did a  
5 view to that question when I said yes, the one approach could be approaching the 2  
leaders of the two arms of state, approaching each other and talking. And then I said  
on some learning that I have had the advantage of going through. A point is made,  
and I think I do share it, a point is made, there may be times when somebody who is  
10 at a certain level within the judiciary and that for me speaks to the judiciary may have  
to respond. Take a situation where you try to reach out to the leader of the other  
arm of state. And you see that things are going exactly the way that Justice  
Mohammed says it shouldn't go. Exactly the way that Justice Kriegler in Mamabolo  
warns against. When you try to reach out to the other arms of state and you are met  
with resistance, or the leader just says I will not see you at all, or they see you and  
15 say there is nothing I am going to do about that, what do you do? Do you then throw  
your hands up in the air and do nothing and let the public believe what they want to  
believe in an instance where something does have to be done? But I want to  
emphasize and I did say this before, I am by no means advocating a situation where  
day in and day out we would be running to the media. Not at all. But there will be,  
20 and it is quite conceivable, but there will be odd occasions where it will be necessary.

**Commissioner Notyesi:**

This is my last question now. The question is only on this.

25 **Justice Petse:**

You have exceeded your time allocation. By 10 minutes already.

**Commissioner Notyesi:**

Oh, I thought this was the 10<sup>th</sup> minute.

30

**Justice Xola Petse:**

Please pose your question.

**Commissioner Notyesi:**

Thank you, President. I just want this question because this question is on transformation asked by everyone. Would you agree with me, in this country, blacks and, banks and big business, they are advocating for racists, they hate black practitioners. Would I be correct to make that conclusion that big banks, big business actually advocate for racism because they are the people who don't want to brief black practitioners and women in all their cases. You can take from the SCA, Constitutional Court, if the case that involves them, they simply don't brief black practitioners and black women. Is that not racism or how best can we describe it?

10

**Justice Madlanga:**

Commissioner Notyesi, the reality is that I did say, take Umtata for example, there are banks there as well, there were banks there and I think the only bank that briefed black people were on York Road, it's NBS and then the big banks did not. So, the reality is that whatever take you want to give it, they obviously prefer to take the work and take their money to people who look like them and look like them who own the banks. That is the reality of our situation and it explains why, yes there was a little bit of commercial work in Umtata, it explains why I was never exposed to that and it can only be on the basis of that those who have the money and preponderant in South Africa it is white people. Those who have the money will take their money to their people.

20

**Commissioner Notyesi:**

Thank you very much, Chairperson.

25

**Justice Madlanga:**

Largely.

**Justice Xola Petse:**

30 Thank you, Commissioner Notyesi. Commissioner Xaba?

**Commissioner Xaba:**

Thank you very much, Acting President. Good afternoon, Justice Madlanga.

**Justice Madlanga:**

Good afternoon, Commissioner.

5 **Commissioner Xaba:**

I just want to go back to the question Judge President Tlaetsi raised earlier on and also touched on by my colleague who just came before me. But I want to broaden in. It's the traditional approach to, It's the traditional approach that judges speak through their judgements. In the context where there is now a temptation by some  
10 in the judiciary to contribute to the ongoing debates under the rubric of freedom of speech. What is your take on that?

**Justice Madlanga:**

Commissioner, I have attempted to deal with that one at length at the beginning and  
15 I think there was also a follow up question on it. I am not trying to duck it and then again, Commissioner Notyesi engaged me quite extensively on it. I don't think I have anything to add.

20

**Commissioner Xaba:**

With due respect Justice, I thought that was confined only to press statements. Press statements. I am just talking generally. The principle that judges speak through their judgements and the temptation of senior judges to contribute to the issues of the  
25 day.

**Justice Madlanga:**

I hear you now, my apologies, my apologies. To that one I would say, Commissioner, the issues that I say may actually call for a response from the judiciary. And on which  
30 I said, the approach or possible approaches are two-pronged. Sometimes do not relate to court going matters, so they will be at times, there will be no judgement to speak through as it were. Yes, sometimes criticisms may come up as a result of a judgement that we may have given and in those instances, I do not see why a Judge

would, to speak and say no this is actually what I meant and why. Because it is in the judgement, it's in the judgement itself. But there are those instances where the criticisms, the minister added attack or attacks may be relating to issues that have nothing to do with judgements.

5

**Commissioner Xaba:**

Sorry, just to assist, Justice. I am talking in general. Don't confine it to the attacks. It's judges, wanting, entering into a political discussion to an extent in some cases of contradicting government policy or policy of the country.

10

**Justice Madlanga:**

May I, I think now I get the idea of what you are probably alluding to. May I ask to duck that question and put it no higher than the level of principle which I think I have already addressed because you will correct me if I am wrong. Because what I think you are alluding to is something that I is a litigious matter and as a sitting Judge, I would prefer not speaking to it. So, I am quite comfortable addressing issues in general terms and I think I have tried the best I can to do that. But let me say this, the code of conduct, the code of conduct and I thought I did touch on this earlier. When, was it Justice Tlaetsi was asking me, the code of conduct say does say that Judges should not involve themselves in political controversies. The code of conduct does say that. And you will remember Commissioner, then is when I then made the lengthy attempt at explaining how we nonetheless will still get involved in political issues but in the process of the adjudicative process. And then I did say that but once you stray outside of the adjudicative process and meddle into political matters and that's when you then may transgress the code of conduct. I did say that, I am willing to stand by that. That I will not duck. But it was more a feeling that you may be alluding to something specific which is something litigious that I say it's best. I hope at the level of principle yes, yes, yes, we should not meddle in political controversy. I say that categorically.

30

**Commissioner Xaba:**

Thank you very much, Justice Madlanga. You are selling us a vision and you further state that the period remaining in the bench does not count against you for the position of which you applied of Chief Justice. Now, don't you think the short term will make your vision a nearly impossible feat and two may not contribute much to the stability of the court. I'm sorry that I have to labour this point, but I thought I should raise this as a parting shot as it will labour the minds of the Commissioners.

35

**Justice Madlanga:**

Thank you, Commissioner. I will also in a sense be labouring my response. I gave the example of me acting as a Judge President for I think it was about a year. And within  
5 that year bringing in innovations and I gave you a tangible example of what I came up with tangible results. Within a year. I also gave the example of somebody that is well known to this organization body, I'm sure if I sat down and scratched my head hard, I could easily come up with more. I gave an example of Judge President Mbenenge who within a year was able, I will not say that the Eastern Cape division  
10 was a horribly performing court no. But he took it from whatever level it was at and took it high up to one of the better performing divisions, again within a year. And I think some of the results are quite visible to this august body and I hope I will cause resistance for him in the future when he comes here because he and I are quite close. And I do know that by and large that he does manage in this august body to one, he  
15 is able because of how he can identify talent. Of course, it is the minister who makes the appointments, make the appointments, and then have people acting. He is able to bring to this august body the sort of talent that by and large, this august body has found acceptable. But that's just one facet overall, he has made the divisions one of the better performing divisions and he did that within a year. So, 3 years I repeat  
20 categorically Commissioner, 3 years is a very long time. The entity that I said I ran, and I quoted from you, the very laudatory the very praiseworthy words by Deputy Minister Jabu Mlokoti about how I lead that entity. That was what, it was around 3 years starting it from an empty floor. 3 Years I repeat. And if I could rattle of the figures, tens and tens of billions of rands that were exposed to the country, increased  
25 the tax base and so on and so on. Within a few years, please forgive me, Acting President. Let me also say something that I think, without suggesting that people who have longer terms, for example a colleague is coming in would have 12 years as Chief Justice. If at the level of principle or policy, whatever tag may be given to it, it were ever to be said for somebody to be appointed as Chief Justice when they are left with  
30 only 3 years 6 months on the level of principle. That should not be done, it would send a very bad message. It would mean senior judges at the Constitutional Court should forget about ever becoming Chief Justice. Somebody coming in and having 12 years, even people who would come in 2 or 3 years after the Chief Justice with 12 years, then the Chief Justice leaves, those people will be the most senior at the court when the Chief Justice leaves after 12 years. They would be the most senior and they  
35 would be in the exactly the position as I am here today. And they will be told you are only left with 3 years, forget about ever becoming Chief Justice. That would send a bad bad message. By saying that, I should not be misunderstood. I am not saying that somebody should not be appointed from another court. And if they are of a young  
40 age and can therefore serve the 12 years, should not come in and serve the 12 years.

I am not saying that. All that I am arguing against is an idea that 3 years, 6 months, forget about it. That will send out a very terrible message.

**Commissioner Xaba:**

5 You have answered me. Thank you so much.

**Justice Petse:**

Thank you, Commissioner Xaba. Justice Madlanga

10 **Minister Lamola:**

Follow up on that.

**Justice Petse:**

I will defer to you, otherwise I had a follow up.

15

**Minister Lamola:**

It's just on that point. I hear you Justice Madlanga you are emphasizing 3 years. But I will read that, you don't mean 3 years, you mean 6 months, 2 days, 2 years. It doesn't matter. 1 year.

20

**Justice Madlanga:**

No, no, let's focus on my 3 years, 6 months Minister please.

**Minister Lamola:**

25 Ok, that's fine.

**Justice Petse:**

Justice Madlanga, as a follow up. I think at least that you would accept that you know some of the changes or innovations that you might introduce especially you know

changes which are momentous. You would have go through pipelines, to get to fruition, because you for example to get the buy in, across the board. Would you accept that as a general proposition?

5 **Justice Madlanga:**

I would say that would easily apply to 4 years, which Chief Justice Langa served and I mean what's the difference. What much difference is there Acting President Petse between 3 years 6 months and 4 years, the difference is only 6 months. There was no problem at all with the Chief Justice Langa becoming Chief Justice. But addressing  
10 the point of substance, those problems that you allude to would really have to be close to insurmountable problems for them to take 3 years 6 months to resolve. And then I think that perhaps would be more a function of them not being seen as acceptable, than a case of finality being reached on them.

15 **Justice Petse:**

I hear you, except that former Chief Justice Langa was the only candidate when he was interviewed by the Judicial services Commission.

**Justice Madlanga:**

20 My point stands though, my point stands because the person who does the appointment should have said that 4 years is a very short period. Somebody does the appointment. And if there is a factor, it should be a factor at all levels, it should be a factor with the person who does the appointment as well.

25 **Justice Petse:**

Thank you, Justice Madlanga. Commissioner Mpofu?

**Commissioner Mpofu:**

30 Thank you, Acting President. Just another follow up. Justice Madlanga, I would like you to answer this question more on the issue of the term. Just like the issue of leadership earlier, which as you correctly pointed out was raised in the media as a draw back. Which you have really dealt with effectively I think, this is a question of a similar nature. And I think, you should take cue from the last remark of the Acting President. I said earlier to you that, although you are all senior judges and all collegial

and all that but bottom line is, this is a competition. So, this time, it's a competition. It's not just 1 judge sitting there like it usually is. There are other candidates and you must accept that when we ask you questions, we are mindful of the fact that there are other candidates. And it is an opportunity for you to allay any fears that might be there. Let me try and explain it to you, it might well be that actually neutral factor. But the reality is that some of the candidates will be able to serve for a longer term than you if you are appointed. It's a fact. And I think the Commissioner's are trying to give you an opportunity to convince us that when we deliberate, we should not over emphasize this factor as a disadvantage in your case. Just like we should not over emphasize the fact that you have not had the opportunity to lead a court permanently for a long time or as long a time as the other candidates. So, I would like for you to deal with it frontally and explain to us, why for example, my own instinct would be to say arggh only left, let's see the Minister's example with 18 months. Then it means in 18 months we must go through this again, you know. As a country of selecting a Chief Justice, on the other hand, it might well be that if you have somebody that is going to serve for 10 or 12 years, and let's say in the first 6 months we realize we made a mistake. Then we are stuck with that person. It's a serious matter that must be confronted. It is a reality, and we need to be convinced that it is not something that should be a game changer.

20

**Justice Madlanga:**

Thank you, Commissioner Mpofu. I did not want to touch on the very point you made, towards the end. I did not want to make that point myself as it would sound quite negative. As you say, these 2, aside that I lack leadership, these 2 are out there in the public domain, but nobody is left. The 6 months is added left only with 3 years.

25

**Commissioner Mpofu:**

Sometimes it's even said with 2.

30 **Justice Madlanga:**

So, Commissioner, I did think exactly what you just articulated now. There is no way I could articulate it and I thought but what if the person will serve 12 years, then doesn't prove to be what you wanted. But I am not at all, not at all casting aspersions against my colleagues...

35

**Commissioner Mpofu:**

You are not saying it.

**Justice Madlanga:**

5 It's my colleagues, all of whom I respect. But, Commissioner Mpofu, I may be repeating myself, but I want to say that I took the question with a seriousness that I believe it deserves. It may at the time not have been raised, or in fact I mentioned my idea of the qualities of a leader in a different context. In fact, when I was dealing with my leadership skills, I actually have those points on leadership skills, I have them under a flag here that says term. And I make the point that what a leader needs, again

10 I say I am repeating myself. But this is to show that I am taking it with a seriousness that you quite correctly say that I should address it with. I say I disagree that the term is short. Leadership requires a visionary, someone who can identify where A where an institution needs to be taken and B problems and be able to come up with solutions. And then implement immediately. But of course, as the Acting President

15 correctly points out, implementation may be impacted upon by the responses that you get. But for that to get to 3 years, my mind says that should be in respect of what perhaps maybe found to be unacceptable. So, if you have those qualities, you should be able to, within in a matter of days. Months perhaps and to the extent to say if I am appointed, I will approach other heads of courts from the Supreme Court of

20 Appeal to the district courts to get ideas from them as well. Once I have solicited all of that, reached decisions at the levels of heads of court, I will push for implementation immediately. This is, all of this Commissioner Mpofu, is something that can happen in a relatively short time. And if what you have identified under my A and B is something momentous, something concrete and you are able to then

25 create templates on it that should leave the judiciary with lasting templates to be used into the future, even by your successors. What is crucial is that initial stage, that identification process. Both of where you want to go and what problems do you identify and how do you solve them. That is the crucial stage and then immediate implementation. Immediate being relative, who do you have to consult with. And

30 those in my book do not require years and years and years. I hope I have answered you, Commissioner.

**Commissioner Mpofu:**

You have. Thank you, Acting President for the follow up.

35

**Justice Madlanga:**

Thank you very much, Commissioner.

**Justice Petse:**

Thank you, Commissioner Mpofu. Commissioner Mapisa-Nqakula.

5 **Commissioner Malema:**

Follow up.

**Justice Petse:**

Oh, I am sorry, Commissioner Malema. You may proceed.

10

**Commissioner Malema:**

Justice Madlanga, you said something about the person who appoints, would have made the consideration about the 3 years. I don't understand that. What do you mean by that?

15

**Justice Madlanga:**

No, I was not talking about the 3 years 6 months. I made that comment in the context of it being put to me that Justice Langa was the only candidate. Then I said, yes even so, even so, if the aspect of the length of the term is a crucial aspect, then it should have been something that should be on the table at that level. That is what I meant.

20

**Commissioner Malema:**

But Commissioner Mpofu makes a point that we may appoint someone who has 12 years to go and in 3 months' time, we realize this person was a terrible mistake. An impression wants to be created here is that we are going to put our hands on our head. Is that not wrong? Because if we realize in 3 months' time, 6 months' time, 1 years' time, 5 years' time, we have appointed the wrong person. I don't know what's the wrong person. Are there no institutional mechanisms to self-correct?

25

30 **Justice Madlanga:**

Thinking off the cuff, Commissioner Malema, you would probably have seen in the judicial services act under the disciplinary processes there that it is not everything that can lead to getting rid of a judicial officer. I think it is at that level perhaps that Commissioner Mpofu would be raising this. At the level of leadership, sometimes you  
5 may not reach a point where you say we must short of a voting process. You may not be able to reach a level which you say let us get rid of that Judge. And you know how in South Africa and most countries I believe; you get rid of Judges in an impeachment process. So, there are certain, there may be certain shortcomings with regard to the level of leadership which may fall far short of getting rid to that sort of level.

10

**Commissioner Malema:**

No, I agree Justice. All I want is South Africans to be assured whether those things get to be applied or not is something else. But in our judiciary, if a terrible mistake has been committed to the appointment of a Judge, there are institutional  
15 mechanisms to correct that. It's not a hopeless situation where we are stuck for 12 years as if there is no mechanism. Because I earlier said, I don't know what will be such a terrible mistake that will be in 6 months, this was a horrible mistake. I don't know, I am trying to imagine but if that happens there are institutional mechanisms to self-correct like you said, they might take long and all that but it's ok. We agree  
20 that there are institutional mechanisms where we can intervene if there is a terrible mistake with a Judge appointed by this august house.

**Justice Madlanga:**

Yes, yes Commissioner. There is a body, besides the recommendations that it makes, the Constitution, there is also the body that is also tasked with advising on matters  
25 that pertain to the judiciary. I guess in that context, it may be raised certain issues with the judiciary as a body because a Chief Justice is not the judiciary as a whole. So, if the issue is about the judiciary, then this body may raise that with the judiciary as a collective exactly on the basis that aside of recommendations and appointments, it  
30 also has the mandate to advise on issues pertaining to the judiciary of course. If the short comings are of a nature that falls within or what the Chief Justice may have to be disciplined on or about, then that has to be done as well.

**Commissioner Malema:**

No, all I am saying is that. Ok, let me talk about a Chief Justice becomes a horrible  
35 mistake. Like we once had with some Judge there in Pretoria who said he is still to see a black woman who is not raped by their uncles or something like that. a Chief

Justice immediately after this, he said something like that. At the institute, despite still having 12 years. Are there institutional mechanisms to hold that Chief Justice accountable and decisive action taken against that Chief Justice or will we be stuck who views black African women in a manner that I described earlier?

5

**Justice Madlanga:**

No, no Commissioner. You do not have to be, the Commission and the country does not have to be stuck with somebody like that. especially somebody with transgressions at the sort of level that you give. Or it may not be transgressions of that nature but comparable transactions, the Act is there. The Constitution provides for impeachment and at a certain level, that judicial officer including a Chief Justice may or have to be impeached. They are not above the law that provides for impeachment. And 2, the actual processes that are provided for in the Judicial Commission Services Act, a Chief Justice is not above those processes.

15

**Commissioner Malema:**

Now, we've got a candidate of 12 years, well qualified, well-articulated, ok let me leave it. I will take it on my term.

20 **Justice Madlanga:**

I thought this was it, Commissioner Malema.

**Justice Petse:**

Thank you, Commissioner Malema. Commissioner Mapisa-Nqakula?

25 **Commissioner Mapisa-Nqakula:**

Thank you very much, Acting President. And thank you Justice Madlanga.

**Justice Madlanga:**

Thank you, Commissioner.

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**Commissioner Mapisa-Nqakula:**

Justice Madlanga, somewhere in your questionnaire, I read, the questionnaire you were provided with, where you provided answers to the commission, I read in Question number 8.10, your response which says, the question was what would you regard as your most significant contribution to the law in the pursuit of justice in South Africa? And your response to that was, and I won't read it, I will just cite what you are saying there. Amongst others, you are saying that law does not coincide with justice, you are now talking to a peasant. Somebody who is very raw and there are many others who will come across your questionnaire and read what you, how you have responded to the issues raised there. Then you go on to say you use your instinct for what is just and your instinct motivates in the exercise of judicial function. Just clarify, to us ordinary South Africans.

**Justice Madlanga:**

Yes, thank you, Commissioner. There's a nuance Commissioner, on the first part that you said. You said the law does not coincide with justice, if I say so, there then I made a mistake and left out a word. What I think I said, and if I have not said it, what I meant to say was that law does not always coincide with justice. And then the point I am making about a natural instinct within me. And which I believe guides me in the adjudicative process is an instinct that I feel is motivated by an innate sense of justice within me. And I believe that assists me in those instances where law may not coincide with justice. Not just I will again use my self-adjusted adjective and say throw up my hands in a palatial manner and say that is what the law is. Yes, it is unjust but because that is what the law is, I am not going to do anything about it. That innate instinct for justice, motivates me to say, is all that we can do in these circumstances. Why is this piece of law like this? Should it be like this? I will give a live example, a judgement I wrote in the matter of Makoni. Somebody I think in Springs running a small business in town, and she has a lease and the term for extension comes and the owner of the shop where she is running this business write on this contract, it is across the face at the top, extended for whatever the period of extension was. And the lease agreement had what is called an option to buy. Now, when, but then the owner sold to somebody else when she, Ms Mokeni, tried to hold the owner to, these were companies, the seller owner and the other company. She said no, I want to hold you to this because there is the option here, then they said there is an old law. No, they didn't even say old law. There is a legal principle that says if there is no specific indication that you are also extending terms of a contract, that are not essential terms of a lease agreement. Those are additional terms, like the option to be, an option to purchase would be additional. Those additional terms that are not integral to a contract of lease, do not get extended. My instinctive reaction to that, sounded like something wrong in this, I was allocated the judgment in that matter. I sat duck down and I found a 1904 if I am not mistaken, you know that some law we get from

the Roman Dutch Law and the English and so on and it makes up what we know as common law. I found that 1904 case that we imported into South Africa and that has been followed for all this time. But when I interrogated that judgement, I just did not find that principle annunciated there convincing at all. Because it just said, as a matter of legal principle, this is what it should be. And I said, no no, this is a contract, and with all contracts, you must interpret a contract and that is what should determine the outcome. Not a position that is pre-determined and which in my view is against the ordinary in how we deal with contracts. And I upset that old 1904 English legal principle. So, short point I am making is, I was motivated no no, this just does not sound right. This just does not sound right. I hope it explains the point.

**Commissioner Mapisa-Nqakula:**

Thank you very much.

**Justice Madlanga:**

But what I must clarify though is, I should not be understood to be saying that just because of this instinct, I will always and at all costs try to find a way of getting around what the law says. No. There will be those instances when the law is unjust and there is simply nothing, I can do about it. Unfortunately.

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**Commissioner Mapisa-Nqakula:**

That's a very interesting one because actually I think maybe some point, you need to educate us. Now you are saying sometimes the law can be unjust. If the law is unjust, what do you do? It's a discussion for another day. Because at the end of the day, sometimes we become critical of the decisions you take and when we are critical of your decisions, sometimes its because the judgements are unjust. It could be instances such as the one you just mentioned, sometimes it's the law, the law is unjust. Now the other thing I wanted, just to raise, it's not a question, that same questionnaire 16.3 and 16.4, I noticed both of them you responded in this manner. You actually say, my memory fails you, "my memory fails me", but the one case I can remember which is the first one 16.3, you cite the case you remember which is Ntambo versus Minister of Safety and Security and then 16.4 you cite Gqwetha. I think if there were cases which were going to be mentioned, such as the ones you have mentioned, I personally would have preferred not even say that because that. The question doesn't say you should list all the questions, once you have cited the one. I think that is enough, it talks to the matter that was raised earlier on. You are here, whether you like it or not, to market yourself and when we deliberate at the

end, we should be able to say in well in this questionnaire 16.3 he responded to in a particular manner. I would have definitely; I don't appreciate that you actually wrote that your memory fails you.

5 **Justice Madlanga:**

I forget, does the question say, that I remember, how?

**Commissioner Mapisa-Nqakula:**

10 It says please list cases in which you gave judgement, that were unsuccessfully appealed against. Not more than 10.

**Justice Madlanga:**

15 I actually think, Commissioner, that even on another occasion I would answer the question in the same way. Because even if were to say just Gqwetha on the one then the other one on the other, what if, take what the GCB has done for example, the extensive exercise it has done, dug into all judgements. Then I just say Gqwetha on that one, and then they dig up and they say look at what he is saying, this person is dishonest. We've come up with other decisions where his judgements were upset and yet he has not listed them. He wants to give the impression that this is all that was ever upset by an appellate court. I was a Judge at High Court level, it's as good as the 90s because after that I acted in the Supreme Court of Appeal and then the Constitutional Court and then very shortly back in Umtata for a very short period. Then I went back to practice, then I came to sit at the apex court. So, it would be at a very limited time, years and years ago. That the possibility of my judgements being upset on appeal would have been a factor at all. Now that I sit on the apex court, no court can upset our judgements. So, for me to be categorical years and years gone by, it would have been an error, Commissioner. On any other day, I would still have responded to that question exactly the way I have. I hope I clarified.

30 **Commissioner Mapisa-Nqakula:**

35 Well, thank you. Yes, I understood. I do want to; I do know my time is up now. Justice Madlanga, would you say that South Africa is ready for a Chief Justice that is a woman now? I'm purely raising this and I know this is a very sensitive matter, very difficult. I am looking at the Chief Justices that we have had, Chaskalson, Langa and Ngcobo and Judge Mogoeng and we are now post democracy into our 5<sup>th</sup> Chief Justice and I would

want to raise this. Would you say South Africa is ready? And I want your honest answer to it. Thank you.

**Justice Madlanga:**

- 5 Thank you, Commissioner. Commissioner, to that let me say. I know Justice or rather President Maya, very well actually. Very well, I have known her since we were students. I have known her as a colleague. She is a worthy colleague, a worthy lawyer and now she is a leader at a significant level in the judiciary. I would be dishonest to this august body if I were to ever take anything away from what I have just tried to highlight about her, that said, I would say let me leave the final decision on that issue with this august body but clearly and categorically making the acknowledgment that I have made, for which I do not make grudgingly colleague, President.

**Commissioner Mapisa-Nqakula:**

- 15 Thank you, Justice Madlanga, you have not answered by question but Acting President, I will leave it at that because I did not ask about the other competitors. My question to you was, is it your view that South Africa is now ready to have a Chief Justice who is a woman. So, the question was directed at, refers to the country as you see it now. Are we ready? And not so much on the candidates, one of the candidates who we are going to interview. Thank you.

**Justice Madlanga:**

Thank you very much, Commissioner.

25 **Justice Petse:**

Justice Madlanga, do you perhaps need a second to answer the question directly posed to you by the Commissioner?

**Justice Madlanga:**

- 30 I do not think that I can take it further. I do not think that I can take it further. I go no further than to say that I leave everything else to this august body.

**Justice Petse:**

Thank you, Justice Madlanga. Commissioner.

**Commissioner Malema:**

Let me make a follow up, Acting President.

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**Justice Petse:**

Please do. I think by the time we get to you; we would have exhausted your questions.

10 **Commissioner Malema:**

I will be done because it looks like these questions are coming before my 10. I don't know Justice Madlanga if you are doing yourself justice. Because they are not asking you for an opinion of this body. They are asking you your opinion, asking do you think South Africa is ready for a female Justice? It is not a question directed at should this body appoint a female Justice, that's not the question. And I liked the way, you came in earlier about the LGBTQ community, what happened to that firmness about LGBTQ? Now that we are dealing with the real stuff, your character is showing up because the same stand you take on LGBTQ+ is the same stance we take on women. All of them are victims of masculinity and all the isms you were speaking about earlier on. It shouldn't be now that you think you are being put in the corner. You compromise that which came across as your fundamental principles because we are going to doubt them. Now, let me ask the question again, do you think South Africa is ready for a female justice, Chief Justice?

25 **Justice Madlanga:**

Oh God, I am sorry Commissioners. I have a strange phone, which even if it is off, it I actually off, even if I have an alarm, it goes off even if it's off. I apologize Commissioners and I don't know how to sort that out.

30 **Commissioner Madonsela:**

Maybe it is alarmed by the question.

**Justice Petse:**

You are forgiven, Justice Madlanga.

**Justice Madlanga:**

5 So, this boxing is not saving me, Commissioner Malema and I had expected this question from Commissioner Malema and I know how good he is with what the Americans call come backs. That's when somebody says something and then you clap him. And I had thought that I would say to Commissioner Malema but I had already thinking he would come with a very serious clap. I had thought Commissioner Malema, I am actually looking forward to the next elective conference of the EFF and  
10 I want to see Commissioner Malema stepping back and saying I am paving way for the woman commander in chief of the EFF. Please don't come with your characteristic comebacks Commissioner Malema. Commissioner, towards the end of your question, you said you may even doubt the genuine-ness of views that I had expressed. Before answering the question, let me say please don't and other  
15 Commissioners as well and let me also say that it is not just talk, it is there even in my judgements, for example the Bwanya judgement, for example the Danise versus Scribante for example the Mokoni judgement where I came to the assistance of a poor vulnerable woman. So, I do live by those. So, whatever happens, it should not be on the basis that you doubt my genuine-ness of that. Maybe let me just say that I  
20 will accept that. I will accept that. Let's say I have attempted to put myself forward as also a credible candidate and leave it to this commission to exercise its mind as to who it ultimately for whatever reason, for any other reason, I have attempted to do the best I can in this regard. Perhaps let me just say that I accept that.

25 **Commissioner Malema:**

Justice Madlanga, we are now looking for a Chief Justice. I think we will later look for a CIC of the EFF at that time. But for now, we are looking for a Chief Justice. So, we will enter that debate at that time.

30 **Justice Madlanga:**

There's that comeback.

**Commissioner Malema:**

35 So, you know I am worried I respect to and you know Dali will tell you that you are one of the Judges even if you rule against some of us, you do it in such a way that we

come out of it learned, educated and appreciating that we might have missed it here or there. I mean you used to do it very well with Justice Jafta, I am told he is gone. So, the 2 of you every time you write judgements even if you disagree with us, it is so educative, it is nothing where you feel personally attacked or anything of that sort.

5 And you know, a lot of people support women until it comes to them. When it's done there it's ok, don't come closer to the office of the CAC otherwise there is going to be a problem. But on every problem woman must be empowered, women this and women that. Is this not an opportune moment where you are saying demonstrating practically, beyond the issues of judgement where I am not personally involved or

10 affected by that, there are 2 parties, I am not a litigating party. I am making this judgement for the people who are here before me. This is where I can practically make a demonstration of my commitment, even before coming before this body and I said to the President, I really appreciate the fact that you have identified me as one of those people, but I think we need a female now. I mean 30 years, it's going to be

15 30 years, there has never been a female Chief Justice. If anything, the judiciary has performed, worse than us politicians because we have had a Vice President, two of them who were females as a country. But never did we have a Chief Justice or a Deputy Chief Justice who was a female for 30 years. Shouldn't we have reached a point where the male Judges who always tell us and the Justices who always tell us

20 they support gender and all that, pen it to the President and say you know what, we think now is time we get a female Chief Justice. Because we have been theorizing it. Is it not an opportune moment where all of us who say we support females, irrespective of us being identified as potential candidates? Say we think a female can be a Chief Justice. Because I am worried Justice Madlanga, you know apart from you and you know we know that, apart from you repeatedly say you leave it to us. You are struggling to say that South Africans are ready for a female Chief Justice. But in this context, you will have to look at how we perform. Because we are ready, you can't argue that. But it's not coming out of your mouth and that's what we are going to argue when we meet. That commitment that's what makes me doubt the earlier

25 commitment and the commitment in the judgements. Because a staunch supporter of this will not struggle to say we are ready for a female Chief Justice, if you were to ask me, on the eve of 2024 national elections where I will be contesting and you say to me Mr Malema, don't do things, South Africa is ready for a women President. I will say it is ready. Because South Africa is ready for a woman President. So, why should

35 I be giving a long explanation rather than coming out clearly and say we are ready. We have always been ready. We have led by different capable women, in the judiciary, in a better place to side their names, and say but in this context, respective of what I have said, I am here, I am available and let this body take a decision on what needs to happen. But I hear you, and that's what worries me acting President, I hear you struggling to commit that South Africa is ready to have a female Chief Justice.

40 Let's leave the fact that the candidate who contests you, or you are contesting each

other in this. Because that candidate might come and perform badly and you performed better, but we will still appoint you. But it doesn't matter and rule the fact that South Africa is ready for a female Chief Justice. It might not be a Judge President Maya. At this process it might prove that.

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**Justice Madlanga:**

I accepted the proposition, Commissioner Malema. I accepted the proposition.

**Justice Petse:**

10 Thank you, Commissioner Malema. And thank you, Justice Madlanga for that direct response because this is what I was also going to take up with you.

**Justice Madlanga:**

Thank you.

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**Justice Petse:**

Commissioner Mmoiemang, the moment you have now reached has come. Thank you.

20 **Commissioner Mmoiemang:**

Thank you, Acting President. Good evening, Justice Madlanga.

**Justice Madlanga:**

Good evening, Commissioner.

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**Commissioner Mmoiemang:**

30 Just one area that I thought I must converse with you, although it has three sub-branches. The issue of the composition of the ConCourt as alluded to earlier. In your response you did indicate that the lack of appointment of white male judges in the last 12 years.

**Justice Madlanga:**

That was not a point made by me. The question posed to me, and it did not say male, it said white colleagues on that bench and it asked specifically for Section 174 (2),  
5 and then my response was yes there is a need for all the various categories of South African populus, to feel that the various levels of our judiciary belong to them and to an extent, I believe that what Section 174 (2) seeks to address. Yes, of course, I said quite a lot more than just that.

10 **Commissioner Mmoiemang:**

Thank you, I think that the issue of the diversity is a very important matter and the progress that the country has made on the level of ConCourt and the Superior, the Supreme Court of Appeal, the progress must be appreciated. Don't you think we are being too hard on ourselves; I will tell you why I am raising this point, the President  
15 of the United States of America recently made a proposition in replacing one of the senior judges whose term has come to and end. It is an opportunity for him for the first time to appoint a woman of colour in the Supreme Court in America. And, they say that it is a for the first time in more than 232 years, that is the context with issue, are we not being too hard on ourselves, taking from the point that raised around the  
20 important of a person's outlook in terms of approaching issues of transformation as a result thereof, what comes to mind is the outlook of the Chief Justice Author Chaskalson, Justice Albie Sacks, Justice Didcott, which clearly to be says that as opposed to the United States of America, we are doing quite well. As a question to you, are we not being too hard on ourselves in terms of the transformation project  
25 and the judiciary?

**Justice Madlanga:**

I would say yes, we have done well but I will not go back on the concertation I made to the question put to me by Commissioner Malema. I would say that we have done  
30 far better. The United States of America, in our apex court we have a number of women colleagues.

**Commissioner Mmoiemang:**

Thank you, the second lack of my question on the composition, the issue of the term.  
35 I know you have conversed your views on the term, but with regard to whether it is 4 years, or 3 years or 2 years, the reason why I am raising this point, just allow me to

put my proposition forward, Justice Madlanga. One of the angle, that is also in the public domain around the process is the, the rule of the judiciary in the current administration. A concern is raised around the 6<sup>th</sup> administration appointing judges in the last remaining years in the 6<sup>th</sup> administration. A point of emphasis being raised to say, if you appoint in the 6<sup>th</sup> administration appoint judges when it terms come to and end, these judges that are appointed by the 6<sup>th</sup> administration, cut the 7<sup>th</sup> administration, will they not exert influence in the new administration? And exerting influence on 2 areas, the first one is in the 7<sup>th</sup> administration, a potential of these judges, perpetuating the old thinking of the current 6<sup>th</sup> administration in the 7<sup>th</sup> administration in matters of public interest. The second point is the temptation of these 6<sup>th</sup> administration in the 7<sup>th</sup> administration using that opportunity to correct the [inaudible – 8.06.01] it might not have done in the 6<sup>th</sup> administration and this is where an area of judicial activism comes from. So to get your views on that?

15 **Justice Madlanga:**

Commissioner, I do not understand the role of the judiciary to be about either perpetuating the policy of this administration or the policy of the other administration. The Constitution itself in so many words says that Judges are subject to the Constitution and the law. So, Judges regardless of the administration is in power are constitutionally obliged to decide cases in accordance to what the constitution and the law says. Whatever the administration. Indeed, I must state the obvious, which is the oath of office that we take that says we must do apply the law in accordance with the constitution and the law and we must do so impartially and everything else. So, if the law has been changed by another administration through acceptable legal processes and that is the existing law, there is no constitutional challenge against it. That is the law that we will apply if there is a constitutional challenge, it is well grounded, we will invalidate the law regardless of the administration that put it up. I believe that should also deal with your second question which is your temptations, we swear allegiance to the constitution and the law and I do not think any temptations would come into the equation.

**Commissioner Mmoiemang:**

Thank you, Justice Madlanga. Maybe just an elaboration but it won't facilitate your response. This area that I put to you, has been your concern even in America. The judicial process, they say during Obama's administration he had the same challenge and that challenge was also faced by Nixon's administration during 1969 and 1971 and Roosevelt faced the same in 1937, of course mindful of the fact that our constitutional democracy is fairly new. There is a [inaudible – 8.09.36] that maybe in

the future, that could be a possibility. Just the last point now, so that when you respond, at least you also respond to my last question. The judgement that you have referred to as one of your breaking ground, the new nation movement, as per the judgement, the bill is before parliament but what comes to my mind in terms of the thrust of judgement which says the route to parliament and legislature cannot only be through political party but also through individuals and independent. Just indicate to me on that aspect, at the local government level, when an independent or a ward candidate for a political party passes on, a vacancy is declared and by election takes place. Now at the legislature level and the parliament level. When that individual or independent passes away, a vacancy will be declared but I don't get a sense in terms of how will that independent fill that vacancy because he would have passed on. Because if you can just educate me on that aspect.

**Justice Madlanga:**

Happily. Happily, Commissioner. And this is by no means ducking your question. Happily, all that I had to grapple with was an interpretive process. If, you are referring to the Roosevelt and Obama administrations in the context of what happens in the US Supreme court, I would imagine that you have actually read my judgement. If you have that kind of interest, you would have had an interest to read the judgement. You will see in that judgment how extensively I deal with various sections of the constitution itself. My judgement turns an interpretation. I actually start from section 1, the founding provisions and I traverse quite a large part of the constitution into the hundreds of sections, maybe 200 and something and so on. A number. So, my judgement turns on an interpretative exercise of the constitution and I say not to have this is unconstitutional, and then what do I then do with the agreement of the majority of my colleagues. I say, but we suspend this and we send it to parliament and it is for parliamentarians to then see what they do with the vacancy. It is not for the court. All that I had to do was to say but this one act before me is unconstitutional. How it gets corrected, throw it parliament. That's their terrain. I as part of the court will be straying into their terrain. Separation of powers does not allow that.

**Commissioner Mmoiemang:**

Thank you, Justice Madlanga. Thank you, Acting President.

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**Justice Madlanga:**

Thank you very much.

**Justice Petse:**

Thank you, Commissioner Mmoiemang. Commissioner Lucas?

5 **Commissioner Lucas:**

Thank you very much, Chairperson Acting President. Now a lot has been said about the issues that I would love to, went in like the delay and the issues of women, and even about the 3 and a half years. Now my question is of, I think we extensively spoke of delays in the court system. And then about the principle of justice delayed is justice denied. But even yourself, Justice Madlanga, you said you think you are working very hard in the Constitutional Court. My question to you, as a candidate that aspire to become the Chief Justice. Oh ok, I wanted to tell you about the other question that I had before I come to my question. So, my other question I had is practically besides the theory that you wrote about, what have you done to empower women, but I think by now, you don't have to respond to that one.

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**Justice Madlanga:**

I have done a lot.

20 **Commissioner Lucas:**

We have passed that one now.

**Justice Madlanga:**

I have done a lot. But yes.

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**Commissioner Lucas:**

The issue is you have done a lot yes, in the courts and in your theory. But in terms of making sure that you empower women in the communities, to understand how they can use the courts for justice to be done to them. That is exactly the context of my question would have been. So, I want to go further and ask how are we going to, if you are appointed as Chief Justice, how are you going to make sure that you have a community that is more justice savvy, that they understand how to use the judiciary for a better dispensation for themselves. That is the first part I want to ask and sit

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back. And also, how will you work on build a cadre of hard working but also smart working judicial officials to ensure that really our people get justice. And they feel and they see justice to be done to themselves. Those will be my questions. Thank you very much, Chairperson.

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**Justice Madlanga:**

Thank you, Commissioner. With regard to the issues of communities and access to justice. I would say that, there has to be a collective effort on these issues. For example, can't the judiciary partner with say because for example parliamentarians do constituency work. Some of the parliamentarians are in the justice committee. In the collective effort, can't they just assist in that aspect of you know, the educative aspect. This is not to pass the buck; it may have to be an effort that is much much wider rather than focusing on one aspect, just the judiciary. But yes, the judiciary may also play a role in that educative process. Speeches, papers but it is not practical for the judiciary to go out to several communities. It does not have the same kind of outreach. So, I think it would be unrealistic for me sitting here seriously make promises with regard to what can be done but something can certainly be done to some forms of outreach. Like I say, maybe addresses, lectures and so on but the best practical way would be more than just the judiciary being involved, but a broader approach, a collective approach. And I think that that broader or collective approach would be better reach the communities. A cadre of hardworking judicial offices, you are able to you can work hard but if the situation or the circumstance you find yourself in, does not permit you to achieve the sort of outcomes that you achieve. The hard work may take you this far and not that far. An example is what I said for example about the delays at the constitutional court which I said were a function of. I identified at least 2 examples of the deluge of new applications and also just 1 example of our processes on which I said we now have solutions. So, to have a cadre of judicial officers that work hard but I will also emphasize, but also have the desired outcomes. Or are able to bring about the desired outcomes. I would say that one would have to say to focus on the working conditions, on bottle necks, and try as hard as possible to solve those that will then enhance the working environment and improve on outcomes.

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**Commissioner Lucas:**

I asked those questions, someone that aspired to be the Chief Justice. And I asked these questions to you if you would have been the Chief Justice. But I just want to mention an example of what I think that is not smart working.

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**Justice Madlanga:**

That is not what?

**Commissioner Lucas:**

5 Smart working. You are called to the court; you get a letter that says you must be  
there at 9. You get to the court at 9. It is the time when the officials begin to prepare  
themselves for your case. Which means the only time you would appear in front of a  
magistrate is possibly 11 or 12 o'clock. Sometimes the people sit there at 4 o'clock  
and the court closes. No one informs the people that the case will not be in front of  
10 us today. So, what am I saying is that attitude or those ethics that need to be built  
for judicial officials to understand that you must also put in effort or plan better in  
order to serve communities better? I mean as parliamentarians, do you just say that  
you are representing communities and that is why we are here where we are. As  
15 parliament, we were during lockdown, able for 2 years to do a review across the  
country, all people, and that is why I am speaking about this thing, public education  
and public involvement. Because if you work smart and plan properly you will be able  
to do all these things. I don't want a general response. I want a response of someone  
that has got a vision so to how we are going to make sure that what we are supposed  
20 to be doing is actually accessible to our people out there. That's why I say on some  
things, don't respond. But on other things, I said build a cadre that have got an ethic  
of service delivery and that they would want to make sure that they educate our  
communities. Because even in the process, you can educate people but sometimes  
you go to court, you don't even understand where you must go, you don't even know  
what to do, particularly some of us have never been to court in our life when we were  
25 younger. Now that we are older, sometimes we clap people and being taken to court  
and then you don't even know what to do. I am just mentioning it. Thank you.

**Justice Madlanga:**

Commissioner, thank you. I would like to respond. And thank you very much that you  
30 actually gave a concrete example because when a question is asked in broad terms  
like that, it may be difficult for you to grapple with, in practical terms as well. Let me,  
I like responding by making reference to myself, let me do that here as well. When I  
was a high court judge and therefore sat all by myself except for those instances  
where I would be part of a panel on appeal. Court started at 10 then, not even the 9-  
35 o'clock that you are referring to, 10. If, at something like 3 minutes to 10, the court  
orderly had not come to fetch me, I would walk out of my office, go straight to the  
courtroom, enter without that court rise and all that announcement, and go and sit  
down and everybody would jump and run around. And I would not get out until

everybody got organized and started doing something or began with the business of the day. Where am I going with that? If that is how my own make up is, as a Chief Justice, this is something that I would not only willing to but something that I would actually sell and I would go to the right levels of the judiciary to make sure that there is the kind of cadre that you are talking about, Commissioner. And this would come naturally in my case. Thank you.

**Justice Petse:**

Thank you, Commissioner Lucas. Commissioner Breytenbach?

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**Commissioner Breytenbach:**

Thank you very much, Acting President. Good afternoon, Justice Madlanga.

**Justice Madlanga:**

15 Yes, yes, Commissioner.

**Commissioner Breytenbach:**

You must be really tired.

20 **Justice Madlanga:**

Very.

**Commissioner Breytenbach:**

[inaudible – 8.27.07] Not sure how fair it is to subject you to such a lengthy interview.

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**Justice Madlanga:**

I was part of this body when we subjected Chief Justice Mogoeng Mogoeng to 2 days of this. So, maybe I should not complain.

30 **Commissioner Breytenbach:**

My sympathy for you is just evaporating. So, Justice Madlanga, your views on access to justice are terribly exciting. I support them 100% and [inaudible – 8.27.47] from this body [inaudible – 8.27.50] so between the two of us we can actually try and do something [inaudible – 8.27.58] It's a worthwhile project.

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**Justice Madlanga:**

Thank you, Commissioner.

**Commissioner Breytenbach:**

10 One of the consequences of being virtual, not sure if it's an advantage or disadvantage, is of course most of the questions have been traversed and [inaudible – 8.28.17] more likely reasking questions that have been asked.

**Justice Madlanga:**

15 Yes.

**Commissioner Breytenbach:**

20 What I would like to take up with you is, if you were appointed, how do you propose properly and efficiently close the gap between the superior court judiciary and the lower court magistracy in order to promote unity, mutual respect and efficient delivery of justice within the comparative judiciary.

**Justice Madlanga:**

25 Thank you, Commissioner. Even though I stated it very briefly. It is one of those issues, I would if appointed focus on. I touch on the fact that the two main points that I have been able to identify but there is certainly probably more. That the magistracy is raising is, are the question of a move from the Department of Justice and the question that has been referred to as integration. I am for the idea of integration in the sense being, we should be one judiciary in the true sense but that  
30 cannot mean that we will not have the levels that we have. Because, we do have magistracy which itself is at 2 levels. Those will continue to be realities and also the appointment processes it may perhaps not be practical to be the same body. There are more vacancies in the magistracy. This body, it, it, were to be one body doing all the appointments. There will be nothing that you would ever do. You would be

coming here, maybe at one session, maybe appointing many magistrates and many Judges and then because there are vacancies all the time, this is all that you would probably able to do. Integration, yes. One umbrella, yes. But all of these to be done with a recognition of the reality that there are different levels. And coming up with practical ways of how to address or to work with the reality of those 2 differences, different levels, under one umbrella, one judiciary. Yeah, I would leave it at that, Commissioner.

**Commissioner Breytenbach:**

10 Thank you very much. Thank you. Those are my questions.

**Justice Madlanga:**

Thank you, Commissioner.

15 **Justice Petse:**

Thank you, Commissioner Breytenbach. Commissioner Barnard?

**Commissioner Barnard:**

Thank you, Acting President. Good evening, Justice Madlanga.

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**Justice Madlanga:**

Good evening, Commissioner.

**Commissioner Barnard:**

25 Justice Madlanga, my question relates to access to justice, actually in an interesting way, it latches to one of the questions asked by one of the commissioners that came before me. Access to justice, specifically and the smalls claims court. Now if one, you spoke about courts down to down to the Magistrate's court level and district's level. That's the lowest that I heard you speak. If one now speaks about section 165  
30 contribution which gives the responsibility to the Chief Justice the judicial function of all courts, highlight the all-courts aspect of it. This includes Section 166(e) refers to as any other court. That is other than a High and Magistrate's court. So, we talking

really about courts closer to the communities, even those that you refer to. How do you see the role of Chief Justice, you know if any at all, for example of all the small claims court where any citizen can get access to justice? In fact, the client that I am speaking to now, there is probably a small claims court functioning at the moment with people coming from work and attending to court and when many lawyers sit as commissioner, so how do you see your role, do you have a vision for that as well?

**Justice Madlanga:**

Because, even though this was back, this is actually something that I have actually seen work and when I say years back, it really is years back. This is when I was doing pupillage and the advocate, I was doing pupillage under was a Commissioner at the small claims court. So, he would go there and I would go there with him in the evenings after work and I would just sit at the back. In practical terms, I actually saw how well the system works. And of course, then the mandatory jurisdiction was quite low, it's quite low now but it was much much better than now. And you were quite right that is a system that works with access of justice. And I recently had occasion to actually go through the Act. And it makes the process quite accessible. It does away with the clutter and formal processes. It does in fact at a non-lawyer who can read the act and start their own case, lodge it with a small claims court and be able to run with it. But of course, with people who cannot read and be able to do it themselves. Efforts would have to be made to educate people about it. It is, I agree with you, a very useful access to court. It would just have to be used optimally. Are you not muted, Commissioner?

**Commissioner Barnard:**

Thank you, sorry about that. I think the initial Act was something like 36 years ago, there have been some amendments but your vision, is there any vision or thought on integration on this part of the Courts into the grater and wider court structure of South Africa because otherwise [inaudible – 8.36.04] not really talking about what the constitution seems to be intending.

**Justice Madlanga:**

I would say that as long as the idea of integration does not bring within that court the sort of traditions that we have known to exist, within the other components of our court system. So, in essence, it stays the same. I mean the very idea that it has been sold to practitioners to participate in it as commissioners, free of charge, is in itself is quite a benefit to the poor and the vulnerable who have ready access to court.

So, as long as the idea of integration will not unfortunately bring some of the problems that makes, that make the rest of our court system inaccessible, I would have no problems with that idea. So, as to what the actual integration would entail, we should protect.

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**Commissioner Barnard:**

Thank you, my second question I will leave you with because of time constraints is [inaudible – 8.37.43] possibly the last thing I would deal with for today, maybe Paragraph 103 of your application, that you also [inaudible – 8.37.75] record  
10 properties now. Then I noticed in your judgement for Daniel [inaudible – 8.38.05] you know extend the [inaudible – 8.38.12] rights of the occupant of a property, to be able to make changes [inaudible – 8.38.20] of whoever owns the property. So, I'm just wondering in the context of a lessor. You know some of the context, in terms of being  
15 not to allow someone to make changes to the property without the owner consenting. This type of judgement opened the wake for a overall [inaudible – 8.38.50] constitutional laws.

**Justice Madlanga:**

I think a crucial aspect of my judgement which was centered on dignity, the right to  
20 dignity. The fact that it was in the context of Esther, this is somebody who is entitled to live on this farm in terms of an act of parliament. Seek to address. In fact, in a sense, Esther is at the heart of deprivation. You will have seen in that judgement, that I opened with the words Mr Nkosi who says and I paraphrasing and summarizing seriously but the substance of what he says, without length, we are nothing. So, that  
25 was the context and then you will see I go in length into the history of length disposition in the country. So, I think what I say in that judgement should be viewed in the context of what it was about. This poor lady, is on this piece of land. She is not asking to break down walls, take off the roof, all she was asking was, I want to be able at night, if I want water and I have forgotten to fill up my bucket. If I want to  
30 drink or go outside, I want to have a tap inside this house. I want to replace this window. I want to level the floors in this house. And you should bear in my mind in that case, Commissioner. That the respondents, the farm manager and the farm owner did not dispute what she said she wanted. And she wanted to do it out of her own pocket. But they just said no, we will have none of that. And i said, effectively,  
35 it made nonsense of Esther. This makes nonsense of a constitutionally guaranteed right, that she enjoys and that goes to the question of dignity. And I said, based on that, she is entitled to do what she wanted to do out of her pocket, even though the owner did not give permission.

**Commissioner Barnard:**

Thank you very much.

5 **Justice Madlanga:**

Thank you, Commissioner.

**Justice Petse:**

Thank you, Commissioner Barnard. Commissioner Malema?

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**Commissioner Malema:**

Thank you, Acting President. Justice Madlanga, I just want to ask, I know you dealt with that in your questionnaire of going to the bench, and then go back to be an advocate. I find it very strange. Please take us through.

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**Justice Madlanga:**

Commissioner, I had gone to the bench or come to the bench very young. Well, I may be criticized, that was not sound judgement on my part. And maybe if somebody says, well maybe I will not try to argue against that. I came to the bench fairly young. At the time, I was the youngest Judge in South Africa. I was 34, some may say 34 is old. I had a young family and you know what that entails, in expenses and so on. After about 5 years, I just could no longer and I was quite public about this, I was never ever secretive about it. It was not the sort of silent resigned for, what was the term that's normally used. Personal reasons or something like that. Fine I did not make a public statement but I was open about it. The minute I felt I can no longer stand it. I went to, I was acting at the Constitutional Court at the time, I went to President Chaskalson, and I explained everything to him. I was open with him, I didn't just say personal reasons, no I'm out. And then I made an appointment with the Minister then was Penwell Maduna. I also spoke to him fully explained and gave him the same facts I have given you now. Both of them did try to say no no please don't. And I understood where they were coming from but the reality was, Commissioner, I could just no longer go on. To cut a long story short, those unfortunately. And I left, not for any lack of love, the job. I still liked what I was doing. I would have stayed on but it just became impossible and rather than reach a point where it would. I am not saying

I would do anything proper, but it could have reached a point where it just becomes horrible for me. There's the judge he is getting administrated or something like that. Those were the facts, Commissioner.

5 **Commissioner Malema:**

Why did you come back?

**Justice Madlanga:**

10 I'm sorry for the laughter. I still remember the dates, Commissioner Malema. I was on holiday in December, you know late December after Christmas, late 20's to the end of the month. And I was called by, I hope my colleagues will not feel embarrassed about me revealing this. And I was called by the Acting Chief Justice, he was still the Judge President of the Labour Court but he still had acted at the Constitutional Court and he said, there was something he wanted to talk to me about. And I said  
15 fortunately I am, I was on holiday, I said I am in Durban and he came to see me. It was on the 1<sup>st</sup> January 2012, I think. And he broached the subject with me and said haven't your circumstances changed now? And even before I left, he had been wanting me to go act at the Labour Appeal Court and he was soliciting me. So, that's the level at which he respected me as a colleague and as a Judge. And so, he said as  
20 a colleague we knew me and respected me, did I not think it was time to come and rejoin them as colleagues on the bench. And then on the 18th of February and with him having called me a few days before, I met my colleague who you mentioned before Justice Jafta. He also asked to meet me, I met him on 18<sup>th</sup> February of that year and he too broached the same subject. I might mention that other colleagues,  
25 a friend of mine who is a judge, in Port Elizabeth, Judge Mandela-Makhawula had been talking about the same thing quite a number of times. But you know how sometimes treat friends, I never took my close close friends. He comes from my home town, grew up as young bafana together. I told him to get off. So, I started, I then started thinking about it quite seriously and I think that did weigh heavily with me.

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**Commissioner Malema:**

My question is, why did you come back? You left because of personal circumstances that led to you leaving. So, you coming back means that those circumstances have changed for the better. To avoid having a judge being sequestered.

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**Justice Madlanga:**

I felt I was comfortable to come back.

**Commissioner Malema:**

So, you came back in February?

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**Justice Madlanga:**

To the court, no. That was just meeting Justice Jafta on the 18<sup>th</sup> February 2012. I was then appointed from the 1<sup>st</sup> August 2013.

10 **Commissioner Malema:**

Now, do you think judges must go to the houses of politicians? Do you think it is correct to go to the houses of politicians and later say no, I visited the house of a politician because there was a matter of national importance that I wanted to discuss with this politician? But you can't take the country into confidence as to what are those matters of national importance that makes you visit politicians in their houses? Do you think that helps to enhance the good image of the judiciary?

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**Justice Madlanga:**

I would say to the extent of the situation may create suspicion, perceptions, I would say it's not right. But at the level of not of whether you should go at all. I would say, we know, there are politicians that I know on a personal level. And I would have no problems coming to my house. No problems at all going to their houses. But I again emphasize and my understanding is what you raised with me, at the level of a possibility of the perception that may even create possibilities of, does this not get to the level of the lack of impartially, you know those sorts of negative perceptions that should not exist around the judiciary. If it is something that would raise those sorts of problems, I would say then there is something wrong with it.

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**Commissioner Malema:**

No, I understand the one of friendship. We live in the same society; we go to the same school together and all matters of things. But a point where it comes out later that you visited a politician and when you were asked what were you doing with that politician, you say we were discussing a matter of national importance. Meaning you have a secret with a politician as a judge when that type of a meeting is exposed. You

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are still not in a position to take the country into confidence. Does it help to build the confidence of society on our judiciary, where a judge can have a secret with a politician. And when exposed, you still don't want to reveal that type of secret. Does it help to enhance the image of the judiciary?

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**Justice Madlanga:**

Anything, anything, Mr Malema, including that example, it could even be a different example, anything that could create the impression of you know, the possibility of an association that may create a perception of lack of impartiality, lack of independence, is deleterious to the idea of an independent judiciary.

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**Commissioner Malema:**

I don't know if I heard you properly, Justice. You said Chief Justice

15 **Justice Madlanga:**

[inaudible – 8.53.05]

**Commissioner Malema:**

No, I want something else. I am done with that one. You said Chief Justice must be a judge cannot be this super.

20

**Justice Madlanga:**

An SG.

25 **Commissioner Malema:**

An SG. Plus, you don't want to claim that you understand the administrative role of a Chief Justice. Are you saying you are applying for a role where you don't know, apart from being a judge, what is required or what are the duties of the Chief Justice administratively? Because I heard you saying you don't know those responsibilities, you don't want to be claiming to know them because more than being a judge is what we are looking for. Because a Judge's story is a Judge of a Constitutional Court is out that one. We know you can be and we have no doubt about it. Now we are looking

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for a leader who is going to have to be not only a Judge but also lead administratively to make sure that this court runs effectively. And not just the courts, the whole of the judiciary. And key amongst those will also include the spending, because I heard someone say to you that you don't like budgets. Leadership is budget, whether you  
5 are the President or not, you cannot have a Minister of Finance, you can't prevail over and make sure all of those things are done because let's see the SG misuses the funds, it's going to come back to you. Because as you are speaking about it, the SG of the Constitutional Court, I am trying to imagine the picture. I can't even think who is this person. All I am thinking of for the Constitutional Court is Mogoeng Mogoeng.  
10 So, if anything goes wrong, whether you interfering or you not interfering, whether you like the budget or you don't like the budget, it's going to come back to you as the leader of the institution. So, please make me comfortable about that because I heard you say you don't know the administrative roles, you don't want to interfere, you don't want to be a super SG, and therefore those things will leave to people who are  
15 not subjected to this. And as a leader, you take full responsibility including the mistakes of the SG, they come back to you.

**Justice Madlanga:**

Thank you, Commissioner Malema. If I created any impression of being clueless, of  
20 what the Chief Justice does administratively, that was not intended because if that were the case, I would not have been in a position to attempt in what I believe was a fairly detailed manner to even set out a vision. As to how certain issues should be addressed in the future. So, I do have an idea of the sort of administrative or leadership issues that relate to and can be performed by a Chief Justice and some of  
25 them are even, for example, in the judicial service act and superior courts act and even the constitution, one of the commissioners who were online, referred me to the norms and standards. That in terms of the constitution must be set up by the Chief Justice. What I was seeking to address with regard to what, I do not know, and which should be hopefully Commissioner Malema, be acceptable because I have not  
30 been exposed to that, being an ordinary Judge of the Constitutional court. What I was seeking to refer to was the possibility of other administrative functions that may well be out there as well, and it is those that I was trying to refer to. I was by no means as a Chief Justice that I would shirk the responsibility with regard to those that I say are clearly within the remit of the Chief Justice. With regard to the budget, that  
35 too I just said, it is something that I will apply my mind to. It is something that I am willing to consider what the best practice internationally on it. Who in other jurisdictions, in particular comparable jurisdictions, say in Africa? Yes, of course I could look elsewhere as well. Who, within those judiciaries, for example I first heard the idea of an administration that is attached to the court and removed from the  
40 other executive functions. I first heard of a colleague from Mozambique, when I was

a Judge earlier. We know nothing about that at the time in South Africa. So, one can learn even on issues about how are budgets administered from what other countries do. So, it was not a question of an outright rejection of the idea. I guess it was more a question of saying managing monies. But I did say, if you remember Commissioner Malema, I did say but of course the reaction that I have given, without rejecting your idea Commissioner Singh. The idea in no way suggests that I averse to being involved at all on budgets. I said because the OCJ services the judiciary and because the Chief Justice services the judiciary and because the Chief Justice is he head of the judiciary, it makes practical sense for the Chief Justice to have an input on the OCJ's budget and of course it would not only be the Chief Justice. Other heads of courts at all levels would also have to have an input.

**Commissioner Malema:**

Justice Madlanga, as you speak, about learning this administrative component that you might not be aware of. I put another 6 months to 1 year of learning that, into these 3 years. And then I put another 3 to 6 months of you learning in the outside world how the budget works and you are left now with another 1 year 6 months before you do the actual thing. Just learning. Because if you ask us politicians, when you resume office, most difficult thing, she is there, she is a speaker, she is not old in that position but for sure she is still grappling with a lot of small detail, some she gets shocked oh it's done this way or that way. By the time, she becomes well equipped as a speaker, its 2024 and we are going to elections. To learn administration must never be confused with some simple thing, or you are just going to arrive at an office where you are going to be welcome with both hands. You are going to learn these people and all manner of things which I thought Justice Madlanga would have done some small research. Even if you are in a junior, I don't want to call you these things, as a judge but not in the Office of Chief Justice. An ordinary Judge, but preparing for this type.

**Justice Madlanga:**

It's clearly not the level of the Constitutional Court. Sorry, Commissioner Malema.

**Commissioner Malema:**

Yes, an ordinary Judge, who is now preparing to go into that office, you would have said to us apart from described in the constitution and the norms and standards and all of that, these are the issues we are going to deal with administratively that we are going to have to deal with and on matters of budget, you would have also looked at

the previous Chief Justice and what are the issues to take up immediately when you take over. Because we don't want to hear of a scandal of corruption coming out of the office of the Chief Justice because our Chief Justice doesn't know how the budget operates in that office. In the 6 months where you are still trying to learn, you know  
5 these people of South Africa, they have already approved the IT tender. It's gone and it is not done properly. I am going to raise these points when we meet on Saturday. I am worried about this issues that, you are going to be this good Judge and be destroyed because you have not given yourself enough time to climatize yourself or have an idea of how you are going to deal with it because it's very big, it might be  
10 small. But it is a very big operation that makes that office run on a daily basis.

**Justice Madlanga:**

On the first issue of the possibility of a long time being taken, finding out what happens in other jurisdictions with regard to the budget. I would say that the time  
15 cannot be long at all. If appointed, I would already have access to Chief Justices in other countries, pick up the phone and just ask the question, pick up the phone and talk to a few Chief Justices, within a few days, you have the information readily at hand. For example, I said earlier, that we found what the situation is with regards to turn around time for handing down judgements by apex courts. We were tasked by  
20 our colleagues to do this work on the working procedures. Revise the working procedures of the Constitutional Court, second half of last year by the 5<sup>th</sup> of December, we already had a working document, we are just crossing the t's and dotting the i's on now. We were able to pull out one recommendation for immediate implementation. But even there we had to go out to other jurisdictions on  
25 information and we were able to come out with a document within a very short space of time, second half by December we had something ready. And on this one, if I am Chief Justice, I would be able to pick up the phone, who controls the budget, and how. I even on the second one Commissioner, I do not share your view that it would take a terribly long time for me to get around the question of, I have interacted with  
30 the secretary general, in context that of course has nothing to do with Chief Justice which I am not. And the secretary general is very cooperative and very supportive to the judiciary. Immediately on appointment I would set up an appointment with her and she would take me through the processes. And I think you heard me when I was talking earlier about getting up to speed, I even rattled off a few principles in the sort  
35 of area of law, we as black people would not be exposed to, talking about inutility, lack of innovativeness so on and so on. Things that you would be getting to hear about now for the first time. But you would quickly get on top of them and be able to participate effectively and even when a case is argued before them in a court. You saw this for the first time now, you read the papers, went outside of the papers, did  
40 your own research quickly and in court you are able to engage Advocates sensibly

and meaningfully. So, even with this, I do not believe it would be something that would take me 6 months, I don't believe that it would, Commissioner.

**Commissioner Malema:**

5 My last question is do you think commissions of enquiry add value in democratic South Africa or is it just a waste of money or used by politicians to buy themselves time so they can lull society and not be held accountable because I am trying to think of any successful commission of enquiry since 1994? I can't think of any. Successful in a sense that when it concluded its work and made recommendations, there was  
10 serious follow up and action was taken. There is no such and as a result, a lot of money gets to be used in those commissions of enquiry and lawyers just line their pockets and make money out of the taxpayer, but we don't see results of those commissions of enquiry. I am asking this because you were in the Marikana commission. There was a commission into the arms deal, I don't know what is  
15 happening what where. So, I am trying to think, are these things really relevant. I know they have space in terms of the constitution, the Republic and all of that, but have they really added value in our democratic society or were they just buying time so politicians can lull society and lawyers can make money from it. I know Mr Mpofo won't agree with the money but.

20

**Justice Madlanga:**

Commissioner Malema, for reasons that you prefaced the question with, and also with what you ended the question with. May I ask please not to answer the question, as you so many politicians do this and you will remember that I repeatedly said here,  
25 that we as Judges should avoid from engaging in political controversy. May I please ask to.

**Commissioner Malema:**

Let me ask it differently, let me leave politicians.

30

**Justice Madlanga:**

I had to expect that.

**Commissioner Malema:**

Do commissions of enquiry add value to our judiciary or our democratic society? Since 1994, have they played any significant role which helped ordinary people to receive justice.

5 **Justice Madlanga:**

Of the few that I can think of, I cannot think of something that has tangibly redounded to the benefit of people. I cannot think of any.

**Commissioner Malema:**

10 Thank you, Justice Madlanga. Thank you, Acting President.

**Justice Petse:**

Thank you, Commissioner Malema. Justice Madlanga, I've got 2 issues I would like to canvas with you before we conclude. And you already touched upon them earlier but  
15 I am coming from a different perspective. The first one is that South African judges come from various backgrounds. And the broad proposition that I want to put to you, that will call for a simple answer, yes or no, is this. Regardless of their past political affiliations, judges are expected to be scrupulously faithful to their oath of office and decide cases that come before them on their merits with integrity, courage by  
20 applying the law to the facts. Do you subscribe to that statement?

**Justice Madlanga:**

Yes, I do.

25 **Justice Petse:**

And the second one, the last one and you did allude to it earlier. It is an illusion to think that the Chief Justice supernatural being with a monopoly of wisdom will have all the answers for everything. And an astute Chief Justice will recognize that within the judiciary, as with anywhere else for that matter. There will be Judges with special  
30 skills and talents and indeed leadership qualities and a Chief Justice of that kind will then be well advised to tap on these talents and skills for the good of the institution.

**Justice Madlanga:**

Yes.

**Justice Petse:**

5 And lastly, and we are now at the tail end of the interview, do you have anything else that you wish to say that may, in your view, be of assistance to us during our deliberations?

**Justice Madlanga:**

10 I think I have said everything I ever could, Acting President. All I would do, is to thank the Commissioners, all without exception, the manner in which I was engaged. But there is nothing else that I want to add, Acting President.

**Justice Petse:**

15 Thank you. Then it remains for me to thank you most sincerely for availing yourself and for your answers to the questions that were posed to you by the members of the Commission, which will be taken into account during our deliberations on Saturday.

**Justice Madlanga:**

20 Thank you.

**Justice Petse:**

You are now excused.

**Justice Madlanga:**

25 Thank you.

**Justice Petse:**

Thank you.

30 **Commissioner Malema:**

Please call the next candidate please.

**Justice Petse:**

You are usurping my powers, Commissioner Malema.

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**Commissioner Malema:**

No, Chair, I am just saying we are ready for the next one.

**Justice Petse:**

10 Thank you, fellow Commissioners, we have now come to the end of our business for the day. This is now an opportune moment to adjourn until tomorrow morning at 9 o'clock on the dot when the next candidate will be interviewed and thank you very much for your cooperation. Go and retire now and come back tomorrow fully refreshed. Thanks very much.

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**Commissioner Mpofu:**

Thank you, Chair.