



Judicial Service Commission Interviews

3 February 2022

Chief Justice Interviews

Interview of Judge President Dustan Mlambo

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Deputy President Petse (Chairperson):

Good morning, members of the Commission, will you please settle down for us to commence with the business of the day? Thank you. Mr Chiloane, will you please bring in the candidate for today? Judge President Mlambo. Good morning, Judge President Mlambo.

Judge President Mlambo:

Good morning, Deputy President and good morning, Speaker, Minister, Commissioners.

Deputy President Petse (Chairperson):

Would you please switch your microphone on? It's on, thank you. Are you well this morning, Judge President?

Judge President Mlambo:

I've lost 5kgs since Monday. I think that tells you how I feel this morning.

Deputy President Petse (Chairperson):

I will allow you just a few seconds for you to settle down, take a deep breath, then we'll proceed with the business of the day. If you could then give me a signal when you are ready.

Judge President Mlambo:

No, we may proceed, Deputy President.

Deputy President Petse (Chairperson):

Thank you. Just for the record, shall we confirm that you know all the members of the Commission, sitting around this table?

Judge President Mlambo:

I do indeed.

Deputy President Petse (Chairperson):

And speaking for myself, I've known you for several years.

Judge President Mlambo:

That is true, we, our meeting was not a very pleasant one, because I was part of a bench that reversed your judgment.

Deputy President Petse (Chairperson):

But only partially.

Judge President Mlambo:

Yes, well, that's an occupational hazard of every Judge.

Deputy President Petse (Chairperson):

Thank you. And again, for the record, I want to say that you are one of the four candidates who were nominated by the President of the Republic of South Africa for the vacant position of the Chief Justice of South Africa, in terms of the dictates of the Constitution and we welcome you too, to this session of the JSC.

Judge President Mlambo:

Thank you, Deputy President.

Deputy President Petse (Chairperson):

You were born in 1959 and you are 62 years old and will be 63 on your next birthday in September?

Judge President Mlambo:

That is correct, Deputy President.

Deputy President Petse (Chairperson):

And you are married with four children?

Judge President Mlambo:

That is correct, Deputy President.

Deputy President Petse (Chairperson):

Were you to be appointed as the next Chief Justice of the country, you would serve at the most seven years in terms of Section 176 (1) of the Constitution?

Judge President Mlambo:

That is correct, Deputy President. Until I reach the age of 70.

Deputy President Petse (Chairperson):

Which is almost just seven years to go. You hold the degrees of BProc and LLB and the University of Fort Hare confirmed an Honorary Doctorate on you.

Judge President Mlambo:

That is correct, Deputy President.

Deputy President Petse (Chairperson):

And that was in 2019.

Judge President Mlambo:

Yes.

Deputy President Petse (Chairperson):

In 1997 you were appointed as a Judge of the Labour Court at the youthful age, in my view, of 38 years.

Judge President Mlambo:

That is correct. I started with the Acting Chief Justice at that time in the Labour Court.

Deputy President Petse (Chairperson):

And you are currently the Judge President of the Gauteng Division of the High Court of South Africa?

Judge President Mlambo:

Indeed, Deputy President.

Deputy President Petse (Chairperson):

And before your elevation to the Bench, you were a practising attorney and at some point, you were a counsellor, not a municipal one, Law Society counsellor of what was then known the Transvaal Law Society.

Judge President Mlambo:

No, I was not a counsellor... I was just a member of the Law Society.

Deputy President Petse (Chairperson):

Member of the Law Society? Thank you. And at one time or another you held membership of various organizations and bodies?

Judge President Mlambo:

That is correct, Deputy President, sorry!

Deputy President Petse (Chairperson):

Would you share with the Commission the identity of those organizations or some of them?

Judge President Mlambo:

Well, uhm early in my career, before I started the practice of law, I joined the Fellowship Program of the Legal Resources Centre for a year. I think that was in my early days, but I

was a board member of the... uhm, I remain a board member of the ILF, International Legal Foundation. It's an international body. I chair CAOSA, the Community Advice Offices Association of South Africa, which is a grassroots legal service platform, serving the vulnerable sectors of society. I was a director or board member and then chairperson of Legal Aid South Africa. As chair, I stayed for about 17 years. I was a board member of Africa Legal Aid, or AFLA, which is an NGO based in The Hague but focusing on continuing legal debates and discussions with African Diaspora on international forums. I'm a member of the, well, until last year, I was a member of the Legal Resources Centre Trust. I think... uhm, jah, I can mention those, Deputy President.

Deputy President Petse (Chairperson):

Thank you. In paragraph 18.7 of the questionnaire, you state that you subscribe to the principle that leaders of the judiciary should be accessible to the judges that they lead. Why did you find it necessary to underscore that point?

Judge President Mlambo:

Well, it is my experience, as a leader in the judiciary, that visible leadership instills confidence in those that are led. And it's been practice, when I took over in Gauteng, in particular, I found that Judge President Ngoepe only had chambers in Pretoria and he did come to Joburg, but on rare occasions. And I discovered that if I had chambers in Johannesburg as well, and I told this to the judges that I will be visible and, in their face, and my door will always be open for them, should they need any assistance from me. I found that visible and present leadership, goes a long way in instilling confidence in members of the Bench. That's a reason I can mention!

Deputy President Petse (Chairperson):

Do you at all subscribe to the principle that a head of a Court is just a leader amongst equal, in effect, equals?

Judge President Mlambo:

Well, he's the first amongst equals.

Deputy President Petse (Chairperson):

Yes.

Judge President Mlambo:

He's a leader, yes. And I think, just to underscore the other point that we were discussing earlier. There is some convention that I found, when I became Head of Court, that JPs don't go into judges' chamber. Judges go to the JP. I don't subscribe to that. I would surprise judges by simply walking into their chambers and just chatting with them, and most of them, especially in Johannesburg, because they were not used to a visible JP, they would be shocked at seeing me in their chambers and they would ask, what are you doing here? I say, well, I've come to check on you. So... uhm, I just thought let me mention that.

Deputy President Petse (Chairperson):

And I guess some would even tell you that you should have picked up the phone and asked them to come to your chambers and they would immediately run to your chambers.

Judge President Mlambo:

Correct. It's worse, Deputy President. When I took over, those times, 2010, 2012, judges believed in sending written communication in physical form. Because of the engagements I have, sometimes I would be away from my station for some time, and you'd find a couple of letters waiting for me, and I would tell them that guys, I have an email. Just send whatever you want to me by email. And that was the beginning of a journey in conscientizing the judiciary spaces that I've been involved in, that there's a lot to be gained in taking advantage of technology.

Deputy President Petse (Chairperson):

Yes, thank you. In paragraph 18.8, you make the point that it is an essential that Courts and judges should be adequately resourced, to any of them, to do their work efficiently.

Judge President Mlambo:

That is correct. Should I comment on why I said that, Deputy President?

Deputy President Petse (Chairperson):

Well, it's self-evident, but what I want to pose to you is are they, as you are sitting there, would you confidently say that they are adequately resourced?

Judge President Mlambo:

Definitely not! And I can expand if I'm allowed to.

Deputy President Petse (Chairperson):

Perhaps for the benefit of the members of the Commission, I will allow you an opportunity to do so, albeit briefly. Thank you.

Judge President Mlambo:

Thank you. I'll mention two aspects that I've touched in my vision statement. One is the adequate capacitation of judicial establishments needs to be looked at. The workloads in the courts are continuously increasing. That means judges are continuously carrying bigger, and bigger caseloads. I'm talking more from my experience in Gauteng, as well as the Labour Court. I don't want to leave it behind. Because that's actually a very busy Court as well. So, that's the adequate resourcing from a judicial establishment point of view. The Minister will know that he has established a sub-committee, chaired by Deputy Chief Justice Moseneke to engage Heads of Courts as to what the ideal capacitation needs are from an establishment point of view. So, that's one aspect, I think I can mention it. Another aspect is the availability of research capacity for the High Courts, as well as for the lower Courts, the Magistracy, it leaves a lot to be desired. Gauteng, at any given point in time, has a total compliment of some 85 judges. Each division has six researchers at its disposal. That's woefully inadequate to assist with the research needs of judges. I'll mention those two, for the moment, Deputy President.

Deputy President Petse (Chairperson):

And I would guess one could even add that especially seen against the backdrop of the workload and the extent of the litigation that goes on in that division?

Judge President Mlambo:

Correct, correct. We're bombarded. There are counsels who sit in this room today who are complicit in that mischief, if I may use that word, of forever bombarding that Court with complex and involved special motions which we have bent over backwards to accommodate. Usually, they request Full Courts to hear those matters because of the importance they see in them. So, yes, that is correct. The Gauteng Division, especially Pretoria, is a very busy Court.

Deputy President Petse (Chairperson):

I suppose we can forgive them on the understanding that their clients are only exercising their right of access to courts.

Judge President Mlambo:

Correctly, Deputy President and I always say to them, bring it on.

Deputy President Petse (Chairperson):

Thank you. In 2005 you were appointed as a judge of appeal at the SCA and left that Court in 2010.

Judge President Mlambo:

That is correct, Deputy President.

Deputy President Petse (Chairperson):

Some would be tempted to say that you left the SCA because you couldn't put up with the challenges facing that Court at the time. You know, that have been dominating the news in the recent past, especially before this body. So, you didn't have the energy to be an instrument of the change now experienced in that Court.

Judge President Mlambo:

What? I haven't heard that being said to me. I mean, what was said to me was an expression of surprise that one would leave a higher position for a lower position. Because the position of Justice of the Supreme Court of Appeal is higher than that of a Judge President. And that's the one I've heard. I've not heard the one about me running away, so to speak. I wasn't running away. Yes, I had my fair share of the challenges that were happening there, and I'm one of those judges in that Court, though viewed as junior, who took the fight to the seniors who were in my space, not behaving properly.

Deputy President Petse (Chairperson):

I have had the benefit of reading your judgments that form part of the bundle that you submitted. But I'm interested in the one judgment at page 40 of book 1 of 1 for those who have hardcopies. The case of *State v Crossberg*. Yours... you wrote a judgment in that matter.

Judge President Mlambo:

The minority judgment, that's correct!

Deputy President Petse (Chairperson):

Yes, and it was yourself in the minority versus four of your colleagues, and they took the view that your, in your judgment you didn't properly evaluate the evidence and in fact arrived at your conclusion on the facts not borne out by the record. What do you say to that?

Judge President Mlambo:

Well, I don't agree with that. I mean, as I say, I think in my questionnaire, for the benefit of those Commissioners, this is the so-called baboon-shooting case that happened in the Northern Province, or in Limpopo, as we speak. There was eye-witness evidence of someone who was not more than six metres away from the shooter, and the majority sought to refuse to accept his eye-witness testimony, which was direct of how the farmer shot at them, based on him having been contradicted on an unrelated aspect of his evidence and I found that not acceptable. And further, I just felt that the majority didn't factor in properly what I would call victim justice. This is a man who was shot by someone who says he was shooting at a troop of baboons. There was no evidence that there were baboons there. There were humans there. And that's what fortified my view in dissenting against a very strong-minded Bench of senior colleagues.

Deputy President Petse (Chairperson):

Thank you. But you would accept the general proposition that Appellate Courts decide appeals on the basis of what is contained in the record and that barring the admission of new evidence on appeal, they cannot stray beyond the confines of the record?

Judge President Mlambo:

That is correct. I don't think that arose in that matter.

Deputy President Petse (Chairperson):

There is a phenomenon which I observed sitting as a judge of appeal in matters that came from the Gauteng Division, and it is this. Applications for leave to appeal for some reason, take too long to be heard. You'd have a situation where a judgment is given, say on the 3rd of October, and application for leave to appeal if filed in the, I beg your pardon, I meant to say 3rd of February, and application for leave to appeal is filed on the 20th of February, and only for the application for leave to appeal to be heard six, eight months down the line. And to compound issues, a judgment, to be rendered a month or so later. Do you think that that situation is, or is it not undesirable?

Judge President Mlambo:

Oh, it is very undesirable. I agree with you, Deputy President. And it is something that we speak about in judges' meetings all the time. That an application for leave to appeal must be treated like an urgent application. There are a number of factors that cause that but there's no excuse. You are correct. It's unacceptable! And I could say that since the advent of Case Lines, that situation has improved drastically.

Deputy President Petse (Chairperson):

Because I recall from my days when I had the privilege to lead the Umtata Division of the High Court where I put in place a practise in terms of which, you know, practitioners would approach the judge against whose judgment they seek leave to appeal, arrange dates and the judge should then give priority to the matters you have set, even if you are sitting in the Criminal Court, you make a special dispensation where perhaps you would hear the application at 8:30 or 9:30, before you proceed to your other business for the day.

Judge President Mlambo:

That is correct. I mean, as I said, one of the major contributory reasons for those delays you have sketched, Deputy President, was that the applications themselves were not sent to the judges directly. They go via the registrar's office and usually, from the registrar's office to the judge, there are always delays. But you are correct, it's an unacceptable situation and I want to believe we've taken steps to remedy that situation.

Deputy President Petse (Chairperson):

Would that perhaps, or the fact that in some divisions practitioners are not allowed easy access to the judges to say, here's the application for leave to appeal, here's the file, please give us a date, everything is expected to come through the registrar?

Judge President Mlambo:

That is the case flow management capacity that's put to support the judiciary. I'm not sure that judges would be able to cope with the traffic in terms of applications of that nature and other matters that they deal with if they went straight to them. I think the registrar's offices are created for a reason, and it is understandable that there needs to be

efficiencies and courage in the registrar's offices, to ensure that when they receive applications for leave to appeal, they alert the judges concerned without delay.

Deputy President Petse (Chairperson):

Thank you. Judge President, Mlambo, at this stage I'm going to afford you half an hour to tell the Commission and the national at large, how you see the role of the Chief Justice in a constitutional democracy. And also share with the members of this Commission your vision of a functional, efficient, accountable and independent judiciary in the Republic of South Africa. Thank you.

Judge President Mlambo:

Thank you very much, Deputy President. I'll try to keep to the 30 minutes, but I don't know if I would be able to. Thank you very much for the opportunity to share my vision, as a candidate interviewed to occupy the position of Chief Justice. What I did in crafting my vision, members of the Commission, is that I considered what is the proper location of the judiciary in South Africa, as a constitutional democracy, as well as the role of the Constitution in that regard and, importantly, the role of the Chief Justice. I also looked at the current context that is prevailing in South Africa as to the judiciary, what is happening around the judiciary. I did that because it is important, if one looks at Chapter 8 of the Constitution, where you find 165, Section 165, which tells us that the judicial authority of the Republic of South Africa is vested in the Courts, but importantly, Section 165 (6), which charts the responsibility of the Chief Justice in terms of the establishment, monitoring norms and standards in the judiciary.

So, if I am appointed as Chief Justice, I will ensure that this reality that is sketched by Chapter 8 is put central to our efforts as members of the judiciary. The other aspect that I looked at, before crafting my context, my vision... Sorry, Deputy President, is that I conducted an environmental scan of what is the context the judiciary finds itself in. One of the aspects that stands out is that the South African judiciary is a functional judiciary. It's a judiciary that has lived up to the promise of the Constitution in terms of delivering justice. I'm proud to have been a member of this judiciary for just over 20 years. That's on the positive side, Deputy President, but there are challenges. That environmental scan, just to mention one or two aspects, informed me that there are perceptions around South African society, that the Constitution has not delivered and is not achieving its purpose. My scan told me that there's loss of confidence in the judiciary, loss of

confidence as well as in the justice system and the rule of law as sketched by the Constitution, but more worrying, Deputy President, my scan revealed that the judiciary operates in a somewhat toxic environment. Toxic in the sense that the judiciary is attacked on a number of fronts. Its independence and impartiality are always at stake and attacked, and this is a function of a polarized political space. You also have unfounded claims of corruption against members of the judiciary.

But more worrying, members of the Commission, is that I can tell you as Head of Court, starting in Labour Court and then High Court, that there is corruption growing involving court operations in South Africa.

Corruption not by judicial officers, I want to say that upfront, but corruption in terms of the usage and the circulation of fraudulent court orders which bear all the resemblance of a proper court order but when investigated you find that no such was heard on a particular date. That's an issue that I think requires serious attention because it can erode the legitimacy of the judiciary. We've mentioned increasing caseloads, but I think access to justice, access to courts, remains an issue, despite us having got more than 20 years in our constitutional democracy. Those are just a few of the issues, I thought, let me mention, that underscore the vision that I have crafted for the judiciary.

And that vision, if I could mention or express it in a sentence is, my vision is to see and have an efficient and effective judiciary, that is independent and able to fulfil its mandate as set out in the Constitution. That's in a broad nut my vision. But this vision is underscored by pillars. I've come up with seven pillars that underscore this vision, to make sure that it succeeds.

The first pillar is an effective and visible leadership which we have spoken about. Effective leadership, members of the Commission, translates into a leader, leading by example. A leader being with the judges, being concerned with their welfare and wellbeing. It is my aim that should I be appointed as Chief Justice, I will expand my efforts to make sure that together with the colleagues in the Heads of Courts and the judges that we lead, and the Magistracy, that we continue to fortify the strength and independence of our judiciary. As leader of a judiciary, I should be able to inspire and motivate, and ensure that judges and magistrates deliver on the mandate that they have from the Constitution that we find in Chapter 8. And I will ensure that we build strong accountable measures to make sure that we account for what we do in the judiciary. My personal leadership style attests to this, and I can expand on it when I'm given time later. One aspect that I want to underscore in this pillar is that as a judiciary, we must find each other. I use that term deliberately to say we had judicial colloquium in the early stages of

our democracy. I've been a JP since 2010. We've not had a judicial colloquium. We tried, some two or three years ago, to ask for a judicial colloquium to be had to be convened. It is important as members of the judiciary and the leadership to convene in a colloquium, a judicial colloquium, to embrace the developments that happened in 2013 when the office of the Chief Justice was created as a government department. What that entails. There are a number of other issues that we need to discuss as a judiciary, so that we understand, we are members of the same institution. One simple issue is the judiciary logo. The Constitution uses its own logo, the High Courts uses a logo that was adopted by the Heads of Courts, but there are other Courts that continue to use the executive logo. It's a simple issue that I just thought I'll mention, but it's one issue that needs to feature in the agenda of that colloquium. That's the first pillar. Leadership!

The second pillar, members of the Commission, is to, as head of the judiciary, to assert the rightful place of an independent judiciary, as an essential arm of Government. No doubt about it. We are the third arm of Government. We are essential for this democracy. In line with that assertion, we, as a judiciary and as head of the judiciary, I need to ensure that we develop strategies that are aimed at protecting and protecting legitimacy as a judiciary and countering the threats to our legitimacy. As I've said, Section 165 should be our lodestar in this regard. One issue that I think is important in the assertion of the right place of the judiciary, as an arm of Government, is to work towards encouraging the other leaders of Government. The leadership of Parliament, the Speaker, and the leader of the executive, the President. And myself, if appointed, as leader of the judiciary, to get together and talk about issues of concern that could improve how things happen in our respective areas and to express issues of concern that may be happening in the other arms of Government, that affect us as a judiciary. It is important that engagement happens on a regular basis. When I say on a regular, it could be either annually and sometimes when there are pressing issues, to be convened, to discuss whatever those pressing issues are. That's my second pillar.

My third pillar that informs my vision, members of the Commission, is to go back and retake the discussions regarding the institutional model of judicial governance that was adopted for the South African judiciary. In 2013, when the office of the Chief Justice was established as a government department, that was phase one of that model, that we, as Heads of Courts, have adopted and accepted, and informed the executive as such. There are two other phases that remain outstanding. The second phase is what I will encourage and initiate discussions on with the executive, to say it is time that we look at taking the judiciary further towards total independence. Phase 2 in that institutional model, envisages a judiciary running as a separate, completely independent entity, with

its own staffing, its own policies and its own processes and procedures. And the example given in that model is that of the office of the Attorney-General. That operates on its own without interference by anyone else. That's phase 2, and I will explain my efforts at making sure that we discuss and find ways to put that on track because we are only in phase 1, we still have a lot of things that are not happening within the judicial space that are happening elsewhere. And of course, some of them are countenance in the Constitution.

One key component of dealing with the institutional model is taking on hand the single judiciary concept. Office of the Chief Justice is in charge of the higher judiciary. The magistrates remain outside. The Constitution is clear that the Chief Justice is the head of all Courts and by all Courts it means all Courts. I'll go to my next pillar, without wasting any time, members of the Commission, and that pillar focuses on taking a serious look at improving and introducing efficiency measures in our judiciary operations. And when I talk about judicial operations, I've separated into two. Judicial operations would be our operational workings in terms of the support structures headed by the Secretary-General. That's a key component to ensuring that the judiciary delivers on the mandate of the Constitution and is efficient. There are a number of issues about that, that I will deal with, but let me just move onto the second part of this leg of improving judicial operations and that's guarding and ensuring that there's continued improvement and working towards jurisprudential excellence.

South Africa, especially of our Constitutional Court, is renowned internationally and its judgment are quoted and cited and followed internationally. And on the continent. We need to make sure that that jurisprudential excellence continues but a key factor in that is to ensure that our jurisprudential developments factor in our socio-economic realities. I mentioned in my context environment scan, that there are concerns that the Constitution has not delivered, that the Courts have not pronounced enough socio-economic relief for South Africans. It's an important factor to take up. In terms of ensuring that there's jurisprudential excellence, members of the Commission, it is key for the leader of the institution, and if I'm appointed as Chief Justice, I will ensure that there's continued capacitation of the intellectual capital of the judiciary. And that happens on a number of fronts, but the most important is continuous and continued judicial education as well as continuous and continued interaction with other members of the judiciary in the continent and internationally. I think to ensure that the jurisprudence of our courts is properly focused on the South African realities, there is a case to be made for the judiciary to convene what I would loosely call a bi-annual constitutional law jurisprudential conference where legal scholars, Justices, international commentators and members of society as

represented by grassroots movement come and talk and chat, and conduct a critical assessment of the jurisprudence of the courts, especially our Constitutional Court as the Apex Court. Access to justice should also feature. We've had a number of accesses to justice conferences. It remains a problem. One issue that I did as Judge President, in terms of trying to improve access to justice, is to establish legal access helpdesks in the Labour Courts and in the High Courts. These assist unrepresented litigants who are hauled before the Courts. They come without lawyers; they leave with lawyers. Let me come to the second leg, which is the operational efficiency of the judiciary. We touched on the proper resourcing and capacitation of the judiciary, so I won't go to it. The only aspect I want to mention there, members of the Commission, is the executive is always cutting budgets. Budget cuts have a detrimental effect in the judicial space because it affects key stakeholders like Legal Aid South Africa and Members of the Prosecution, because their human capital is reduced and their ability to cover the current courts and more courts is compromised and this is a result of budget cuts. I think there needs to be a rethink. I know that the executive has been kind in terms of treating the economic space entities with kid gloves when it comes to resourcing, but I think it's high time they also factored in the judiciary and the justice sector at large, because we play a critical role in terms of our Constitution. The issue of capacitation we've dealt with, but I think, members of the Commission, as part of this leg, it is important that, as Head of the Court, and as Chief Justice, I look at particular functions and challenges regarding the operational efficiencies that we find in the justice system. The workings of the Constitutional Court, the workings, especially the complaint about the Constitutional Court taking time in terms of delivering its judgments, I think that needs to be looked at. It needs to be addressed. I'll come back to it.

But as part of this leg, as head of the judiciary, if I'm appointed, is to reinforce oversight and accountability. And I mentioned oversight and accountability in one large respect. I've mentioned the issue of the Constitutional Court and the judgments, but the delivery of judgments is a problem. Overall. If you look at the judiciary annual report, you'll find seriously worrying stories of judges sometimes reserving for two years or longer. That's unacceptable. There needs to be consequent management. If you're appointed as a judge, this Commission believes you are confident, it's confident you'll do your work. If you can't write judgments, you don't belong in the judicial space. That's my philosophy. One other aspect in terms of, I will expand my efforts from a good governance and oversight point of view, is the issue of processing of judicial complaints. Judicial complaints have on occasion taken far too long to be processed and this has led to the perception that we are hard on litigants and treat ourselves with kid gloves. That needs to

be addressed. And one other aspect is to relook at the capacitation of the JSC Secretariat. Is it properly resourced? Is it properly able to follow up on all complaints it handles? But more, to look at the judges who serve in the Judicial Conduct Committee. That committee of the JSC uses almost exclusively, judges in active service. These are judges who have their own loads in their own courts. They don't have any special dispensation that gives them time to attend to JCC work. I think we need to look at that.

In terms of accountability, I want to say, as Chief Justice, I'll focus my efforts on looking at the workings of the justice system in particular. And I want to focus on three issues here, still part of this leg. One of those issues is, there are worrying levels of part-heard matters involving awaiting trial detainees that take just too long to be finalized. These are people who have not been found guilty, but they languish in jail, sometimes more than five years, six years, seven years. It is unacceptable in a constitutional democracy, to have matters taking that long, of people who are presumed innocent. That problem resorts largely in the Regional Courts and I think as head of the judiciary, if I am appointed, it is an aspect that I will ensure I take onboard and address. The issue of the Land Claims Court. The Land Claims Court is a Constitutional Court, a post-Constitutional Democracy Court but for many years, that Court has operated with acting judges, and it is a Court that does its operations more outside, in terms of interacting with communities, especially. It takes a long time for a Land Claims Court matter to be finalized and it's no fault of the judges and the acting Judge President of that Court. It is the resourcing. That Court needs more judges. So, I applaud the recent effort of appointing judges, permanent judges to that Court. It will go a long way towards addressing that.

One last issue, in this leg, that I want to mention is our ineffective Maintenance Court system in South Africa. You talk to anyone, you listen to radio stations, you read horror stories about how single mothers in particular are unable to get Maintenance Courts to come to their assistance in bringing up their children. It's a big problem that I will, as Head of Court, look at. There are issues about infrastructure maintenance. The Palm Ridge Court is falling apart. It's a new Court. The Polokwane Court... High Court, that is the Limpopo High Court, is falling apart. It's a new Court. Same goes for the Mpumalanga High Court. They are falling apart, yet they are new Courts because there are no maintenance contracts. Why should that situation persist? As Head of Court, I will ensure that when I engage the other arms of Government, especially the executive, that they take this one up. The Soweto Court, or Protea Court, magistrates are working on top of each other. Because there's just no space there. It's an aspect that needs to be attended to without delay. The issue is about finding land. It's a to-ing and fro-ing

between the City Council, the Department of Public Works and it's just going nowhere. These are real issues that needs to be addressed to make sure that we protect our space.

My fifth leg of pillar of my vision is the establishment, or development, let me put it that way, of a holistic transformative program for the judiciary. We need national, at a national level in the judiciary, to have the same objectives as a judiciary about how we can achieve the transformation goals about obtaining, maintaining and achieving demographic representation in our ranks. That's one issue I will focus my attention on. We need to develop a judiciary-wide gender-based violence, sexual harassment policy. In Gauteng, we have... we adopted a sexual harassment policy, but we need a policy for the entire judiciary. To make sure that we effectively deal with this scourge There's also an issue of looking at internal institutional health issue, like the wellbeing of judges. The issue of medical aid and stuff. There's an issue there that needs to be addressed.

The sixth and second last pillar is to develop functional communication and engagement strategies as an institution. We have a policy in the judiciary, and I have no reason to doubt its efficacy, all that requires is that we as Heads of Courts in particular, need to make sure that we apply our communications policy. I chair the Judicial Communications Committee of the judiciary, that's why I am the editor of the judiciary newsletter. But it is critical that we have a properly placed communications platform that enables us to be timeously responsible to attacks that come against us. And that policy sets out all the functionaries of there, with the anchor position being that of a spokesperson, a judiciary spokesperson. So, we can talk further about the other legs of that judicial policy, but I think it is important that we are able to communicate effectively our messages, our judgments, and to dispel whatever perceptions are there in terms of what we do as a judiciary, to make sure that South African society is informed about what we are doing.

I think this is the importance, this is where the importance of a structured engagement with the arms of State comes in. Because sometimes issues erupt in the public domain that affect us and it is important that when we come together as leadership of the three arms, we are able to deal with these issues. But there's an important other aspect about that gathering. Chief Justice Mogoeng Mogoeng established the PEEC and NEEC. The NEEC, which is the National Efficiency Enhancement Committee, it brings together national leadership of key Government departments and judiciary stakeholders as well as leadership in the judiciary. It is at that forum that implementation failures down are escalated to make sure that the NEEC looks at the national leadership that's there and identifies which departments are not delivering and why they are not delivering and put them on terms to do what they are supposed to be doing. I mentioned the issue of

maintenance contracts. It is unconscionable that government would spend so much money in building new court infrastructure and also see it deteriorating. So, implementation failures that can be resolved at the NEEC level, can be adequately dealt with in the meeting of the leadership of the three arms of government.

My last leg of my vision, members of the Commission, involves embracing and continuing to embrace innovation and court modernization. And the sub-part of that is ensuring that we are administratively efficient as a judiciary. We have all seen that properly taken advantage of technology can go a long way in enabling us to be an efficient judiciary. And I thank Chief Justice Mogoeng Mogoeng for conscientizing all of us as Heads of Courts, that we need to take onboard modernization. I mentioned CaseLines. CaseLines is the buzz word in Gauteng. Unfortunately, it has not been cascaded to the other divisions and it's through no fault on my part, in particular. It's something that can be discussed but as I sit here, I'm acting in the Constitutional Court. The first thing I did was to ask permission from the Acting Chief Justice that he allows me to use CaseLines. Because I'm used to it, I can't go back to hardcopy stuff, when I know that there's a platform that's hugely enabling in terms of making sure that everything is available at my fingertips. We are about to have the implementation of what we call Court Online. CaseLines is an evidence management platform. It was meant for that, conceived for that. But because Court Online, which is the CRM dynamics platform under Microsoft, has been long in coming along, it's taken a long time, but it's imminent now to be implemented. That's the e-filing system that will deal with the proper e-filing of pleadings that would then be embedded onto the CaseLines platform. So, these two programs are the reality for the South African judiciary, as we go on and I will ensure, if I'm appointed, that I continue to champion the usage and the embracement of IT.

One key and very critical element in terms of ensuring that members of the judiciary and the legal profession embrace technology, is what is called a changed management tactic, is to have a champion as Chief Justice, if I'm appointed. I undertake to ensure that I champion modernization in the judiciary. Not only championing it by talking, but by using it. It is very important because when judges see other judges doing it, that's how we introduce CaseLines. We started with five judges. It increased until it was accepted by all judges that this is the way to go.

One other aspect, which is the last aspect on this leg, members of the Commission, and I'm sorry I've taken long, is the judiciary is the custodian of old court records. When we had a presentation from an official of the Department of Justice some five years ago, he told us that what the Department of Justice was in custody of, in terms of old court

records from the judiciary, was files and Court records that could fill five rugby stadiums. Some people were laughing at the Gauteng High Court when there was rain and there was flooding in the Courts and a lot of files were flooded. We don't need to experience that heartache. We need to digitize those Court files. Once we digitize them, they are available on your fingertips, and you don't need any physical space that you pay money for to maintain. When we visited Brazil, myself and Chief Justice Mogoeng and President Maya, I took it upon myself to go and explore how they digitized their records. It took them a full two years and what they did, they approached entities that were responsible for taking care of the interests of persons with disabilities, and they used them, largely, to digitize the entire Brazilian judiciary. So, members of the Commission, modernization is the way to go. You can call me a judicial technocrat, if you want to, but I am as much a technocrat and administrator as I am a judge. I have sat in a number of cases, and I think I bring enough energy to make sure that these pillars of my vision go a long way into asserting the judiciary in its rightful place. I will stop there. Thank you very much.

Deputy President Petse (Chairperson):

Thank you, Judge President Mlambo. At this stage I will call upon any of the members of the Commission who would like to put questions to you, to indicate to me. I will record their names and thereafter give them an opportunity to ask whatever questions they might have and in the order in which an interest has been indicated to me. Today I want to give preference to our fellow Commissioners who are with us virtually. If they would like to avail themselves of that opportunity. And that will be Commissioner Breytenbach and Commissioner Barnard.

Commissioner Breytenbach:

Thank you very much, Deputy President. Mr Barnard had his hand up before and I'll go second, thank you.

Deputy President Petse (Chairperson):

Thank you. Oh, by the way, I have to begin. Okay, I've got Mpofo, Madonsela, don't forget Cane, Commissioner Tshepe. Commissioner Matolo-Dlepu. Commissioner Matolo-Dlepu, you'll be number eight today, not 17. Commissioner Shabangu, okay, thank you. Shabangu-Mndawe. Prof, I've noted you. Okay. Thank you, Commissioner

Magwanishe. Okay, Commissioner Mmoiemang. Commissioner Xaba, I've got you. Commissioner Nyambi, I've got you. Oh, Madam Speaker, Commissioner Mapisa-Nqakula. I've noted you, Commissioner Malema, Commissioner Singh. Commissioner Dodovu and Commissioner Notyesi. Okay, before I allow Commissioner Breytenbach, I just want to make one housekeeping announcement. There'll be loadshedding again today at two o'clock, so we will adjourn for lunch at ten to two and then resume at ten to three. And we'll take a short adjournment again at four o'clock and resume at half past four. Thank you. Commissioner Breytenbach?

Commissioner Breytenbach:

Thank you, Deputy President and good morning to everybody and good morning to Judge President Mlambo.

Judge President Mlambo:

Good morning, Commissioner.

Commissioner Breytenbach:

I hope you are well?

Judge President Mlambo:

Under the circumstances, I'm trying.

Commissioner Breytenbach:

My first question, Judge President Mlambo is around the Legal Aid Board of South Africa. So, you were involved with that for over a decade, well over a decade and you, when you took it over it was really just, I hesitate to use the words dysfunctional, but it did not function well. It was not highly regarded. It struggled to attract staff of any description, let alone staff of good quality. And the work it produced was generally quite sharply criticized by the Courts. And when you left it, you left it running as well-oiled machine, an employer of choice, attracting skilled practitioners, producing work of high quality, on time. The

change around was quite remarkable. So, my question is, the lessons that you learnt at Legal Aid South Africa, how would you implement those to achieve the same kind of turnaround in the Courts which are not, you know, not all the Courts, but those Courts that are not functioning optimally and particularly how would use your influence, if you are appointed, in the lower Courts to make them more efficient? Thank you.

Judge President Mlambo:

Thank you very much for the question, Commissioner Barnard. I mentioned that as Legal Aid Board chair, we focused at the beginning of my tenure in 2002, at having a three-day strategic session that conducted, that considered what the environmental scan had produced about why the Legal Aid was not performing as expected. The biggest issue was instability at executive ranks, instability at lawyer ranks. Now instability at lawyer ranks, was because all the lawyers who were employed by Legal Aid South Africa at the time, were on fixed term contracts and towards the end of their contracts, they got jittery fit and when they left, that destabilized court rolls. And we had to take a decisive policy decision that those contracts are going to no longer be fixed term but permanent but coupled with tough performance management policies, to make sure that people don't relax because they are permanent. We also ensured that we stabilize the instability at executive ranks. That is the leadership at operations and the team that started that journey saw the journey through because we wanted buy-in to the policy of what the Constitution expects the Legal Aid service offering to provide in terms of quality and timeous assistance to people who needed assistance. So, we also looked at the issue of resourcing, right? You took, you look at the courts that you've got to service as an entity and you make a judgment call as to how many lawyers you need to service each particular court and you have to make sure that those lawyers are properly resourced, right? The problems of the past were that lawyers were carrying unrealistic caseloads. They had not preparation time. No consultation time. We looked at all those things to ensure that we bring in timely interventions to give them that space that when they appear they are properly prepared. So, that's at the top, that's what we did.

But in terms of your second question, Commissioner Breytenbach, about the lower courts, I think a serious discussion needs to happen about the system that's followed, especially in the Regional Courts, Criminal Courts. The High Courts use what we call a running roll system, where when you start a case, you must finish it. In the Regional Courts you find on the roll of each magistrate on a daily basis, he's got five matters, they are all part-heard. He'll hear two witnesses in one case, postpone it for another month or two

months. Hear another one, do the same thing and that's what adds to these matters not being finalized timeously. I think we need to consider seriously, as the leadership of the judiciary, strong case management initiatives at that level as well as looking at the systems that are used by those Courts in terms of ensuring that when they start cases, they run them and finalize them. So, let me stop there. I hope I've answered your question partially, or if not fully.

Commissioner Breytenbach:

Thank you, JP, you've answered my question fully. Thank you very much. My second question is about how you would, if you're appointed, how do you, what do you see as the most appropriate method for the judiciary to provide comprehensive feedback and interaction with Parliament and with the public with regards to judicial accountability?

Judge President Mlambo:

Well, there was a reason why Chief Justice Mogoeng Mogoeng, with the agreement of the Heads of Courts, adopted the Judiciary Day, Judiciary Annual Day initiative. Because we use that day, annually, to account to the South African public about judicial operations in terms of judicial functions. Because I'm not aware that we have an obligation to account to parliament as a judiciary, for judicial functions. But we have also, as Heads of Courts, met with the Justice Portfolio Committee because it's a committee that operates in our space and it's to me, an interbranch engagement between the judiciary and the executive in terms of sharing points about what's not going right, what's going right and ensuring that the service offering improves. In terms of operations, in terms of how the budget is spent, the human capital, how people are employed, dismissed and other aspects about that, the Minister of Justice currently accounts to that for the office of the Chief Justice and that's part of the phase one process that I mentioned.

But I think for judicial functions, because I'm sure that's where your question is focused at, is I think the current annual day, Annual Judiciary Day is sufficient to tell South African society how we have done. How many judgments we've, how many cases we've taken on board, how many cases were finalized, how many judgments are reserved, how long they took and things like that. So, I think those processes are now, they just need to be barest to make sure that they continue to deliver. Thank you.

Commissioner Breytenbach:

Thank you very much, JP and thank you Deputy President. Those are my questions.

Deputy President Petse (Chairperson):

Thank you, Commissioner Breytenbach. Judge President Mlambo, I've got Commissioner Lucas, who has a follow up question on the questions posed to you by Commissioner Breytenbach.

Minister Lamola:

I also have a follow up, Deputy President. Lamola.

Deputy President Petse (Chairperson):

Noted, Honourable Minister.

Commissioner Lucas:

Thank you very much, Deputy President. Good morning, JP.

Judge President Mlambo:

Good morning, Commissioner.

Commissioner Lucas:

Yes, it's a big stretch to see you on the other side of the table. No, you were speaking about the Annual Judiciary Day as kind of like feedback to South Africans. I was just wondering, do you really think it is inclusive enough to make sure that there is a better understanding of the kind of load, or the kind of responsibility that is being carried by the judiciary? It just came up in my mind when you said it seems to be sufficient. I mean, we can differ about it, but I, just, do you really truly think it's inclusive enough, particularly of the lower levels, to make sure that there is a better understanding.

Judge President Mlambo:

In fact, that's an important question and thank you very much, Commissioner Lucas, about that. Because I think in my, in one of the pillars, the communication pillar that I elaborated on. One of the aspects I didn't mention was that as a judiciary, and it's part of my psyche, so to speak, that we need to stay in touch with South African society. So that's one level at which we account to South African judiciary.

But in my pillar, I've sketched that there's a case to be made for grassroots organizations that represent larger South African society to be consulted or to be organized in an engagement where I've seen the Department of Justice called the imbizos. You know? There's nothing that would preclude the judiciary to hold an imbizo and to hear from members of the public what their concerns are, and to clarify what they have issues with. I think that would go a long way in terms of making South African society understand judicial operations, so yes, it may not be adequate sufficiently, but we are there to listen, as the judiciary, to say what other improvement mechanisms, can we embed to make sure that our accounting reaches a far bigger group. Thank you very much.

Commissioner Lucas:

Thank you, JP.

Deputy President Petse (Chairperson):

Thank you, Commissioner Lucas. Honourable Minister?

Minister Lamola:

Thank you very much, Acting Judge President and JP Mlambo. Good morning. When you spoke about seven pillars, so I thought you will say cardinal pillars, you know, but I think you deliberately said seven pillars. My question relates to the first one, on the Legal Aid that Commissioner Breytenbach has asked you about. I've seen that within the justice family, Legal Aid is also one of the most techno-savvy or digital kind of use of platforms. Did you play any role there when you were with the Legal Aid to transform them or to help them transform in the use of these digital platforms? I've heard you

speaking, when you're speaking on your... you only spoke about your role on CaseLines and in Gauteng. Did you play any role in the Legal Aid in that regard?

Judge President Mlambo:

Oh, yes, Minister, thanks for the question. We... in our strategic planning session was to specially find funds in our budget to initiate a process, a product called *Ad Infinitum*, AI. That was a technological initiative that would help Legal Aid in terms of tracking from the time a file is opened and up to its finalization. Because you'll remember, one of the complaints was that Legal Aid is taking too long in terms of finalizing cases. So, AI was meant to deal with the operations on the legal side of things, as well as help with management information. Because it is important to draw reports from technological products that inform you which other improvements you can make. Yes, I was involved because I was chairing the Board when this whole issue was decided and we decided as a Board that it was an important strategic direction to accept, to adopt, to make sure that Legal Aid South Africa is technologically enabled to make sure that it does its work much more efficiently.

Yes, I was involved. Thank you for that question, Minister. In fact, that's where, those days, I'm sorry to say this, 2002, 2003, 2004, I was in the High Court and transiting to the SCA, the justice email platform was notoriously unstable. For me, to make sure I continue doing my work, I used the Legal Aid platform and I'm just giving you that example to say, we understood the role that can be played by technology in introducing efficiencies and *Ad Infinitum*, yes, is the product that we had. I think it was changed when a new system was adopted after I left Legal Aid South Africa in 20... I can't remember 2017 or 2019.

Minister Lamola:

Thank you, Deputy President.

Deputy President Petse (Chairperson):

Thank you, Honourable Minister. Commissioner Barnard, do you also have questions for Judge President Mlambo?

Commissioner Barnard:

Good morning, Deputy President and fellow Commissioners and President Mlambo. Yes, I do, I would like to put my questions forward if it is possible?

Deputy President Petse (Chairperson):

Yes, this is your moment then, thank you.

Commissioner Barnard:

Thank you. Judge Mlambo, before I heard your vision that slightly changed my reading of, you know, the preparation and so on, but one of the things that came for me strong to the fore, not only just in preparing on the documents, but in the interaction with yourself in the past, is that one word that comes to mind strongly is delegation or empowering. You have a way of empowering and building or using or assisting people around you to actually carry the vision forward. Now, one thing that has been made, one point over the past couple of days, is that the task of the Chief Justice, the office of the Chief Justice is huge. How will you use this to your best, a tribute of yourself to your best, you know the delegation and empowerment of people to assist with carrying your vision forward?

Judge President Mlambo:

Thank you very much for that question, Commissioner Barnard. I think it's part of my psyche. I humble myself. I'm one Head of Court who's acutely aware that there are some of my judges who may be better than me in one or other aspect. Instead of sidelining them, I bring them closer to me because I believe we are colleagues, we're both battling for the same team to make sure that the team succeeds. It's productive, it's efficient. So, that's one of my leadership traits, to bring anyone aboard and to take people with me onboard. All my directives that were issued when the pandemic struck, were not dictated to judges or the profession. They were done in consultation with the judges and the legal profession. That's what I can cite as me taking people along with me. Because in those engagements, we debate and understand why we want to go a particular route. But an important aspect, Commissioner Barnard, is I was aware that the resourcing and the capacitation around the Judge President, needed attention because if you only have one secretary and you have a lot of things that you have to do as a Judge President, you

need proper support. I came up with the idea of office managers in the office of the Judge President. That office came about after I took over and I suggested it and I know that there are Heads of Court who have taken it onboard and used it. Because it is an office manager who also deals with the issues that judges are faced with. One thing that I believe in is judges must work in an administratively efficient environment. They don't have to be bogged down by administrative issues. That's my task as their leader to make sure that I deal with the administration issues that may be at their issues. So, that's my way of doing things, of making sure that people follow me, understand me, persuade me and we go along in the route that we've adopted. Thank you for the question.

Commissioner Barnard:

Thank you. Now, in listening to your very positive vision and specifically the aspect on modernization. It really, I think, is something which comes across well. Now, the question is, how practical is this? I'm actually asking your vision of hope almost, because you know, it's one thing to having the rollout in Gauteng but if one, like myself practises quite often in the Magistrate's Court and one had seen the lack of capacity on the side of, for example, the court function... the clerks of the court, so there's a huge gap between or disparity between I almost want to say those people serving the High Court and maybe the Magistrate's Courts, providing the support functions. So, can you give us hope that this vision of yours of modernization can be carried through to the Courts at that level?

Judge President Mlambo:

By all means, I can give that undertaking and it's one of the objectives I will pursue should I be appointed as Chief Justice. The points you mention about the Magistracy are points that are very critical and important and affect the service offering from that level. Had it been for me, I would have ensured that CaseLines is also, as it is currently operational in Gauteng, it also is operationalized in the Magistrate's Court.

I mean, as we speak, the issue of dealing with criminal trial records that are on appeal in the High Court, those records are available electronically in the Magistrate's Courts, but because of the thinking, the static thinking that's there, these are downloaded and printed and then sent to the High Court in hard format. That's not adequate.

What should be happening is, and I requested the regional head here to say the court clerks must be trained on how to upload those records onto CaseLines and voila, you

have it in front of you, if you're sitting in an appeal. And I can mention this, some people may be angry with me, there are magistrates that have acted in the High Court and have tasted and used CaseLines. I have some of them who phoned me to say they've sought agreement with the practitioners in matters they are involved in; they seek my permission to use CaseLines. And I've said yes, by all means, they should do it. Because it's a system where we use the public's funds to pay for and it should be used and cascaded as widely as possible. Thank you very much, Mr Barnard. I hope I've answered your question.

Commissioner Barnard:

Yes, thank you. Now, going even lower, what would your vision be to, you spoke about Courts being all Courts, quite correctly so in terms of 166 and then specifically thinking about the other Courts, 166 (e), what's your vision for something like the Small Claims Court, for example?

Judge President Mlambo:

I think all courts caption means all courts. The Small Claims Courts, I mean, I have attended a number of functions, organized by the Deputy Minister of Justice, who takes particular charge of those court, and my sense was that there's huge commitment from members of the legal profession in serving as Small Claims Court Commissioners. Uhm and I think, if I'm not mistaken, the jurisdiction of the Small Claims Court has been increased to countenance, a number of the matters that would force people not to litigate because all their capital will be taken up in lawyers' fees, so that's a positive example. But there was an issue about Small Claims Court not sitting only in the evenings or at night but sitting during the day. I think it's a worthwhile argument and initiative to be embraced, to make sure that they continue serving.

Because I know from where I sit, based on those functions that I've attended, that they bring justice to the grassroots levels of society without them having to spend a lot of money. So, it's something that we should look at, as members of the judiciary, and in consultation and discussions with the member of the executive in charge of the justice portfolio, to see how it can be buttress and influenced and improved further. Thank you, Commissioner Barnard.

Commissioner Barnard:

Thank you, now, just moving from that to a much, on the vision, you've spoken much about South African Courts, but on the matter of the SADC Tribunal, you know, the Tribunal that's seated in Namibia and the litigation that took place there and so on, is there a role and what, is there an extended role for a Court, in the Southern African system, how do you see that as part of the judiciary? I ask specifically because that matter originated or was mitigated in your Court and so on as well.

Judge President Mlambo:

Yes, thank you for the question, Commissioner Barnard. The SADC Tribunal is a Regional Court. It was meant to serve the SADC member states and the citizens of those member states. Right? So, regional tribunals operate on what we call a complementary jurisdictional premise. Complementary in the sense that if you do not get justice in the sense that your matter, your local or domestic justice institutions don't want to hear your matter, then that triggers the jurisdiction of the regional tribunal to hear your matter.

That was the case regarding the SADC Tribunal matter I was involved in. The farmers whose farms were impounded, were not getting justice in Zimbabwe because the Zimbabwe Courts didn't want to hear their matters and they went to the SADC Tribunal. And when the SADC Tribunal made its findings and rulings and ruled against the Government of Zimbabwe, that was followed by an AU, SADC leaders meeting that worked towards disabling that court from doing anything further.

So, I'm saying, its regional tribunals are international tribunals. They exist, like the African Court on human and people's rights, they exist to provide justice to those citizens of the member states who haven't got justice in their own domestic backgrounds. So, yes, I mean, I would encourage that we continue supporting that initiative of the SADC Tribunal and the African Court on Human and People's Rights. I think, Advocate Ntsebeza is one of the most recent appointees to that court. So, we should, as a country, support these international tribunals especially in the continent.

Commissioner Barnard:

Do you think, and it doesn't have that role at the moment, but do you think it has a role to play or one could develop it into a role. I'm thinking a situation like we faced in South Africa with the past many years where there's a crisis in the judiciary, maybe a judge is,

you know, there's problems with a judge or whatever, and then the matters are litigated up to the Constitutional Court and you sit with all sorts of questions, like judges should recuse themselves and that sort of thing. Whereas wouldn't it be of assistance that one could have given another court, to refer such matters to, to have more of an independent view taken. I know this is a big jurisdictional issue, but just thinking visionary now, is there not some way that that could be developed in that direction or movement in that direction?

Judge President Mlambo:

Well, thanks for the question, Advocate ... Mr Barnard. I think it's an issue to be considered but from where I sit, I've been involved in requests from other jurisdictions on the continent, especially in Lesotho. Where members of the Lesotho judiciary cannot sit in a particular matter. Where South African judges are requested. I mean, they would ask for judges from Gauteng, or from the Free State, I'm not sure if JP Musi has participated, but I suspect he has, in going to those jurisdictions to deal with those matters. I think, in my view, it's a much more cleaner way to source the judicial capacity elsewhere but not fiddle with the jurisdiction of the domestic tribunal, of the regional tribunals, because those operate in a carefully circumscribed judicial... jurisdictional space and I don't think this would be the type of matters that would go there. That's my honest answer.

Commissioner Barnard:

Thank you. Then my last question. We're sitting with, well, this is the third interview, but it seems apparent that there's four very strong candidates each with maybe unique areas or reasons why they are best suited for the position of Chief Justice. But how do you think, having been serving on the JSC, also for quite some time how do you think the Commissioner should deal with the gender issue, bearing in mind that all candidates are strong and capable, etc. What should the approach be?

Judge President Mlambo:

I don't think the issue arises, Commissioner Barnard. I mean, if the question to me is, is South Africa ready, and I don't think, why should one ask that question, is South Africa ready for a female Chief Justice. We've been ready for a long time. It's not an issue! I think President Maya answered the question adequately yesterday by saying you're not

appointing me because I'm a woman, if you appoint me. You're appointing me because I'm a strong judge. I think that's the issue, isn't it?

But talking about gender in general, I mentioned in one of my pillars that we need to have a holistic transformation agenda for the judiciary or program. At Legal Aid South Africa, one of our deliverable objectives was tracking how we were doing in terms of changing the demographics of Legal Aid South Africa. I'm proud that I was able to ensure that we appoint a female CEO. And we appoint women in key aspects of the executive management of Legal Aid South Africa. The CFO was a woman. The head of IT was a woman. The head of the Audit Committee of the Board was a woman. So, I think I'm alive to these transformative ideas and as Chief Justice, if I'm appointed, I'll ensure we have a transformative agenda. That looks at gender transformation of the Bench and that has really stick objective from a timeline point of view, to say by this time, this is what should have happened. Because, as Judge Presidents, I've discovered that one can productively use available vacant judge positions, in terms of bringing on women candidates to come and act.

One of the members of the Commissioner here heads an organization that had an undertaking, an understanding with me that at any given point in time, when I appoint acting judges, I must make sure that four of those women acting judges, come from women and from that organization and I want to believe I've lived up to that. My statistics at how I've done in that regard, speak volumes.

When I took over Gauteng, there were 49 male judges and 15 female judges. Today we have 41 male judges and 38 female judges. I want to believe I've done my bit to advance gender transformation in the Gauteng Bench. So yes, I will continue my issues to make sure that ... but I think a holistic program that has timelines, is the way to go.

Commissioner Barnard:

Thank you, JP. Thank you, Deputy President, also for starting online today. We appreciate it, thank you.

Deputy President Petse (Chairperson):

Thank you, Commissioner Barnard. Members of the Commission, I propose to give the Honourable Minister an opportunity to put his questions after which we'll take the short

adjournment which in fact, we should have taken about 15 minutes ago. I hope you'll bear with me. Thank you. Honourable Minister?

Minister Lamola:

Thank you very much, Deputy President and I've already greeted you, Judge President.

Judge President Mlambo:

Indeed, Minister.

Minister Lamola:

My question relates to the issues you raised in your vision on the Court administration model and the office of the Chief Justice. What is your envisaged end goal of that office? As you are aware, it was a temporary arrangement and I heard you saying it was phase one and so forth. What is your envisaged end goal and do you think Section 54 of the Superior Courts Act... 54 (1). I'm not sure if I should read it for you or I suspect you will be aware, but it speaks about the role of the Minister, particularly in parliament to request a fund, but it says that the Chief Justice determines the budget after consultation with the other Heads of Courts?

Judge President Mlambo:

I think that's the current arrangement, Minister and I did acknowledge, when I articulated my vision about that, that there are provisions, even in the Constitution, that envisage a role for the executive in judicial affairs. So, there's no debate between us about that. But the model that I articulated that we as Heads of Courts looked at, is a model that envisages a journey to total judicial independence.

You will recall that in that model. I think that comes in in phase two, to say the governance of the judiciary, from an oversight and accountability point of view, will be undertaken by a Judicial Council. A Judicial Council that involves the judiciary, it involves the executive, it involves the legal profession, it involves members of society, it involves traditional leadership. So, that's phase two.

I'm saying, there's no reason why we as a judiciary should not engage with the executive to say this is the model that we, in the South African judiciary, think is the way to go. Let's talk about it. Because it's a platform where we'll exchange ideas and debate, right?

If we are wrong, I'm sure the executive will be there to say you can't go this route, for the following reasons. So, yes Minister, you are correct, Section 54 as you say, has a role for the executive in judicial affairs. Just as a role it is there for the appointment of judges and acting judges. It's a role that the executive plays. It's countenance in the Constitution. So, you said to me, what do I envisage, what will I do as Chief Justice. I've looked at this as work in progress. We gave the report to Minister Radebe, when he was the Minister and we said this is what we think we need as a South African judiciary. Let's talk about it. That engagement is long overdue. That's what I was saying. And as Chief Justice I will ensure that that engagement starts and continues.

Minister Lamola:

Ja. No, thank you. I think the executive will also be ready soon to engage at that level. The response is being processed through Cabinet to respond to that day, input. So, hopefully, we will engage soon. What is your view, I want to ask you with regards to the Section 29 of the Superior Courts Act? For sure you were watching yesterday.

Judge President Mlambo:

No.

Minister Lamola:

Oh, you did not. Okay. What is your view on the operationalization of Section 29 of the Superior Courts Act?

Judge President Mlambo:

Would the Minister just tell me what the Section reads, I don't have the Act with me.

Minister Lamola:

The Rule 29 is the Chief Justice, after consultation with the Minister, makes rules relating to the manner in which the Constitutional Court may be engaged in any matter, including the matters referred to in Section 172 of the Constitution and all matters relating to the proceedings and before the Court. You will be aware that we could not be able to operationalize this Section, because of the concerns that were still raised by the Heads of Courts, through the former Chief Justice.

Judge President Mlambo:

Ja. Minister, this is one of the issues that need to be resolved because at the heart of this problem is the rule-making prerogative that's involved there. And that's the prerogative of parliament, isn't it?

So, my view as Chief Justice, let's engage, but I don't think we can completely oust the role of the executive in that. As long as it happens in consultation with us, as the judiciary. I mean, that also deals with the issue regarding the Rules Board. I mean, the complaint has been, the Rules Board sits in the executive, but it makes rules for the judiciary. The issue is, consult us. Let's tell you what we think will work best and then you can take it forward and then promulgate the rules. That would be my approach, simply put.

Minister Lamola:

What do you think are the lessons you have learnt when you play the role in the establishment of the Mpumalanga Division and the Limpopo one? In terms of access to justice including your role as the Chairperson of the Legal Aid South Africa, which is responsible mostly for access for the indigent people of the country?

Judge President Mlambo:

I mean, from an umbrella position, if I may use that, it pained me that when I took over as JP of Gauteng. People in Limpopo came to Pretoria for their cases and some people around Thohoyandou, because the Thohoyandou High Court only had jurisdiction for a very small area. Everything around that, everyone around that Court, had to come to Pretoria. With Mpumalanga it was even worse because there was nothing.

That's at the core of access to justice, Minister. When we say access to justice, bring the institutions of justice closer to the people. That's my principle and that's why I worked hard at ensuring that those Courts, like the Limpopo one, that had come to a standstill, and nothing was happening. That it is, the process starts afresh, and it continues and as I say, in Mpumalanga, it existed as an idea. There was nothing when I took over as Judge President. But I made sure that what you see today, happens. Because it is in keeping with access to justice.

Minister Lamola:

Ja, lastly, continuing on the access one, you spoke about the issue of the use of technology for Legal Aid South Africa and also the Gauteng. How do you think access can be enhanced through technology? And what will be your role to ensure that technology as you speak, can be something that does not then also then hinder access. As you are aware, our country, there is a technological divide and the indigen people, for example, that are helped by Legal Aid South Africa, may not have access to the same. How are you going to help us as you help with the modernization and so forth that this also bring together or bring along the people that may be affected by digital non-access.

Judge President Mlambo:

Yes. Minister, thank you for the question. It is a critical issue that when we move to the technological world, we do not leave anyone behind. The point you make is a very important point. I chair CAOSA, which is active in the grassroots level. We have advice offices, deep in communities and communities know they can access legal assistance from these offices. When Covid struck we sourced funds to provide data to our advice offices, because data is the big issue when it comes to access to anything. We sourced funds for data and for laptops and tablets for our offices but for them to also spread the message that they could assist members who come in terms of lodging whatever claims they wanted to lodge. So, you are correct, Minister, that we need to be careful that as we move to the technological world, we don't leave anyone behind.

In the High Courts, I was alive to that reality. That's why I said, any person who comes to the court and the matter is being run virtually and on CaseLines, we've got helpdesks that are established in both courts to make sure that members of the public are assisted to participate in proceedings that involve them.

It's an evolved issue, but it's an issue that we need to make sure that we understand the dynamics of the communities, that require this assistance and how we can establish points of contact, where they'll be able to, I mean, you would call it hubs. We saw this when we went to Malaysia, with former Chief Justice Mogoeng Mogoeng, where you'd have hubs that members of the public will know they will go to if they want to lodge anything or file something in the courts and it will be received in the courts. So, it's an engagement that has to happen so that we don't leave anyone behind, and we understand those dynamics.

Minister Lamola:

Judge President, with your indulgence, I know I have said last, I have one last question I forgot.

Deputy President Petse (Chairperson):

Please fire ahead, Honourable Minister.

Minister Lamola:

Ja, Legal Aid South Africa will soon be handling land matters, and I know you have dealt with the Legal Aid South Africa introducing many aspects of the law. What could be the lessons we can learn from that experience of introducing and what should be your guidance to the State and to the Courts, the Land Claims Court, as it will also be dealing with practitioners from Legal Aid South Africa now handling some of the land matters?

Judge President Mlambo:

Well, Minister, you would know that when I was still Chairperson of Legal Aid South Africa, I began championing this cause that the model that the executive had of handling Land Claims Court matters, was seriously expensive at the time. And in these discussions at Portfolio Committee meetings, we were able to demonstrate to them how given the money, because it comes with money, you need new lawyers, you can't add the Land Claims Court work on the current workloads of the people who are there.

You need funds and you need funds to employ legal practitioners that understand that area of the law. Because the dynamic as we speak, in the Land Claims Court scenario, is that the landowners have got deep pockets, they are represented by well-oiled legal teams, but come to the communities, it's a problem. So, those are the dynamics I was talking about, to say, in these matters if the Land Claims Court Head of Court gets matters that involve communities that require assistance, financially in terms of legal assistance, he should be able to make sure who she makes a call to. And if it goes to Legal Aid South Africa, adequate resourcing from that point of view, is critical. Otherwise, it will flop.

Minister Lamola:

Thank you, Acting Justice President.

Deputy President Petse (Chairperson):

Thank you, Honourable Minister. At this stage we'll take hour mid-morning adjournment and we'll resume, I make it 11h00 now, on the dot, we'll resume at 11h20. Judge President Mlambo, you are also free to stretch your legs.

Justice Mlambo:

Thank you very much, Deputy President.

[tea break 2:12:32.0]

[resume 2:36:37.3]

Deputy President Petse (Chairperson):

Commissioners, will you please resume your seats? The candidate is now on his way back. Thank you. JP Tlaletsi?

Judge President Tlaetsi:

Thank you, Deputy President and good morning, Judge President Mlambo.

Judge President Mlambo:

Good morning, my fellow Ghana.

Judge President Tlaetsi:

I must indicate from the beginning that I had an opportunity to serve with you and you were my leader and Judge President at the Labour Court, and I can attest to your leadership skills, particularly administratively and intellectually from the cases that we served on. And I must also indicate that you appear to be a bit modest in your CVs and information that you have provided and the Heads of the Judges' President, which I represent, do have confidence in you and this is also evident from the fact that you have been deployed to serve in so, to lead so many committees in the Heads of Court. And one wonders at times, where do you find this time being so overloaded by virtue of you leading the biggest and busiest court in the country and being able to perform your functions on those delegations that have been given to you, quite well. But this brings me to the seven priorities that you've mentioned.

Firstly, I know you were instrumental in introducing the Traditional Courts to be part of the system and Community Courts to be included within the judicial system. And I would want you to say something on that and then secondly, from the seven priorities, are those that you would have, you would prioritize, I mean the pillars, that you would prioritise as immediate and immediately achievable, if you are sent to this office of Chief Justice?

Judge President Mlambo:

Thank you very much, Judge President Tlaetsi. I think I must just own up, the credit you give me, regarding the Traditional Courts and Community Courts, belongs to JP Legodi, not to me.

Judge President Tlaetsi:

Yes.

Judge President Mlambo:

I was part of that thinking process with him, but he was leading that aspect. But thank you for giving me that credit, I appreciate it.

Your question is which ones should I prioritise? I think the very first one, that I mentioned, that looks at the institution of the judiciary. Because it has in it embedded an engagement with the other leaders of the other arms of State. Just to lay the groundwork. I would prioritise that one upfront, right. And the issue around a holistic transformative program for the judiciary, it also requires prioritization because as a judiciary, I think we're lagged behind in terms of keeping up with the promise of meeting the demographics as we have the Constitution.

So, I would put those two right up there but probably something that also needs to be looked at, is the issue of looking at introducing efficiencies into judicial operations, that is addressing the issue of reserved judgments, long processing of cases, so I think I would put those three upfront. The others are not very far behind, but I think those three would require urgent attention. Because I think this one, that I'm mentioning now, it has in it the issue of looking at the ideal efficiency that one looks for, especially in the Constitutional Court and in the other courts in terms of receiving cases, what type of cases, and how long it takes for judgments to come out.

Judge President Tlaetsi:

I see. And then, please, on behalf of the JPs, how soon can we have a roll out of the CaseLines?

Judge President Mlambo:

It should have happened in 2020, JP Tlaetsi, you know.

Judge President Tlaetsi:

Yes.

Judge President Mlambo:

And I was pushing for it but it's a different story on why it didn't happen.

Judge President Tlaetsi:

I see. Thank you. And then, I've noticed from the comments by the GCB that you are a person who would also perform the functions, the core functions of a judge who is leading a division by sitting on cases. Some of them are high profile cases and you wouldn't shy away. You would sit with the other senior judges and lead them in those cases. Okay, you may comment for now.

Judge President Mlambo:

Sorry, sorry. You were not finished, sorry about that.

Judge President Tlaetsi:

Now, it would appear that participating again in those cases, it has led to an objection that we have before us, coming from the office of the Public Protector, in her personal capacity ... well, both in her personal capacity and in her official capacity. Firstly, I do understand that there is no pending complaints before this body against you, regarding those issues that have been raised. It is only here to serve merely as an objection to your appointment to this office. Would you like to share some information about that? I know you've provided a written document that's dealing with that. But for the benefit of the public, I don't want things to be spun as if this was not attended to.

Judge President Mlambo:

Yes. Yes, I think those complaints, if there are any complaints from the office of the Public Protector, have not seen the light of day as far as the JSC and the JSCC are concerned. She's not done that. And as I've responded in my response, her first complaint that I refused to meet with her when she asked for a meeting, I've clearly explained. She had lawyers, she didn't use those lawyers to write to me, she wrote to me herself saying she wants a meeting and she explained why she wanted a meeting.

I've mentioned in my response that there's a cardinal principle in how we engage with litigants, as judges. She wanted to meet with me on her own and her staff, regarding matters that were in court being handled by judges and that involved other parties. If you want to get into trouble as a judge, is to meet one party in the absence of the other. She wanted to do that. And that was the first cardinal misconception that she had. But the other one was she had lawyers who could voice any concerns she had with those judges that were handling those matters. So, that's the first complaint.

The second complaint, I've explained it, that is the first time I heard about me being approached by Judge Twala to the effect that Judge Fabricius tried to influence him by giving him a draft judgment. It was the first time when I saw it in a letter and I consulted those judges to ask them, what about it. I started with Twala, and they were all surprised about it. So, it's unfortunate, she's chosen to lodge and objection, but in my view there's merit in both objections that she has lodged.

Judge President Tlaetsi:

Thank you, President. Thank you, JP.

Judge President Mlambo:

Thank you very much.

Deputy President Petse (Chairperson):

Thank you, JP Tlaetsi. Advocate Madonsela?

Commissioner Madonsela:

Good morning, Judge President Mlambo.

Deputy President Petse (Chairperson):

Good morning, Commissioner Madonsela.

Commissioner Madonsela:

I just want to clarify one thing from your CV or your questionnaire. I see that there is reference to you having a BProc and an LLB and then it says 1983 and 2019, I think it's page ...[intervenes]

Judge President Mlambo:

That is correct. Those facts are correct.

Commissioner Madonsela:

I'm not sure whether it's, I want just clarification. Do you have, are these read, did you read for an LLB in 2019?

Judge President Mlambo:

Yes. I started reading for it, I think in 2015.

Commissioner Madonsela:

So, you have a BProc degree.

Judge President Mlambo:

Yes.

Commissioner Madonsela:

And an LLB? On that understanding then it means you were, you did an LLB when you were already a judge and in fact even a judge, it means you have been a judge of the Supreme Court of Appeals.

Judge President Mlambo:

Yes. That's true.

Commissioner Madonsela:

Why did you have to do that?

Justice Mlambo:

Why did I?

Commissioner Madonsela:

Why did you have to do that? You already were a judge, what was the point of it?

Judge President Mlambo:

It was something that I regarded as outstanding. When I finished my BProc, I was under pressure to find work and help my father in terms of catering for the needs of my siblings. My mother has never worked. So, the burden on my father, in terms of bringing us up and paying for our fees, had been so great. So, when I finished my BProc, I went straight into employment. But I started studying for the LLB at that time, but the environment that being at university and outside, is very different, so I had a number of mishaps in terms of failing and decided no, but as the years went by, I decided that it's something that I could try and do. Take advantage of long leave, the long leave that we get as judges, to sit for the exams, to try and fit in studying in between and I think my inspiration was one Justice, who is now in the SCA, who was also, he had a BProc as well, so he was also studying. So, I said, well, it's something outstanding I need to do and that's why I did it.

Commissioner Madonsela:

How did it feel to read from the course work some of the judgments which you have delivered?

Judge President Mlambo:

It was a bit of a delicate thing, because in terms of choosing the examination centres that I sit in, I chose a centre that's completely away from where I live, you know, where people would not know me. I mean, as it happens, when we wrote the Constitutional Law paper, the Al Bashir judgment was a question, and I just shook my head.

Commissioner Madonsela:

Which judgment?

Judge President Mlambo:

The Al Bashir.

Commissioner Madonsela:

Oh, the Al Bashir, the extradition case, yes. There's another matter connected with the background you have given us about what happened to you when you were studying, and you could not finish. The South African Constitution is a product of a struggle against apartheid by the... in particular black people in this country and other conscientious white people in this country, who sacrificed a lot in order to produce a constitution that we have today or deliberation that South Africa has found itself in today. Did you have any participation in that struggle for deliberation of South Africa in the yesteryears?

Judge President Mlambo:

No.

Commissioner Madonsela:

Sorry?

Judge President Mlambo:

No. I mean, I regard my contribution is as a public interest and trade union lawyer, because I was representing that sector, and that's a practice that started pre-Constitutionally.

Commissioner Madonsela:

So, how can you preside and be a vanguard of a constitution you never fought for?

Judge President Mlambo:

If?

Commissioner Madonsela:

How can you be, preside over and be a vanguard of a constitution that you never fought for?

Judge President Mlambo:

I don't see that as a disqualification, Commissioner Madonsela. The Constitution is a product of blood, sweat and tears, that is correct. I'm a beneficiary of that process and I want to believe that I have contributed in my way to ensuring that I bring some relief to vulnerable sectors of South African society.

Commissioner Madonsela:

On a different topic, I am worried about your concept which you have presented. You concept of a visible leader who is there to see that everyone is doing what he's supposed to do. It sounds to me more like an Inspector-General of the judges and the judiciary or some court inspector or school inspector. Judges are adults and they're supposed to be free to do things the way they should do it and I do not think, I'm speaking for myself, they need to be monitored as if they were school kids. The best way I think, in which judges can be visible or leaders of the Court should be visible to judges is by leading by example in relation to, amongst other things, writing authoritative judgments which are persuasive

and vindicates the law as it should be and stand, and read the law as it should be. Am I getting the wrong impression about your vision?

Judge President Mlambo:

Indeed, you're getting the wrong impression. I didn't say I'll monitor the movements of judges. Visible leadership, being present, being in their space. If they require you, you should be accessible. That's what I mean by that principle. And I can tell you that a lot of judges found a lot of value that they knew that the JP is around. They would call my office, when is the JP here, and then they would walk in or ask to see me and raise whatever they want to raise with me. That's what I mean by visibility. Being accessible.

Commissioner Madonsela:

On the pillar four, President, if I reach my ten minutes, can I please be allowed some latitude and also you can indicate to me if my time is up. I'm not looking at the time.

Deputy President Petse (Chairperson):

Yes, you can continue, Advocate Madonsela. Thank you.

Commissioner Madonsela:

Yes. Under pillar four of your vision of pillars, your pillar of visions, you speak about South African Constitution as being renowned internationally for its jurisprudence on socio-economic rights and I attest to that because the fact that socio-economic right has been entrenched in our Bill of Rights, has become a flagship of our constitutionalism, internationally. Are you able to point out to any of the decisions that you have handed down, yourself, which vindicate the right of individuals to socio-economic rights?

Judge President Mlambo:

Well, a judgment that comes to mind is the Congress of South African Trade Unions and the Western Cape Government that I handed down as a judge of the Labour Court. It's a matter where COSATU wanted to initiate protest action against the poor and non-

resourcing of schools in black townships as compared to the white areas. That was a key socio-economic right that what advanced. I can think of that judgment, yes.

Commissioner Madonsela:

Have you, can you think of any others?

Judge President Mlambo:

I think the judgment I wrote in the Labour Appeal Court, that is the *SAPS v Barnard*. It dealt with affirmative action, the appointment of a white woman over a black man and sitting for the LAC we ruled against her appointment and upheld the affirmative action policy which was being used by SAPS not to appoint her. She appealed to the SCA. The SCA reversed us in the LAC, but the Constitutional Court reinstated our ruling. I mean, you know, that affirmative action is one of the key components of the equality clause of the Constitution.

Commissioner Madonsela:

Except that equality is not a socio-economic right.

Judge President Mlambo:

Ja.

Commissioner Madonsela:

I was confining myself to socio-economic ...[intervenes]

Judge President Mlambo:

Socio-economic right, ja. Okay. Well, I thought of that one. I can't think of any other judgment now, but if I think hard, I'll probably remember another one, yes.

Commissioner Madonsela:

I couldn't find one, I was looking for it in order to check if ...[intervenes]

Judge President Mlambo:

You may be correct, Commissioner Madonsela.

Commissioner Madonsela:

I may be correct on what?

Judge President Mlambo:

You may be correct that I didn't write another one.

Commissioner Madonsela:

There is a, on a different topic, you have not dealt with the complaint which was raised against you by Democracy in Action. In which they laid down an objection to your appointment or your consideration as a Chief Justice and it relates to Public Protector matters. They bemoan the fact that you have demonstrated incoherence in jurisprudence that exhibit executive mindedness in judgment writing or decision-making. They say that you find in one breath in relation to protective powers, there's nothing in the Public Protector Act that forbids or prohibits the Public Protector to give direction to another organ of State. In that case I think it was the NDPP, let me go to ...[intervenes]

Judge President Mlambo:

I know the cases, Commissioner.

Commissioner Madonsela:

In one breath they say you find that there's nothing in the Public Protector Act on the Ethics Code where, which prohibits the Public Protector from instructing another Organ of State to conduct further investigations. Yet, in another breath, in a case involving the

Public Protector, of course, when the Government has changed, in other words, when the subject of the complaint has changed, from one President to the other, or one Government ... administration to the other, you find quite the opposite where you say, the Public Protector Act and the NPA are clear that the Public Protector has no powers to direct the NDPP, another organ of State, to investigate any criminal offenses. I would like to comment on this, because it is an objection that you do not produce coherent jurisprudence. It is as though you tailor it in accordance with the times, in order to favour the establishment of the time.

Judge President Mlambo:

Thank you very much for the question and I'm happy you asked it, because I think it provides me with an opportunity to clear it. You will recall that in the so-called State Capture judgment, the remedial action that was an issue, was challenged on a legality basis. Right? And there was nothing found unsound with that remedial action, where the Public Protector said the President should appoint a Commission of Enquiry and must consult the Chief Justice to appoint a judge to check that Commission. We found nothing wrong in that and our basis, as a Bench, was the authority that comes from the Nkandla judgment of the Constitutional Court. That says remedial action is situational and case specific.

Commissioner Madonsela:

Which case is that?

Judge President Mlambo:

The EFF v President of the Republic of South Africa.

Commissioner Madonsela:

The Nkandla judgment.

Judge President Mlambo:

The Nkandla judgment. It laid down the law about how Courts were to approach remedial action. Right? It used those terms that I've used, like case specific and I think, I've forgotten the other phrase. So, the issue on which that remedial action was premised by the Public Protector, was that the President was implicated, was implicated. And that it called for an extraordinary measure to ensure that the remedial action is seen through and we agreed with that. So, that's your first basis to saying in one breath I say she can do that. Let's look at the second case.

Commissioner Madonsela:

Can I pause because you go to the second case?

Judge President Mlambo:

Yes.

Commissioner Madonsela:

I thought that you were laying down a principle of law as opposed to one of fact when you said there is nothing in the Act that prohibits the Public Protector to instruct the other organ of State. It cannot be a factual matter, it is a legal issue.

Judge President Mlambo:

It is a legal issue ...[intervenes]

Commissioner Madonsela:

But why do you introduce the factual specifics.

Judge President Mlambo:

But the facts of the cases are different, and I think if you allow me to discuss the two cases, I will explain what the legal stratum is.

Commissioner Madonsela:

I'm so sorry, please ... I'm so sorry.

Judge President Mlambo:

I mean, there are a number of cases where the Courts have upheld remedial action, where the Public Protector does exactly that. There are. So, it was, and I accept that. And as I said, Nkandla, the Nkandla judgment, you'll recall we quoted it extensively in buttressing our finding, right? That that remedial action passed the legally to scrutiny. And I just want to go to the second case, because as I said in responding, there is a complaint that deals with what you are raising, and I think I responded to it. It may not be democracy. But I think it is Democrats in Action, I may be mistaken, but I responded to this complaint.

Commissioner Madonsela:

Sorry, Judge President. I just want to say, we need to deal with this here, because the members of the public ...[intervenes]

Judge President Mlambo:

No, I'm going to deal with it.

Commissioner Madonsela:

... may not be aware of that complaint and how you have dealt with it in your response, so please forgive me for zooming into this.

Judge President Mlambo:

Yes. The second case, the Public Protector found that President Ramaphosa had benefited financially from contributions to the CR17 fund. She made that finding. And on the basis of that finding she instructed the Speaker of Parliament to subject President Ramaphosa to the Joint Committee of Parliament, for disciplinary action. To start with, there was no foundation for that finding by the Public Protector. But worse still, a

conceptual flaw was that President Ramaphosa was not a member of Parliament. Therefore, the Joint Committee had not jurisdiction over him. So that remedial action had no effect whatsoever. Let's go to the NDPP.

Commissioner Madonsela:

Before we go there. Because it is a subject of a different complaint and I will deal with it separately, I just confine myself to ...[intervenes]

Judge President Mlambo:

It's the same case, Advocate Madonsela.

Commissioner Madonsela:

No, no, no, the ... are we not dealing with the appointment of the Zondo Commission?

Judge President Mlambo:

Yes, the complaint says in the State Capture judgment, we approved remedial action and in the so-called CR17 judgment, we did not approve remedial action. So, I'm dealing with that, unless I'm misunderstanding you. Because those are the cases that are being referred to when people say I flip-flop. So, I'm trying to respond to that, unless you're referring to another case?

Commissioner Madonsela:

No, no, no, please continue. I will come in at the right time.

Judge President Mlambo:

Yes. You see, in the so-called CR17 case, I've dealt with the Parliamentary side. The other side was, and in fact, when she instructed the Speaker, she said the Speaker must also report back to her about what she's done regarding that referral to her. And it's the same situation when it comes to her instruction to the NDPP. She said President

Ramaphosa has made himself guilty of criminality. The NDPP must investigate, put in place a plan to deal with this, that is the prosecution and submit a plan to her, that is the Public Protector, within 30 days for her to look as to whether they have complied with the remedial action.

Prosecutorial independence is deep in our Constitution. And on that basis, she went far beyond what the Public Protector Act permitted her to do and what Section 182 permitted her to do. And that's why we ruled it offside. But the issue about that remedial action, Advocate Madonsela, is that we set aside that remedial action on the basis that it had no foundation. She had no evidence to reach that conclusion and come with that remedial action. So, the facts are different and the application of the law to those facts is different. Hence the different results. In one case, the State Capture case, the remedial action was upheld, and I've mentioned the key to that was the role allegedly played by the former President in all the malfeasance that was alleged in that report. And in the second report, there was no evidence justifying that remedial action, whatsoever.

Commissioner Madonsela:

The, I think the undercurrent of the criticism is that you appear to be making favourable judgments in favour of President Ramaphosa and castigating the former President in all of your judgments.

Judge President Mlambo:

Well, I think it is fair to say that people are at liberty to make comments but as I say, facts are facts in each case, and it has nothing to do with who the parties are. It's a question of applying the law to the facts that are before us. I have no soft spot for President Ramaphosa, as you say that's the undercurrent of this thing and I have nothing against President Zuma, former President Zuma. Nothing whatsoever, as a judge.

Commissioner Madonsela:

There is another case that is referred to in the Democracy in Action that complained by Thabo Ntsweni. It's a matter that never really saw the light of the day in the Constitutional Court. In the sense that it was not considered by that court and decided finally because the matter resolved itself. It concerns the appointment of the State Capture Commission.

Where you said in your judgment that the State President, or the President at the time, Mr Jacob Zuma, could not appoint the Chairperson of the Commission of Inquiry, because he had a conflict of interest and therefore the Chief Justice must do so. That was in the circumstances where, as I recall, the law and the Act, the Commissions Act, squarely vested that power with the President and not with the Chief Justice. And there's been complaint in academic circles about whether it was competent for the court to make that finding, jurisprudentially. Is there any merit, do you think there's any merit in that criticism?

Judge President Mlambo:

I'm aware of academic writings about that judgment and the criticism is premised on the separation of arms principle. It's premised on that. And you are correct that in terms of the Commissions Act, it's only the President who has the power to appoint a Chairperson of a Commission. I have explained to this Commission that we did not come with that remedial action. It was put to us by the Public Protector, and we had to determine whether, on the legality principle, it could withstand scrutiny and we did. We found that yes, for what the Public Protector justified as why, she had to go that route. We found nothing wrong with the remedial action that says the President must go to the Chief Justice to appoint a judge to preside in the Commission. And it's unfortunate that no Appellate Court has ever pronounced on that. I would have welcomed it, either way.

Commissioner Madonsela:

Well, I guess by that time the blood was already on the floor, because you had already said that it should be the Chief Justice who must make the call. Based on conflict of interests. But talking about conflict of interest, just for the moment. It seems to me that, and also is a complaint, that cases involving the previous administration was in the past, would be taken to the Cape Provincial Division, because that's where Parliament, cases against Parliament, that's where Parliament is. There has been a growing tendency that those cases get litigated in your Court. I'm talking about your court, sorry, it's the Gauteng High Court and the perception now there is that it is your Court, under your leadership and how you allocate judges which ensures that there's always adverse judgments against the previous judgment, in your Court. And that's why people prefer it. And I raise this at a level that the undercurrent of the complaint, as I said earlier, is that

people see you and your court as a court that is favourable to the establishment, and you will always find against the previous administration. What have you got to say to that?

Judge President Mlambo:

It's unfortunate that there is this undercurrent. I'm aware of it. It's very unfortunate because factually, it is also incorrect. Now, you don't mention which cases in the Western Cape Division, but I'm aware of some which were ...[intervenes]

Commissioner Madonsela:

I can, it's just that I don't have the time.

Judge President Mlambo:

It's fine, but I'm just saying, I'm aware of some that went against the previous administration. I'm aware, in the Western Cape Division. So, that generalization is unfortunate and unfair. And I'm also aware of cases in Gauteng, I think I'm aware of two where I was involved which went in favour of that administration. So, the generalization is unfortunate and unfair. I can mention those cases in Gauteng ...[intervenes]

Commissioner Madonsela:

I really would like you to mention them, so that we clear the air in this regard.

Judge President Mlambo:

The one, one of them is the Oakbay matter. Remember, the Oakbay matter?

Commissioner Madonsela:

Is that the mining case?

Judge President Mlambo:

The Oakbay matter which is launched by Minister Pravin Gordhan. We threw that case out.

Commissioner Madonsela:

By the powers of the Master?

Judge President Mlambo:

No, it's about, he wanted an, I think he wanted an interdict or interlocutory interdict against what the Oakbay Group of Companies wanted to do. And I mention this because I'm operating on the narrative that you are raising with me that cases that went, that were heard in the Gauteng Division, against the previous administration, always went against them. In that case the dynamics were, Pravin Gordhan, Minister Pravin Gordhan, was viewed as anti-the former President. Right? And that matter went against Minister Pravin Gordhan.

Commissioner Madonsela:

On what aspect?

Justice President Mlambo:

I can't remember the facts but it's there. Advocate Mpofu ...[intervenes]

Commissioner Madonsela:

I know we should not examine the cases, I wanted to ...[intervenes]

Deputy President Petse (Chairperson):

Commissioner Madonsela, will you please bear in mind that your time allocation has ... you have exceeded it by five ... ten minutes already, so if you could please wrap up. Thank you.

Commissioner Madonsela:

Look, I don't want to really take time from other people, I have other questions, but I think others will pick them up as we go. If they don't, I will ask for indulgence. I really don't want to take all the time.

Deputy President Petse (Chairperson):

I'm not preventing you from wrapping up your questioning, but you must be mindful of the fact that you have exceeded your time allocation already.

Commissioner Madonsela:

Thank you.

Deputy President Petse (Chairperson):

So, the choice is yours.

Commissioner Madonsela:

Yes.

Deputy President Petse (Chairperson):

If you want to forego any questions that you might still have. Thank you.

Commissioner Madonsela:

Yes. Judge President, I think we were interrupted, do you want to finalize this aspect, maybe ... I move onto the other one.

Judge President Mlambo:

Yes... I wanted to mention the other case.

Commissioner Madonsela:

Yes, please.

Judge President Mlambo:

You will remember that there was some drama if I may call it that and I will be pardoned if that's unfortunate use of language. Regarding charges being brought against Minister Pravin Gordhan, do you remember that? By former NDPP Shaun Abrahams. There was a meeting that happened at Shell House involving the NDPP and the former Head of State. That matter, the legal NGOs rushed to Court to try and get some relief like forcing NDPP to resign or something like that. I can't remember the facts as we speak, but all I'm saying is, when that matter came to us, we through it out.

Because it had no merit. So, I'm just citing those two cases to say to you, it is incorrect to generalize as you repeat this narrative, that everything that was brought by the former administration, we went against them. The disco wins as well, but it's not my function as a judge, Commissioner Madonsela, to keep a tally of this administration has won five so they must start losing. Or this administration has won four, they must start losing. We don't do that. We approach cases on the facts as they come to us and our application of the law, leads us to the outcomes that we reach in those matters. So, it is completely unfortunate that people are saying I was unfair and against the former State President and I'm in favour of the current State President. I deny it. It's not like that, it's not how I operate. I value my independence and impartiality, and open-mindedness.

Commissioner Madonsela:

I'm sorry if I have repeated... please don't get me wrong, I'm not repeating this complaint as if I am as if I am asserting them. I think it is fair that this should be ventilated here for you to comment on this.

Judge President Mlambo:

Yes.

Commissioner Madonsela:

So, I'm not embracing the comments as correct, I'm asking you to comment on them in order to give you a fair chance to respond to them.

Judge President Mlambo:

Yes.

Commissioner Madonsela:

The cases that you have presided over ...[intervenes]

Deputy President Petse (Chairperson):

Commissioner Madonsela. I think you have now taxed the patience of the members of this Commission to the limit.

Commissioner Madonsela:

Yes, I don't want to go beyond that.

Deputy President Petse (Chairperson):

Thank you.

Commissioner Madonsela:

I'm sure others would pick up this other stuff ...[intervenes]

Deputy President Petse (Chairperson):

Yes, let's hope so. Thank you. Commissioner ...[intervenes]

Commissioner Malema:

I had my hand for long.

Deputy President Petse (Chairperson):

Commissioner Malema?

Commissioner Malema:

Thank you, Deputy President and thank you JP. I will be very quick. Following up on what Commissioner Madonsela said, I'm not a lawyer, you will have a better understanding than mine, but you would have been wrong if you had said the Public Protector has got no right to instruct other organ of the State. That would have been wrong from a legal point of view. That would have been wrong.

Justice Mlambo:

Yes.

Commissioner Malema:

But the impression we got from the last judgment on this Public Protector is that you had said that she has no right to instruct another organ of the State. On the facts I agree with you, you are correct. Let's say the remedial action says the Joint Committee must sanction the President, correctly so you said, the President is not a member of Parliament and therefore that remedial action can't be followed through. So, it doesn't mean she can't instruct Parliament, but the ruling would have been, this falls off, this remedial action falls off because it's not in line with what the law requires. The President is not a member of Parliament and blah, blah, blah.

But to say on the basis of that fact, you have no right to instruct another organ of the State, that would have been wrong, because from where I'm sitting in the *EFF v the President*, that was very clear by yourself, where you said she can, like she did and therefore that remedial action must be followed through.

Judge President Mlambo:

Yes.

Commissioner Malema:

Is the second judgment saying she can't give another organ of the State an instruction?

Judge President Mlambo:

No. I think I read that judgment again, I'm sorry, should I ...[intervenes]

Commissioner Malema:

Yes, yes, yes, JP.

Judge President Mlambo:

I'm sorry about it. I read that judgment again. I don't think we made it as a general statement of the law that she can't. We made it fact-specific that on the facts of this case, she can't do it. Because there was no substance to that remedial action in the first place. You remember, the way the judgment is structured, we dealt with the remedial action first before we dealt with these two aspects of the case of going to Parliament and going to the NDPP. And in the first part we were clear that there was no evidence supporting this remedial action, therefore, it was a non-starter.

Commissioner Malema:

Therefore, a Public Protector, where the facts are clear and her remedial actions can be applicable, it is well within her right to give another organ of the State an instruction based on her remedial actions, that you need to do one, two, three, within a particular period.

Judge President Mlambo:

Not to that extent as far as the prosecution is concerned.

Commissioner Malema:

Prosecution?

Judge President Mlambo:

Ja, the NPA, yes. She can't go to that extent. That one is clear. It would violate prosecutorial independence if she instructs them to say, you prosecute, you prosecute this way and you report back to me. The law, that is the Public Protector Act and Section 182 allows her to say, I'm referring these matters to you because this is what I found. You do what you want to do with them and stop there. And not say, come back to me and tell me what you've done. Because she goes further than what the law allows her to do. That's the NDPP part. I need to emphasize that.

Commissioner Malema:

Yes.

Judge President Mlambo:

Yes.

Commissioner Malema:

No, thank you. I don't hear her to be saying to the NDPP you must prosecute this way and that way and all of that, I hear her to be saying, these matters are referred to you, please follow them through, within the next 30 days report to me, and report would have been look, we've looked into the matter, we've referred it to the Hawks for further investigation and we'll see if we can prosecute.

So, that, to put days for me is like she wants to make sure the matters are being followed through and within a short space of time. Not necessarily saying, charge racketeering, charge with money laundering, charge ... and this must be done in the next six months. I hear her to be saying, I think you've got some role to play here, please make further investigations and tell me how you've acted on these matters within a short space of time.

And they can come back and say well, we received, and we have referred to these other institutions or we have received and with evidence presented to us, we have taken a decision to prosecute. I don't hear her saying, within 30 days you must have prosecuted this one, because I know Professor Thuli Madonsela, Advocate Thuli Madonsela did that even herself, where she will refer matters to NDPP and say, these are for further investigations.

Judge President Mlambo:

But that's the point, isn't it?

Commissioner Malema:

So, she's got the right to say ...[intervenes]

Judge President Mlambo:

To refer. Look, you investigate it in terms of how you do things and leave it there and not say come back to me and tell me what you've done. That's ...[intervenes]

Commissioner Malema:

So, she can't say come back to me in 30 days.

Judge President Mlambo:

No, no, she can't.

Commissioner Malema:

Okay. JP, another question is about your involvement during the struggle. I have no problem with you not being involved and all of that, but there's a clip that once came through, which created an impression where you were doing an interview that you went to an extent of telling some leader of the student movement or SRC or something that you should actually stop with this thing because we want to go to class. You were actually

campaigning against a strike that you want to go to class, and this thing must end because your bursary and all of that. Do you remember that conversation?

Judge President Mlambo:

No. I'm not aware of that and I've never done that. I've never been anti-student protests and you would know. And you would know, during my time at the University of Limpopo, we had disturbances almost every year. I was never against it. I was not on record, I don't know what clip you're talking about, Commissioner Malema.

Commissioner Malema:

I think it was Ngwalana SC's interview with you.

Judge President Mlambo:

Well, let me explain and put it in context. He asked me if I was involved in the struggle. I wasn't. Right? I was the first one to run when the cops hit campus. Right? So, the question he asked was about there's this advocate who passed away a few years ago, I think she was the husband of Sesi Baloyi. Right? I didn't know him on campus, and I don't remember ever meeting him on campus, right? What I said in the interview, so I said oh, this is, I can't remember what's his name ...[intervenues]

Unknown Speaker:

Kabelo Lengane.

Judge President Mlambo:

Yes, ja. Advocate Lengane. I said oh, so this is the Mr Lengane who was at the forefront of arranging protest action on campus. That's what I said. Not that I was against it, never.

Commissioner Malema:

That's fine, JP, this is not my turn, I was just making a follow up, so my turn is going to come later. I will come with the facts.

Judge President Mlambo:

Yes.

Commissioner Malema:

And then the last one, did you watch the, any of the interviews?

Judge President Mlambo:

No, I think I watched when yourself asked Justice Madlanga about whether South Africa was ready for a female Chief Justice, I think I watched that part.

Commissioner Malema:

No, I got worried because you said you never watched, when Minister Lamola asked you, you said I never watched and then on the other side you then said, President Maya answered this question very correctly. o I was worried, where did you see it if you have never watched because you said you never watched and then later on you said President Maya answered this question correctly. So, I thought there was some contradiction there.

Judge President Mlambo:

I watched the Madlanga part, Justice Madlanga part. The President Maya part I heard it on the news.

Commissioner Malema:

Thank you.

Judge President Mlambo:

Thank you. I didn't watch President Maya's interview, altogether.

Deputy President Petse (Chairperson):

Thank you, Commissioner Malema. Commissioner Dodovu, is that a follow up?

Commissioner Dodovu:

Yes, please DP. Good day, Justice Mlambo.

Judge President Mlambo:

Good day, Commissioner Dodovu.

Commissioner Dodovu:

Yes, I'm a Member of Parliament. I may not be very clear legally with all the arguments, but I'm not a novice. Based on what was raised with you in respect of the objections, those who objected, who object your appointment. Now, my understanding is that the division that you had, like all other divisions, provincial divisions are not cause of the last instance, which means that whatever rulings that you make, those can be reviewed or appealed at either the SCA or the ConCourt, that's my understanding. Now, based on that understanding, I want to ask you this question and in the balance of evidence, out of all these cases that you are now a suspect that you might have been biased there and there. How many of those which were upheld by the upper divisions, in this instance the SCA or the ConCourt. Do you have knowledge of all those cases which were upheld, because I want to measure whether indeed in your judgments, you were either bias or not. Thank you.

Judge President Mlambo:

To my knowledge, I have not been reversed on appeal by either the SCA or the Constitutional Court. Let me just explain the State Capture judgment. I'm not sure whether it went on leave to appeal to the SCA, but by that, when that was happening, the new President had distanced himself from the litigation, so I'm not aware what happened

to that one, but all the others, especially this one about the instructions to Parliament and to the NDPP, those were upheld by the Constitutional Court.

Commissioner Dodovu:

Specifically, those of the Public Protector?

Judge President Mlambo:

Yes.

Commissioner Dodovu:

As well as the so-called CR17. Were they upheld by those divisions?

Judge President Mlambo:

They were upheld by the Constitutional Court.

Commissioner Dodovu:

Okay, thank you very much. Thank you, Justice Petse.

Deputy President Petse (Chairperson):

Thank you, Commissioner Dodovu. Advocate Cane?

Commissioner Cane:

Thank you, Deputy President. Good morning, Judge Mlambo.

Judge President Mlambo:

Good afternoon, Advocate Cane.

Commissioner Cane:

Time has gone quickly. When you were delivering your vision statement at the outset, what struck me so powerfully was the feeling that this is very much the man I know, and you have consistently engaged with the leaders of the Bar within your jurisdiction. I'm quite sure that you've done it with every leader of the Bar, not only me. And I thought it would be a good thing then, to bring out two things from that engagement and the advocates' professions perspective. The one is an aspect they raise in their report, containing the submissions of the GCB and it pertains to your service as leader of the busiest division in this country and actually the implication that you could have had a choice to have adopted another career path, going to the Supreme Court of Appeal, but you actually have engaged that hard work by choice. Is that correct and why did you make such a decision?

Judge President Mlambo:

Thanks for the question, Advocate Cane. When I was in the SCA I was approached by Deputy Judge President Wagley, who was the DJP of the Labour Court at the time and he has asked to see me when I was on leave, or on recess from the SCA and when I saw him, he said he would request me to stand to be JP of the Labour Court. I was taken aback, because I said, but you are the DJP, you should take over when, you should apply, not take over, you should apply when Acting Chief Justice Zondo's term ends. He said no, I want to be led by you. I said but you've seen no leadership qualities from me. He says no, that's incorrect and he referred to my Labour Court experience, not Labour Court, sorry, my Legal Aid SA experience. Because I was at the helm of that institution.

So, I initially rejected him, but he persisted until I engaged with the issue and I thought about it and I said well, if I'm not going to lose anything by way of a drop in salary or benefits, if I make a sideways move, then I'll go for it. And then I applied to become JP of the Labour Court. And what had moved me was that he specifically said there could be a career for you in court leadership. Based on what you've done at Legal Aid South Africa and that's what made me think about this thing and the rest is history if I may say so.

Commissioner Cane:

You have emphasized in your vision statement that how much priority you place on engagement with all the role-players, to make the administration of justice more efficient, and in that you've even mentioned communication strategies and the importance of the independence and the impartiality of the judiciary.

Now, in that regard, there was an incident during the time where Commissioner Mpfu and I were leading the Bar Council, which you no doubt have forgotten because it would have been insignificant in all the matters you deal with but it is a nice illustration and I thought I should remind you of it and ask a few questions following from that, because it so emphasizes the very things you've brought out in your vision statement.

What had happened was that the press had reported, and this was during September 2016, that you had actually confirmed the existence of corruption in the judiciary and that some judges were taking favour or kickback and that that practise needed to stop. It was reported as something of which you had knowledge and we engaged on it at the time in correspondence. And I'll remind you that what you had done is that you had immediately engaged the Heads of Court and they had given you their support to ask the office of the Chief Justice Communications to write to that media house demanding a retraction of the article and the office of the Chief Justice then did that on your behalf, setting out the facts and the media house in fact did offer you an apology and retract the article entirely.

Now, it pertained to the independence and the impartiality of the judiciary. What would have happened had you been able to identify any judge of which you had known that had perhaps been engaged in such conduct?

Justice Mlambo:

Oh, had I discovered that judge was corrupt (and) was actually taking money, I would have taken the issue to the Chief Justice and to be guided by him whether I should lay a complaint against the judge or not. But I would not have kept quiet about the matter had that been the case, and as you correctly say, that's not what I had said in the statement that was attributed to me.

Commissioner Cane:

You will be chairing the small JSC if you're appointed as the new Chief Justice, and what would your approach be in relation to any threat to the independence or impartiality of the judiciary?

Judge President Mlambo:

You link that to chairing the small JSC, I don't understand why you do that ...[intervenes]

Commissioner Cane:

Oh, let me explain? It's because any matter or complaint of that sort of serious nature, against a judge word fall under the jurisdiction of the small JSC insofar as remedial steps or disciplinary action is concerned.

Judge President Mlambo:

Yes. Let me answer the question this way. I as JP have been approached and I've written judgments about the impact of Section 47. That is the immunity of judges against being sued. Now, I refer to that example deliberately, because when I have facts before me, I approach the matter with a completely open mind but if I had had a previous engagement, say it's a matter that I've reported to the JSC to say, this judge is on the take, if that matter comes before the small JSC, clearly, I cannot participate in the proceedings of the small JSC. It has to be the Deputy Chief Justice, because he's got no involvement in that matter.

But where I have had no involvement whatsoever with the occurrences that are on the agenda of the small JSC, I don't see any problem in continuing to chair the small JSC. Even if it involved judges because it is envisaged that the JSCC is a body created to look at conduct by judges – by its nature.

Commissioner Cane:

You mentioned that part of the problem with judicial complaints and them taking too long is that we are seen to be hard on litigants but kind on ourselves. Now, that relates to this question because so many, or every, virtually every judge that's going to be facing some sort of process before the small JSC, would be a colleague of yours, somebody who you've worked with. And in that regard, I'd like to hear your view as to making those tough decisions when it comes to disciplining people that you may well be very fond of?

Judge President Mlambo:

Yes, I stand by the statement I've made that if a judiciary, we are seen to be hard on litigants, the treatment has to be the same when it even comes to judges who are accused in judicial complaints. But I'm not making a judgment that they are guilty, so that does not compromise my participation in chairing the small JSC. What I was talking about was, I think the situation can improve in terms of the handling and processing of JCC complaints and that's why I made the example that most of the judges who sit there, have got their own workloads in their own divisions. And they have no special dispensation of time to attend to JCC work. They attend to that work after hours and on weekends and that's why I think there's a role for retired judges, right? Who with no active roles, to come and assist in that space. So, I'm just clarifying that I wasn't passing judgment, that any judge who is facing a judicial complaint is guilty. I wasn't passing that judgment, no.

Commissioner Cane:

No, I didn't understand you to be, I was just testing your willingness to take on that very difficult onerous function that may well come to you.

Judge President Mlambo:

Yes.

Commissioner Cane:

Thank you.

Judge President Mlambo:

Yes, I could definitely do that, I don't have a problem. If I've not been involved in the matter, I know of a number of complaints that I have personally lodged to the JSC. Should I be appointed in those matters come to the JSC clearly, I can't participate.

Commissioner Cane:

Yes.

Judge President Mlambo:

Yes.

Commissioner Cane:

Thank you, Deputy President.

Deputy President Petse (Chairperson):

Thank you, Advocate Cane.

Minister Lamola:

Follow up, Deputy President?

Deputy President Petse (Chairperson):

Yes, you may proceed, Honourable Minister.

Minister Lamola:

No, thank you. On this issue of the small JSC, Judge President, my worry and you will correct me, and you will raise your view. Is that I hear every time a candidate comes here, you say hey, we've known each other for 20 years or 50 years. I've heard you with Justice Petse here and I expect that goes with many of your colleagues and now you'll be chairing this thing that must say you must be impeached, or you must take the salary, or whatever that is the outcome. How do you handle it? In ensuring that indeed justice is done through that process, when it's your long-held colleague that you know each other for many years in practice or as judges or whatever?

Judge President Mlambo:

Well, my sense of it, Minister, is we have to know each other, we know each other, we are colleagues, but the fact that we know each other, can never be an impediment in us doing what the JCC work demands or calls upon us.

It's a different story if you've had some involvement or you've expressed yourself in favour of one or other of the competing issues at stake in that particular complaint. Then you've got to step out. But based on knowing a colleague only, I don't think that should disqualify me, if I'm appointed as Chief Justice to preside in those matters. I don't think so. But that's me, people may differ with me.

But just know, I know JP Tlaetsi, we know each other, I used to brief his firm as a correspondent when we were all in practice, but should JP Tlaetsi be charged with some misconduct and he comes before me, we sit together as Heads of Courts, perhaps maybe that could be a dynamic that come in. But generally, that I've known him, for so many years, shouldn't disqualify me from participating in those proceedings. Because I am one judge to say if I have an open mind about things, I have an open mind about things. And that's why I would be prepared to participate in those proceedings.

Commissioner Madonsela:

Follow up, President.

Deputy President Petse (Chairperson):

Are you done, Honourable Minister? Thank you.

Unknown Speaker:

Follow up.

Commissioner Madonsela:

I did say that I would want to leave other questions and follow up if other Commissioners picked up the issue and this is one of the issues that I had... I wanted to deal with and I would like to follow up on the Minister's question.

Deputy President Petse (Chairperson):

Keep it short, Commissioner Madonsela.

Commissioner Madonsela:

Thank you, Deputy President. Judge President, as you know.... My other role in this commission, JSC is to be in charge of litigation against the Commission and I've interacted with you in that regard.

Judge President Mlambo:

Yes.

Commissioner Madonsela:

It is a matter of public record that Judge President Hlophe has taken the JSC to Court. Incidentally, the matter is in your court in High Court. The matter is, in my calculation, one way or the other, likely to end up in the Constitutional Court. If that were to happen, given the fact that Judge President Hlophe, in the papers in court, accuses you of conflict of interest. In the sense that you sat in his judgment, in circumstances where you have dealt with other cases, would that not place you in a precarious position when you are the Chief Justice, and the matter serves before the Constitutional Court in which you preside? Firstly.

Secondly, is it at all desirable and will it not put much pressure on the colleagues in the Constitutional Court, hearing a matter in which the Chief Justice, the sitting Chief Justice is a party against whom certain allegations of misconduct. Because that's what, effectively Judge Hlophe is saying about you, are concerned and decide the issue?

Judge President Mlambo:

Well, Commissioner Madonsela, Judge Hlophe has poignantly raised the issue subsequently, you would know, that I told the small JSC that I did not regard myself as conflicted. I still do.

I'm not conflicted, I have no gripe or grudge or any issue against Judge President Hlophe, whatsoever. And, I said as much when the small JSC met. But the development of the matter is that now, the matter has proceeded to the point where Judge President Hlophe has poignantly raised the issue, right, that I should not have sat there. Whichever way the matter goes in the High Court, if it comes to the Constitutional Court, I can never participate in that matter. I think that's a given. Because I'm mentioned as having taken one or other side. It would be completely improper for me to sit in that matter.

It's a function of life or judicial careers, Commissioner Madonsela, that we do a lot of things and when we do things, we don't take one step and say I'm not taking these steps because there's a likely issue that 20 years down the line this thing will be raised and whatever.

You do the work as it comes to you at the time. Because if that would be the approach, then I doubt if we'll be able to do much because we would be scared. We will always be cautious, right?

So, my short answer to your question is, now that Judge Present Hlophe has raised the issue the way he has, I cannot participate in any follow up proceedings that take place, should I be appointed as Chief Justice.

Commissioner Madonsela:

The certain part of the question is, what ... will that not bring much pressure on your colleagues who will be sitting with the Chief Justice for a considerable period of time, they've made a decision against you, is that not going to create much tension and pressure on them. To find against a Chief Justice who is already a Chief Justice in the term, in a long term that they will, that you are poised to stay in the Constitutional Court if you were to be appointed? Not so much about you, but so much about them?

Judge President Mlambo:

Well, I am not sure I agree with you. Because I can cite examples where Chief Justices, I mean, I remember the matter involving the extension of Chief Justice Ngcobo's term. The Constitutional Court sat in that matter, didn't they.

Commissioner Madonsela:

But then he left immediately.

Judge President Mlambo:

Ja, but he was leaving, but I'm saying, the pressure you say they will have, they would have had pressure to sit and decide on that matter, isn't it? But they didn't have that pressure. They didn't. So, I don't agree with you that we should willy-nilly look at this issue, the way you are putting it. I mean, the Deputy Judge President Mojapelo case, is an example. He made findings against a sitting Chief Justice. If what you put to me is correct, he would have been under pressure not to do so. So, I don't agree with you that justices of the Constitutional Court will feel pressured if they were to sit in a matter where I'm implicated in one way or the other.

Minister Lamola:

A brief follow up.

Deputy President Petse (Chairperson):

And it must be brief, Honourable Minister.

Minister Lamola:

Ja, it's very brief. I heard Counsel Madonsela saying this matter now of Judge Hlophe, is before the Gauteng High Court?

Justice Mlambo:

Yes.

Minister Lamola:

If I'm correct. So, what you're saying, if you are a Chief Justice, will it not be applicable now. As we speak, because you are a Judge President of the Gauteng High Court, it means that pressure will be there.

Judge President Mlambo:

Correct, Minister. It's an issue I didn't think of, but yes. If Commissioner Madonsela is correct, yes, then those judges should feel pressured, because it's the leader of the division who is alleged to have been to have misconducted himself in one way or the other. It's the same principle. I would imagine.

Deputy President Petse (Chairperson):

Commissioner, Advocate Mpofu.

Commissioner Mpofu:

Thank you, Chair, but Commissioner Singh wanted to do a follow up, unless if you are overruling him.

Commissioner Singh:

I don't he noticed me on this end. Probably our voices are similar. I just wanted a brief follow up on this one.

Deputy President Petse (Chairperson):

Please, you may proceed, Commissioner Singh.

Commissioner Singh:

Thank you, very much and good afternoon, Judge President Mlambo.

Judge President Mlambo:

Afternoon, Commissioner Singh.

Commissioner Singh:

As you are well aware, you know, we on this side of the house, do not sit on the small JSC so we're not privy to everything that happens, you know, in the small JSC and the agenda, etc. But you've said to this Commission that there are a number of cases that you've reported to the JCC. Can you give us an idea, without going into details, how many cases and what time has lapsed in the investigation of those cases? It would be interesting to know how many judges have been reported for misconduct.

Judge President Mlambo:

Well, actually, I should have, it's two actually. It's two cases against two judges for reserving judgments for very long periods. It's those two.

One is a matter where the evidence leaders seek my... they sought an affidavit from me. It involved a judge whose matter is before the JCC, I think. But I didn't lodge that complaint in that one.

Commissioner Singh:

Okay, and to your knowledge, these matters have not been finalized yet, by the JCC and how long ago were they reported?

Judge President Mlambo:

No, they ... well, I think the JCC met a few weeks ago, regarding the two. I don't know what the result was. Regarding those two, whether they have been referred to a tribunal stage or not, but they are still pending, yes.

Commissioner Singh:

Thank you.

Deputy President Petse (Chairperson):

Thank you, Commissioner Singh. Advocate Mpofu.

Commissioner Mpofu:

Thank you very much, Deputy President. Good afternoon, JP.

Judge President Mlambo:

Good afternoon, *mhlekazi*.

Commissioner Mpofu:

Thank you, *mhlekazi ongafanelekanga ukubhubha!* Thank you, JP... yes, I think I must answer ... start with declarations, along the lines, the Minister said we all know each other. It is as Justice Maya said, it's a small community.

Just to clear, you and I did articles together and you accused me of throwing mud with my fancy car when I was driving past you. But I also want to plead guilty on two counts which you have always accused me of. One, this morning about bombarding you with complex cases and special allocations. Uhm... and the second one is not heeding to your constant invitations to come and act as a judge. Which you also have made sure I remember all the time.

But I want to talk to you about the two areas, maybe three, depending on how much time I will be given, I will ask for a little bit of leeway. You know that I sit here representing primarily Advocates for Transformation, so through the auspices of the GCB, but so I have to talk about that otherwise I'll lose my job. And, but I want to talk also generally, specifically about the three areas... If you agree with me, I mapped out three broad areas that we are dealing with in this particular type of interview.

And the one was judicial skills and experience; you've spoken a lot about that. The second one is leadership and people skills and the third broad area, administrative and management skills. Would you agree that broadly speaking there might be other things, those are the types of attributes that one is looking for in a Chief Justice?

Judge President Mlambo:

I would agree with you, Commissioner Mpofu.

Commissioner Mpofu:

Now, I don't want to waste your time. Let me just put it up front that being a person who is in this division and who has interacted with you on many fronts, I have no doubt that you are definitely probably one of the most accessible leaders of any court, I'm prepared to say that even without having met all of them. And have the patience to deal with a busy division as I have mentioned, but have time for all of us, whether junior or senior or from all walks of life.

And so, as far as the leadership and people skills are concerned, I'm prepared to say that you're almost 90 to 100%. Then, comes the, also the area of administrative and management skills, you have said everything about Legal Aid, court management, CaseLines is a star performance and again I think, without fear of contradiction, I can say that your skills in those areas are – I'll go as far as to say unmatched.

It seems that the area there are questions, if you follow up, and I want to confirm what Advocate Cane said about our interactions when we were in the leadership of the profession. The area that seems to be needing your assurance of this commission, seems to be in the first area of the three that you and I have agreed, which is the judicial skills, the judicial experience, the issues about constitutional cases that you've done and so on and so on.

And I'm given you an opportunity to deal with that particularly, because as you know, as Commissioner Barnard said we have four good candidates and the other candidates have got almost an unquestioned pedigree in that first area. So, where you beat them hands down in the other two areas, in my book at least, in that one area there might be questions. So, I'd like you to brag a little bit, don't be modest. Somebody said you are being modest and deal with if one were deliberating and somebody says '*... well, JP Mlambo is good, he's a good man, he's a good leader and so on, but he's not an intellectual leader on the Bench*', what would you say?

Judge President Mlambo:

I would dispute that. I would dispute that. As I said when I finished my vision, that inasmuch as I'm an administrator, I'm also a judge as well as a Head of Court. So, I've presided in matters, some of them very complicated which really challenged our thinking and how we were going to approach them. And I've presided in quite a number of Full

Court matters that are varied, you know? So, I would, on that basis dispute that. Because you would criticize me of being weak on jurisprudence if I've not sat and presided and written judgments. I have done that, so I would dispute the statement you are putting to me.

Commissioner Mpofu:

Okay, well... alright. No, what I was really getting into is you must give me the arms to dispute that statement... if it is made. And just say I'm disputing the statement if it's made in the deliberations.

Judge President Mlambo:

I mean, from my days in the Labour Court, I mentioned one judgment in the Western Cape department. I dealt with that matter which looks at socio-economic rights as I think Advocate Madonsela asked me the question. I also sat in the *Barnard* case. You would know that that case called on an interpretation of how courts view affirmative action policies by Government. I've sat in that matter. I've sat in the SCA in a number of matters. I can remember the *Fraser, ABSA Bank* matter, which dealt with whether he was entitled to access the frozen funds, to fund his legal defence, because that goes to the heart of the fair trial rights issues, in the Constitution. I've sat in the *Doorenbal* matter, you remember *Doorenbal* was a very big land matter in the Northwest. I didn't scribe it, but I was part of that Bench in that matter. I sat in, I think the *Barkhuizen v Napier* matter, which dealt with ...[intervenes]

Commissioner Mpofu:

Before it went up.

Judge President Mlambo:

... I was in the SCA and I think the CC upheld our direction in that matter. In this division I've sat in a number of other matters. The *Al Bashir* matter called on the application of international law and a bit... the Rome Statute as signed by South Africa, I sat in that matter.

Commissioner Mpofu:

Okay, well, I hear that and you, that's why I was thinking you were short-changing yourself, even when you were answering Advocate Madonsela, because last year you sat, and again you may not have scribed the judgment, but you sat in a case that I was involved in which involved socio-economic rights, which was education. The case around ...[intervenes]

Judge President Mlambo:

The *One South Africa* case?

Commissioner Mpofu:

The *One South Africa* case, ja. So, okay. And incidentally, who wrote the judgment in that case?

Judge President Mlambo:

It was assigned to all of us. What I do in these Full Courts, that's why the judgment comes out as a Court judgment, even in the *Fair-Trade Tobacco* case. It comes out as a judgment of the court because we allocate each other sections two write on, that's why it comes out as a court judgment.

Commissioner Mpofu:

Right. Okay, now, okay thanks, that satisfies me on that area. Then the second area is kind of a broad area. All sorts of things have been said here, I'll call it whispering campaigns or you called it undercurrents about all sorts of things ranging from corruption, kickbacks, that your court is captured by a particular faction, and so on. You are aware of those – you have said you are aware. You dispute them of course, but you are aware of them?

Judge President Mlambo:

Yes, those we dealt with Commissioner Madonsela, yes.

Commissioner Mpofu:

Ja. And Commissioner Cane?

Judge President Mlambo:

Yes.

Commissioner Mpofu:

Now... I want to deal with two specific areas where I want you to lay any fears about any of those whispering campaigns. Firstly, you'll say if you are aware and also then deal with it. The first one deals with allocation. You know, of course, that one of the ways in which the power of a JP can be abused is the power of allocation, possibly? So, this is one of the areas. There is a tendency, I don't know if this is deliberate but all your three-judge panels... Almost, it looks like it's compulsory that they must have white judges and in particular then there were would specific persons who are always allocated into these and just... JP Tlaletsi said, you sit in these matters and you sit with other senior colleagues but the evidence is that some of these people are not even senior colleagues. There's one person in particular, I think you might know who I'm speaking about, who has sat on my count, one, two, three, four of the Full Benches with you and she's not even, maybe four, five years on the Bench. Is there any specific reasons why other judges, black or white, don't get these fancy allocations and they seem to go to junior judges?

Judge President Mlambo:

Well, you've generalized it too much, Commissioner Mpofu. But let me explain how I do the roster in Gauteng. I do, and finalize, the roster for the next term, like I'm acting in the CC now, this term, the High Court term will end the end of March. But it starts again, I think, towards the end of April, if I'm not mistaken.

But I would make sure that I finalize the roster before the term ends so that when judges go into recess, they know what they are allocated to. Right? So, I have a template in terms of which I allocate, I do the roster, to make sure that there's equal distribution of

allocations throughout the term. Now, I would be interested to know who is this one person who sat five times with me because I don't recall sitting in many, in such many cases with one particular judge, except those cases in the Disaster Management situation.

I would have sat with one panel in probably three cases, simply to avoid the issue of split decisions coming from one division. So, I would be interested to know who that judge is and who you say is junior. But let me just finish explaining.

So, when I do the roster, it just follows. I would know that if this judge started the term in the opposed motion roll, the first term, I want to make sure that in the second term he doesn't start in the opposed motion roll, he starts in a different work area. Right? So that, there, especially their rotation in the difficult courts like the opposed motions, special motions and urgent courts, all of them have their times in those matters. So, it's not that I go out of my way to handpick and select certain judges to hear particular matters, that's not the roster I do. I can show you, and I can share with you how the template roster is done.

Commissioner Mpofu:

Ja, okay. Alright, so, okay, so you'll say therefore then, it's a coincidence that at least, I would think of four Full Bench panels, some of which I was involved in, one in which you were not involved in. But in *Freedom Front Plus v President of RSA*, this was the Bench: Mlambo, Keightley and Kollapen.

Judge President Mlambo:

Yes.

Commissioner Mpofu:

In *One South Africa Movement v President of RSA*: Mlambo, Keightley and Kollapen.

Judge President Mlambo:

Yes.

Commissioner Mpofu:

President of RSA v Public Protector... that's the Busasa CR17 case, Mlambo, Matojane, Keightley.

Judge President Mlambo:

Yes.

Commissioner Mpofu:

Then another relatively high-profile matter, *Moyo v Old Mutual*, which I was involved in, that one. But where you put in the panel: Maier-Frawley, Keightley and Matojane. So, you're saying that's just coincidence?

Judge President Mlambo:

Yes, it's coincidental. I don't go out of my way to handpick judges. I mean, where the duty roster places acting judges in the urgent court, that's where I intervene. Because I don't want mishaps to happen, I then swop them with permanent judges, because the Urgent Court, as you know, is a very difficult court.

Commissioner Mpofu:

Yes. And, but you would agree, at least, that when you are in charge of the largest division with a large number of judges of different seniorities, a judge such as Judge Keightley is one of the more junior, I think she's about five years or so?

Judge President Mlambo:

Well, I can mention other judges who are junior to her, who have sat in actually serious matters. The issue of... (intervenes). No... I want to answer that question because you want to emphasize the fact that she is junior. It's a coincidence she sat in all those

matters. But the fact of the matter is, if you want proper transfer of skills and exposure, you can't ignore junior judges sitting in the difficult cases. You can't!

Commissioner Mpofu:

Transfer of skills from what to what. Because she's a junior judge, what skills?

Judge President Mlambo:

Yes. No, exposure to how they deal with difficult cases.

Commissioner Mpofu:

Okay. Then, there's... So you then refute any suggestion that there's a judicial hit squad in your division?

Judge President Mlambo:

No, there's no hit squad.

Commissioner Mpofu:

A specific group of ... Okay, no those are the kinds of terms that have been used. Okay, so okay, that's fine. Then the last one is the... Something again that's, I know you are aware of, but unfortunately, it's probably again one of these, what I call, whispering campaign. But I'd like you to deal with it, particularly because it's much more serious. There have been allegations of sexual harassment in which you are implicated, rightly or wrongly and it's one of those things which is so frustrating. I think probably more for you because I even thought now that someone would have put in a complaint, and nobody did. But you and I have spoken about this, maybe informally. Is this, where does this come from? Is there any substance to it? Are there any victims somewhere out there who might come out when you are Chief Justice which would embarrass the country or is this just one of those, I'm an expert in this, where people just smear without any foundation? And I'd like to put it out there, because as you know, this is a serious matter, it would be an impeachable matter if it had any substance.

Judge President Mlambo:

There is no substance to that rumour. It's a rumour and I think it's an insidious, poisonous rumour. There's actually no substance to it. When I heard about it, I was actually shocked, right? And I was actually hoping that someone would come up and say, I'm one of those who have been sexually harassed by Judge President Mlambo. So, it's unfortunate that people are using people's names willy-nilly in spreading rumours of this nature. There's completely no substance to that rumour!

Commissioner Mpofu:

Thank you. And so, there'll be no, if you are appointed, there will be no surprises in that regard that might embarrass the country?

Judge President Mlambo:

No, never.

Commissioner Mpofu:

Thank you very much.

Commissioner Malema:

Follow up, Chair?

Deputy President Petse (Chairperson):

Thank you, Commissioner Mpofu. Commissioner Malema.

Commissioner Malema:

No, on the rumour of sexual harassment, JP, what got me more worried was that it is actually happening to women who want to be acting judges. So for them to get access to act, they get to be subjected to all those manners of things.

Judge President Mlambo:

Well, Commissioner Malema, you seem to have details, I don't have those details. I know that as I sit here, I have never sexually harassed anyone, especially people who have aspiration of coming to the Bench. I have not sexually harassed anyone. And let me put it to you this way, I've shared with this commission the statistics of how many women judges I have been instrumental in ensuring they either come to act or they come and are appointed permanently in the division. If I understand your, what you are putting to me... You are suggesting that I have in a way, I think you put it as sexual harassment, sexually harassed women judges who want to be acting judges. I don't know if I understood you well because I think that's what you said?

Commissioner Malema:

No, no, that there should be some sexual favours. It will amount to sexual harassment, for people to, for women to qualify to act in the Gauteng Division.

Judge President Mlambo:

No, there's no substance to that and I bring it back to you to say, if you look at the number, I've not shared with the commission the number of acting women judges I have appointed because it's many, many of them. If you look at that number and you look at the number of women judges who have actually been appointed, the suggestion is that I would have demanded sexual favours from them for them to get the nod. I think it's an insult to me and to those women judges to spread a rumour of this nature. There is completely no substance whatsoever to that rumour!

Commissioner Malema:

Now, the last point, JP! I think it was raised by Commissioner Mpofo, but to an extent by Commissioner Madonsela, the issue of acquiring the LLB when you are already sitting. a judge. But also, it goes to an extent of then getting this permanently, which will deal with,

maybe put differently, maybe it can come into approaches. One, that the LLB was acquired because you have a desire to improve your writing skills, because you are challenged in writing judgments and as a result you bring white judges on the Full Bench to help you write judgments. Because when it comes to writing of judgment, there is a limitation and this particular judge that get to be mentioned, I think she's the most preferred judge because she fills in that gap where there is a limitation when it comes to judgment writing.

Judge President Mlambo:

Well, I don't understand how you link the LLB and writing judgments because those two don't connect.

Commissioner Malema:

No, no, when you were sitting on the Bench already, you came to appreciate the limitation that you needed to improve your qualifications and skills and part of which will be to engage in that particular program of acquiring the LLB. And then, when they stretch it further it's that no, that did not help, that's why there's permanently a white person on the panel and where you are, then there will be this other judge who helps as well with regard to writing. That's why I was interested in that question as to who wrote the judgment. Because I thought, in your answering, then it was going to confirm that she's actually the one who writes the most of those judgments.

Judge President Mlambo:

I've answered that question that we allocate each other sections in the judgment. Which one writes on which aspect. That's why they come out as Full Court judgments. But I think there's something factually out of place in that allegation that I realize that I had a shortcoming in writing judgments. I started studying for the LLB in 2015. I've been a judge for many years! I've been writing judgments all those years, and no one has ever said, JP Mlambo has been writing suspect judgments in all those years. So, it can never be correct, Commissioner Malema, that I decided to do the LLB because I wanted to improve my writing skills. It can never be correct! I've been a judge for a very long time before I decided to finish my unfinished work of studying for the LLB. I hope you see my point.

I've been writing judgments, even in the SCA, I've been writing judgments. And in the LAC, I've been writing judgments.

Commissioner Malema:

No, I'm actually inspired by you going to write an LLB while you're a sitting judge. I'm just bringing these matters to you so that you can clarify them, but sitting judge writing an LLB, should serve as an inspiration to many of us. So, I make no issue with that. I'm just saying, following up on what they were saying. These are issues related to those allegations. But perhaps it is for transformative purposes or whatever reason, I don't know. In your approach, of constituting a Full Bench, do you always see a need to put a white person there? Because there's stories that you're putting white people because you want them to write.

Judge President Mlambo:

I know. It's an unfortunate statement to make that I put it ... because it suggests that I think white judges are the only ones who are good and better at writing judgments. It's incorrect. It's incorrect!

Commissioner Malema:

Thank you, JP.

Judge President Mlambo:

Thank you.

Minister Lamola:

Follow up.

Deputy President Petse (Chairperson):

Thank you, Commissioner Malema. Honourable Minister?

Minister Lamola:

JP, my follow up relates to this matter of the manner of appointment of acting judges. I think on the sexual harassment one you have responded to. But my question is, there's a discussion we had, yourselves as Heads of Courts and ourselves on some issues that were raised by the profession for guidelines for acting appointments. And I know that you know that there's, what has delayed us is the process is in the Limpopo High Court as we speak now. But don't you think if there is a kind of a transparent process of the appointment of acting judges, we will be able to minimize most of these complaints and issues that comes, and rumours that comes in the public or from the profession. We also dealt with this matter when we were interviewing Judge President Maya. I think it was BLA, they raised an issue in a manner of acting appointments.

Judge President Mlambo:

Let me speak for what I do in the Gauteng Division and there are advocates who practise in this division in this commission today. They know that when I approach them to suggest people to act in the division, I tell them that the person must have been in practice for not less than 12 years. And I emphasize that I want them to focus more on women candidates because my problem is I don't see many junior briefs by women candidates, or, I don't see, even women silks running complex matters on their own without being led by male silks. So, if I were to follow those stereotypes, I would exclude junior people altogether and I want to avoid exclude junior people. Because in the Bar... at the Bar, if you have 12 years, you've done enough to raise your hand and say I can act as a judge. So, I want to believe in Gauteng I'm transparent. They know on what basis I select acting judges and almost invariably, whatever recommendations that come my way for acting judges, the advocates know I would say, don't recommend someone because he or she is your friend. Recommend them on the basis of what they've done at the Bar, what work they've done. What cases they have argued. Where they've appeared but 12 years and above and the emphasis is always on women because I'm on gender transformation.

Minister Lamola:

You may well be right, Judge President, on that. My contention on the matter is that the practice where the JPs obviously recommend or appoint and so forth, I know I appoint, but that recommendation, it's a practice that comes from the old system where there were few white practitioners and the JPs who really knew the number of people, which speciality, so it was a bit easy also to quickly consult with some few leaderships of the profession. But now the practitioners are mainly with diverse backgrounds. There could be a brilliant practitioner somewhere in Springs or in the outskirts of South Africa, that the JP may not know or some of the leadership of the profession may not know, but it's a brilliant guy or lady somewhere. So if there is some guideline or processes that anyone who may want to, or anyone we want to nominate, will that not really help to enhance this system of transparency?

Judge President Mlambo:

That's what applies in Gauteng, Minister. You can ask the advocates who sit here. I ask them, I always ask them, like Advocate Mpofu, I've said *'Okay, I've chased you, I hope one day you'll come to act but who can you recommend?'*

I'm always receiving recommendations from the Bar and from the private sector, the private attorneys' sector of people who are recommended to come and act. So, I try my best. It's true, I mean when I approached Justice Baqwana, I didn't know her. I was JP of the Labour Court. But when she was recommended, I said *'Well, this is someone who must come and act here.'*

And Minister, some of the things that are not known is that when it became known, I'm that type of consultative JP, when it became known in the Court that I was intending to appoint Justice Baqwana to come and act in the Labour Court, there was a delegation of senior judges who came to see me to say *'Don't do it, she's too junior, she knows nothing about labour.'* I said *'Well... I'm bringing her, it's my call! I'm bringing her because I think she'll add value.'* Look at where she is today!

So, I'm saying, I'm always inviting those recommendations for people to come and act. And you know... Uhm, this problem of *'juniorising'* people and of trying to keep people out of certain work areas or to keep people out of acting appointments, it's something we face as JPs. There's always grandstanding on one Court or another, but I'm the type of JP to say *'If you have an issue with this person that I want to appoint to act, tell me why. I want documented evidence why you're against it.'* And those objections fizzle into nothing, right?

Because it's like that, it's in the nature of the legal profession to backstab, you know! But I challenge it and I make sure that no, I discovered a very brilliant tax law practitioner, by way of recommendation. And she became appointed by this JSC and she's a woman. I was surprised to start with that there's a woman who specializes in Tax Law. I didn't know it!

She came and she was such a revelation because she assisted in revamping the Tax Court and in ensuring that its processes are streamlined. She knows Tax Law like nobody's business. So, I'm saying, I agree with you, we need to be open as Heads of Courts to listen, to receive and to evaluate whatever recommendations we get and to factor them in, and I do that, you know?

Minister Lamola:

Thank you.

Unknown Speaker:

Can I follow up, Chair?

Deputy President Petse (Chairperson):

Thank you, Honourable Minister.

Unknown Speaker:

Can I follow up, Deputy President?

Deputy President Petse (Chairperson):

Yes, I'll give you an opportunity after Commissioner Mapisa-Nqakula, Commissioner.

Commissioner Mapisa-Nqakula:

Thank you very much, Acting President. Good afternoon, Judge President Mlambo.

Judge President Mlambo:

Good afternoon, Madam Speaker. It feels different, I'm sitting far away today, from you.

Commissioner Mapisa-Nqakula:

Judge President, there's a matter which was raised here by Commissioner Mpofo, and I've just been trying to think how I should raise a follow up question with you on this matter because you mentioned that you became aware of the rumour and what has also come out is that, you know, it's like... by faceless people. I would like to know, when first did you become aware of the rumour? And whether there's ever been a discussion between yourself and the CJ on the matter? I'm ... ja, it is a sensitive matter! I have not heard you saying, you know, you became aware, and an allegation was made by a particular person, I'm fully aware of that. But my question would be, when did you become aware of the rumour? Thank you.

Justice Mlambo:

Thanks for the question, Madam Speaker. There are many allegations that are always in circulation. I mean, Commissioner Mpofo said it, they are always there. Allegations or whatever and because it's in the nature of the legal profession to gossip. If you want a profession that gossips, go to the legal profession. They gossip big time on nonsense.

And when this Chief Justice nomination process started... I got a call from a retired judge in the Western Cape, who said '*Hey, I've heard something disturbing about you...*' and I said '*What?*' And I was told what and it was what Commissioner Mpofo raised. I was shocked. I said '*...but why are people these things to me. Do you have a name?*' He said '*No, I don't have a name, it's just being spoken about but hush-hush, you know!*'

So, it started now, in the currency of this CJ process starting. So, I had a discussion with no one because I just ascribed it to the rumour mill that always happens in the judiciary. I mean, even before I took over, I've heard rumours about other JPs, but I didn't think it's worthy of me to act on it, because as you say, Madam Speaker, it's a rumour that's difficult to pin. Who? Why? Where? Why are they not coming out? And the rumours don't identify anyone, in any way, you know?

So, I feel pained that this rumour has now found its way into my interview because I just feel it gives credence to the poisoning of the candidature that I have in this position, and it started against him in this process. Clearly, it's purpose is to poison my candidature. So, I didn't speak to anyone, I didn't think it's worthy of me to action it with anyone.

Commissioner Mapisa-Nqakula:

Thank you very much, Judge President Mlambo. Thank you.

Deputy President Petse (Chairperson):

Thank you, Commissioner Mapisa-Nqakula. Commissioner Magwanishe?

Commissioner Magwanishe:

Just two quick follow ups, Chair. Thank you very much. Good morning, Judge President.

Judge President Mlambo:

Good afternoon, Commissioner Magwanishe. That means I'm in for a long slog if you're still in the morning.

Commissioner Magwanishe:

My apologies, I think it's me who is sleeping. Now, you said that you have a sexual harassment policy.

Judge President Mlambo:

Yes.

Commissioner Magwanishe:

Has that policy ever been used, ever?

Judge President Mlambo:

No.

Commissioner Magwanishe:

Not at all?

Judge President Mlambo:

In fact, let me explain. It was not used but the reason we crafted it, there were complaints that were lodged with me by two female colleagues in Pretoria, who felt that they were the victims of offensive conduct by their male colleagues. And I asked them, I said *'This is serious, I think it should go further than this.'* They said *'No, JP, I'm raising it with you as Head of the Court. I don't want to take it forward; I just want you to be aware.'* Right? So, I consulted the DJP, DJP Ledwaba, I said *'Hey, something serious was reported to me.'* Right? And the good thing, if I recall, in one of those instances, the male colleague was identified as to who did it, you see? So, I consulted the DJP, I said, the judges said to me explicitly, under no circumstances do you take this thing forward, wherever. We're raising it with you, see what you do with it, divisionally.

So, I then consulted the two colleagues to say look, I've spoken to the DJP, we think these are serious things and we want to impress on you to consider lodging complaints with the JSC, right, and they refused. So, we said *'well, as a fallback position, shouldn't we engage an experienced retired judge to come have a chat with you...'* because all they said they wanted this thing to be spoken over and resolved so that it's brought to the understanding of those colleagues that this is wrong. So, we tabled it in a judges' meeting, and we spoke about it extensively that colleagues, as JP, the leadership of the division, we have received this. *'Please desist from doing this.'* And as a follow up, we got a retired Justice of the Constitutional Court, just to come and have a session, a debriefing session with those ladies. Because I felt that they were hurt but they didn't want to take the matter forward. But the upshot of it all, in both judges' meetings, Joburg and Pretoria, the view was, let's come with a sexual harassment policy that will enable those you are victims of this conduct, to be assured that they will not be victimized should they come up. And we did that. We ... it was drafted, and it was circulated amongst all judges, and it was adopted.

Commissioner Magwanishe:

Now the last one! I can see that Commissioner Mpfu is giving you sleepless nights, you have been running after him to act. Now, have you considered approach legal academics to act?

Judge President Mlambo:

I do. I've always said, Commissioner Magwanishe, that one of the acting slots in the division, is for legal academics. I mean, this Commission appointed Judge Van der Schyff, about three years ago, she was an academic, right, but there's an academic who is acting now, Professor Phoko, he is acting. And I didn't know him from any bar of soap, but the man is good, you know? So, there are particular problems that apply to the academic world. The time that they must come and get to come and act is always a difficulty between them and their deans, but whatever the space is, because some of them, like Professor van der Schyff, some of the times she came to act, she had to do so without pay, right? From her institution, right? Well, she was going to be paid an acting judge salary in any way.

So, I'm saying, there are particular difficulties. I remember having a number of engagements at Wits, where I raised this particular issue to say, why is it always a problem when we try to invite academics to come and act and they tell us that the management structure is blocking their way. It didn't come to much, although, I think a year or two thereafter, one of the academics from Wits came to act, a Family Law practitioner. But there is a slot, Commissioner Schlemmer knows, I've always mentioned it in this JSC.

Commissioner Magwanishe:

Thank you, JP. Thank you acting, DJP.

Deputy President Petse (Chairperson):

Thank you, Commissioner Magwanishe. Commissioner Nyambi?

[... interference]

Commissioner Nyambi:

Thank you, Deputy President.

Commissioner Mpofu:

Follow up.

Commissioner Nyambi:

It's a follow up.

Commissioner Mpofu:

Oh, it's a follow up as well?

Commissioner Nyambi:

Thank you, Deputy President. Morning, JP Mlambo.

Judge President Mlambo:

Good afternoon, Commissioner Nyambi.

Commissioner Nyambi:

It's very much unfortunate that in your interview we have to deal with this matter, but I think you know better than I do, this process that, when we have our closed session, you won't be there and sometimes you'll have something that can be used against you.

I want us, I want you to allay issues... the fears in addressing the question raised by the Speaker. I know everywhere, even in Parliament, there are gossips everywhere, we will always have that challenge. But I thought it was going to be an anonymous source but

when you said it's a retired judge, then to assist us when having our sessions to doing the deliberations, whether that retired judge was able to take you into confidence where is this rumour emanating from. Because they are raising something very serious, sensitive in this country, that has got that serious challenge and you are being interviewed now, and as I said, you know better what happens when we get to the closed session.

I don't want it to be used against you, so that we can have a proper clarification about this issue, in terms of the source from this retired judge, whether he was able to assist you when you engaged... when he called you about this sensitive issue.

Judge President Mlambo:

I tried to probe the judge, the retired judge, Commissioner Nyambi, but who is saying these things? He says, well, people are whispering about it here, in Cape Town, and she wouldn't come out and tell me who those people are. I explored, I probed, I pleaded and got nowhere. And it pained me to hear something like that, because I realised that something must have been at play here for people to start saying that. You know? So, I probed! I tried all my best to get the retired judge to tell me who was saying these things and she wouldn't budge.

Commissioner Nyambi:

Thank you, JP Mlambo. Thank you, Deputy President.

Deputy President Petse (Chairperson):

Thank you, Commissioner Nyambi. Things are beginning to get out of hand now. Commissioner Mpofu want to follow up on a follow up question. Commissioner Mpofu?

Commissioner Mpofu:

No, it's fine, Chair. I don't want to follow up on a follow up question. I actually wanted to follow up on the Speaker's point and the comments that came from the candidate.

Deputy President Petse (Chairperson):

Please proceed, Commissioner Mpofu, just briefly!

Commissioner Mpofu:

Thank you. JP, sorry... I'm sorry, Deputy President, but I just missed the turn to follow up at the correct time. You just said something that seems to be worrying me now, after we, I thought we had put this thing to bed.

In your answer to the Speaker, you were suggesting that this matter has come up for the first time in the context of the CJ interviews and also that you think that it has been brought up, I don't know, I can't remember the words you used '*... to poison your interview.*' We have raised, I think I made it clear, you know, people maybe are... I heard some comments about how you were asking soft questions, that's simply because the Chair, we have promised the Chair that, because of the seriousness of these interviews, whatever questions, easy or hard, but they must be asked in a measured manner, which is what I think everyone would have seen in the last three days. But that doesn't mean we mustn't ask the hard questions.

I put to you that you know that there are rumours about kickbacks, about capture of your division, and so on but you seem to, is it your... suggestion that if there is this other undercurrent or rumour about sexual harassment, that it should not be mentioned so that you are given an opportunity to deal with it?

Judge President Mlambo:

No, we're dealing with it, Commissioner Mpofu... [intervenes]

Commissioner Mpofu:

Ja, but you seem to be saying that it's brought in order, as if there's some other motive for it being brought about, except giving you an opportunity to clear the air, which I thought you had, by the way.

Judge President Mlambo:

... I am responding to the question ... [intervenes] Yes.

Commissioner Mpofu:

Are you happy with that?

Judge President Mlambo:

Yes, I welcome the opportunity. If it's raised, if it's worrying this Commission, that it be raised with me. It's an important issue!

Commissioner Mpofu:

Thanks. Okay, and you agree with me that even the risk, because of the nature and the sensitivity of the issue, even the slightest risk of it ever surfacing in respect of our Chief Justice in the country, is something that needs to be killed at this stage?

Judge President Mlambo:

Yes.

Commissioner Mpofu:

Thank you.

Deputy President Petse (Chairperson):

Thank you, Commissioner Mpofu?

Commissioner Barnard:

Deputy President, Commissioner Barnard, follow up, if possible?

Deputy President Petse (Chairperson):

Yes, Commissioner Barnard.

Commissioner Barnard:

Thank you. JP, there's two statements that you made that seem to be rather concerning in your answering the last couple of minutes. The one statement that you made was the nature of the legal profession is to backstab and then a little bit later on in a further part of the response, you said it's in the nature of the legal profession to gossip. Would you not say that those are two unfortunate generalizations?

Judge President Mlambo:

Commissioner Barnard, I've been a lawyer and a judge. I've been a member of this profession for all those years, and I didn't say those ... make those statement lightly. It is because that's the nature of that profession. It gossips! I can share examples with yourself about how when judges or people who are shortlisted, who must come to be interviewed, especially coming from the Bar, where you found judges who still carry Bar gripes or Bar baggage who try and influence me against supporting particular candidates all based on rumours. So, that's been my experience. So, the answers I gave are based on my experience as being in the legal profession. That the legal profession gossips!

Gossips terribly and it's in the nature of simply just perpetuating gossips that morph and take their own life and continue.

So, that's my experience and that's why I answered it that way. And the backstabbing part is part of that answer. That simply because people were colleagues at a particular Bar and they had a run in regarding a particular issue, when one is now a judge, and I receive a request from Commissioner Mpofu as Chair of the Johannesburg Society, to say, there's a list of prospective silk candidates, can you get comments from your judges about what they say, then all the baggage comes out. You know, which is unfounded. So, it's based on that experience, Commissioner Barnard! If I'm offending anyone, I apologise, but that's been my experience in the legal profession, that there's backstabbing, there's gossiping.

Commissioner Barnard:

Well, it seems to me when you refer to the legal profession, you're actually referring to the judiciary, or members of the judiciary?

Judge President Mlambo:

And lawyers and advocates. That's the legal profession.

Commissioner Barnard:

And you don't think that that's, you know... I'm thinking about the concept of placing the judiciary in disrepute. If it's not something which is quite a serious allegation.

Judge President Mlambo:

I suppose it can be viewed as serious, but the members of the legal profession who are in this room, know that what I'm saying is what they have experienced as well. I mean, there's Commissioner Madonsela, he's nodding.

Commissioner Madonsela:

I grudgingly agree.

Unknown Speaker:

That's because Madonsela gossips a lot.

Commissioner Madonsela:

For the record, I grudgingly agree.

Unknown Speaker:

Sorry, Deputy President.

Commissioner Barnard:

Thank you, JP. Thank you, Deputy President.

Deputy President Petse (Chairperson):

Thank you, Commissioner Barnard. Commissioner Tshepe? At long last we have reached you now.

Commissioner Tshepe:

Ja, there have been ten follow ups just before I could speak. Thank you, Deputy President. Good afternoon, JP.

Judge President Mlambo:

Good afternoon, Commissioner Tshepe.

Commissioner Tshepe:

Are you well?

Judge President Mlambo:

Under the circumstances, yes, I'm well. You are one of those who spent my attempts to come and act.

Commissioner Tshepe:

I will not confirm or deny that statement, JP. JP, in the morning when you were speaking to your vision, the issue of transformation was, you regarded that as critical, and the issue of acting judges is somehow linked to that?

Judge President Mlambo:

Yes.

Commissioner Tshepe:

Because you were creating a pool and in creating that pool, that is then the pool that applies to the Judicial Services Commission for recommendation and subsequent appointment. So, I think the issue of acting judges is an important matter.

So, what I wanted to raise is an issue that the Minister dealt with briefly about some kind of a transparent and open process relating to acting appointments. It's not about what you have done, it's more, were you are to be appointed a Chief Justice, the issue of acting appointments, either in the High Courts, an issue was raised by BLA with the SCA and I think the GCB in their comments were raising about acting judges in the Constitutional Court.

So, in your view, as the Minister said, should we be having a, shouldn't we be having a transparent policy or practise on how that happens, so that allegations of the nature that it is not fair or transparent and that we actually do get to reach all candidates, potential candidates who can come and act in our Courts? For me I think that would alleviate an important aspect that could alleviate all the criticism because I think you are being... the GCB in particular, says you've done well in getting many people to act, but that criticism is, what is the criteria, is it a transparent process?

Judge President Mlambo:

I think it's a legitimate concern to raise that there should be transparency. And I subscribe to it! That's why I answered the question by what's happening in Gauteng. And obviously, as Chief Justice, if I'm appointed, I will have to push for more transparency in terms of that. And I think, we will have to be guided as to what facets, I think I mentioned the key criteria of the experience at that Bar, or in practise as an attorney, you know... So, I subscribe to transparency, and I would support that it be transparent in all respects. I mean, just to buttress that in Gauteng when we appoint acting judges, if there are new acting judges that have not acted before, what is attached to the duty roster, well, when it's placed on CaseLines, are the profiles of the new acting judges, so that colleagues have to know them, right? *'Who is this? What have they done? Where do they come from?'* And whatever because they are going to be colleagues for the term. So, transparency is the way to go, I agree with you.

Commissioner Tshepe:

Thank you so much, JP. And linked to that, is just the, and you are agreeing, but I'm just saying, it's not just about appointing them, it's also the processes that you would have started implementing in Gauteng. If you were to be a Chief Justice, we would want those systems to not just move out, just because you would have left the division, but that it is something that then gets implemented elsewhere, including the support that would come, the support that you would provide to those acting judges, would you agree?

Judge President Mlambo:

No, I agree. I mean, it's a function of us as Heads of Courts, making sure that we do that.

Commissioner Tshepe:

Thank you, JP. Just on the very issue of transformation and you're saying we have to have a national program. As I understand you, there is a committee of Heads of Courts?

Judge President Mlambo:

Yes.

Commissioner Tshepe:

Why is that not already implement, and you participate as a leader of the judiciary, already in that? This is, as you rightly say, a key component and should, in my mind, be something that should be implemented as in yesterday.

Judge President Mlambo:

Yes. Your correct, Commissioner Tshepe, I'm Head of Court and Commissioner Tlaletsi is here, maybe I'm misrepresenting the facts, but I don't think so. I don't think we have a national policy in the judiciary on sexual harassment, no, not on sexual harassment... on transformation. I don't think so, because if we do, I've never seen it. So, I want to plead complicity in not doing anything at that level, right? At the Heads of Court level, to ensure that we have a national policy. But I want to believe that my own actions in the division I head, have been, even though there's an unwritten transformation policy for the division,

but it's something that I've been doing in terms of achieving transformation goals in the division. So, I hope I've answered your question.

Commissioner Tshepe:

You have JP, thank you so much. All I'm asking is that some of the issues should not be waiting, including the sexual harassment policy, I don't know if you would have heard. Yesterday we had a discussion with President Maya and as I understand, you are correct, there is no anti-sexual harassment policy in the judiciary and those kinds of policies should have been there a while and we should be ensuring that we implement them. Whether this, wherever this process leads, because you are already a leader in the judiciary.

Just, the last issue I wanted to raise with you, JP, is on the exciting modernization and I was glad you managed to slip it in as part of your priorities as well. The question I've been asking candidates is that, obviously as practitioners we have seen the value, particularly during the lockdown and the Covid pandemic, the value of CaseLines and online virtual hearings. It is a reality to most of us but from an access to justice perspective, it still remains a dream for most South African litigants or possible litigants. You spoke briefly about one of the centres, advisory centres, I think, that you referred to. Is that something that is happened across the country or is it just here in Gauteng? Because I would like us to, in doing that, have a strategy that covers the country, I mean, were you to be appointed a Chief Justice that would be what it is and do you have any ideas how we're going to do so?

Judge President Mlambo:

Yes, the Community Advice Officers Association of South Africa is a national body. It's got advice officers spread throughout South Africa. Unfortunately, some of the funding they obtained during the Covid era, especially covering the availability of data for officers, was not national, it covered some advice offices. And I'm happy that, I mean, we made an approach the LPC and the LPC chair, Commissioner Dlepu, was very receptive to the idea of grassroots entities assisting in terms of closing this gap on access to justice and that's one aspect. But I think, someone asked me if the accounting that we do, shouldn't go deeper down. But in the same thinking, Commissioner Tshepe, there needs to be a discussion involving Legal Aid South Africa, that has a footprint throughout South Africa. But you may find that its offices probably don't cover certain areas. You know?

There needs to be a discussion with that role-player and other social justice actors who are in the space, just to identify the gaps as to how the whole country can be covered in ensuring that no one is left behind. So, I agree with you, it's something that I've always said in my speeches wherever, that access to justice is a key human right and it's something that should be upheld. You know, Commissioner Tshepe, when someone who's being sued and being threatened to be taken out of their house, responds to the summons and comes to the High Court and presents himself to the judge and says I don't have a lawyer, the judge stops the proceedings, sends the person to the legal helpdesk downstairs, and because there's a rotational list of attorneys on call to help, the next one on the line is called and that attorney, that client, the relief you see in their faces that *'I now have a lawyer, I've got someone who's going to assist me stand up and put my case forward.'* So, it just illustrates the importance that it can't only be people who are able and who have access to funds, who access the justice system. It should be everyone! So, I agree with you, something needs to be found. A strategy to an engagement with the justice sector actors at grassroots. It needs to happen to make sure that we cover all the gaps, and we have something sustainable.

One issue which I've raised which I can raise for you is, Legal Aid piloted an internship project years ago. We had to go outside Government to find money to employ about 100, I think it was 50 if not 100 interns, because a lot of the university graduates walk the streets without getting articles or getting pupillage. Now, if the big law consumers or law consuming centres in South Africa were to have an internship program that is that wide, it would give access to these law graduates to have access and be paired with seasoned practitioners in how the legal system works, but it will also help, that's our experience at Legal Aid South Africa, it will help with legal services offering. So, these are things that can be discussed and be implemented.

Commissioner Tshepe:

Thank you, JP. Thank you, Deputy President. I appreciate the time.

Deputy President Petse (Chairperson):

Thank you, Commissioner Tshepe. I make it ten to two now, loadshedding is due to kick in at two o'clock, so this will be the convenient time to take the lunch adjournment. One hour, we will resume at ten to three. Thank you.

[lunch adjournment 5:03:13.7]

[resumes 6:04:14.8]

Deputy President Petse (Chairperson):

Commissioner Matolo-Dlepu, Judge President Mlambo is back on his seat, waiting for you.

Commissioner Matolo-Dlepu:

Thank you, thank you, Deputy President. Good afternoon, JP. Okay, before I start, I need to make a, declare that Justice Mlambo was one of my mentors. He is actually the person who taught me judicial skills and it was a group of women, when it was not fashionable to empower women. And we, I think, we're about five or six and most of the judges who were there, didn't want to deal with us because they thought, they didn't want to go into the same lift with us, because we were making noise, but he took us on. I want to declare that.

Secondly, Justice Mlambo, I want us to go to your pillars, neh? I know that you are a champion, you are a champion of access to justice and also that you really do care for unrepresented litigants, but what I just wanted to find out from you, if you can just elaborate more, can't we use, I know the ineffective Maintenance Courts worry you. Shouldn't we use mediation to intervene in those matters, and especially in the Maintenance Court. And one thing that I know, the profession offers themselves to go to Maintenance Courts to try and assist. And another thing, the profession offers themselves, to go and teach police officers how to take statements that relate to sexual harassment or gender-based violence. But I just wanted to hear you, how can we fast track the issue of mediation, especially in the lower Courts? That can still work, according to me.

Judge President Mlambo:

Thank you very much for the question, Commissioner Dlepu. Yes, mediation is one of my pillars, is in one of my pillars, that is the judicial operations pillar in terms of an option that can be used to alleviate workloads in the courts. You know we have the Rule 41 (a) initiative that comes from the Rules Board, but the application of that rule, which introduces mediation, has not been very successful.

I chair a sub-committee of the Law Reform Commission that's tasked with coming up with a Mediation Bill for South Africa. And we had an engagement with the Nigerian judiciary where they have a multidoor mediation programme. It is highly successful, run by female judges. Very successful! So, I'm citing this Nigerian example to say, good practise exists in this continent, that mediation can assist in dispute resolution. It's a function of an engagement and when I say an engagement, you say members of the profession offer themselves, I would be interested to know, because had it been in my Court, I would have embraced it and we'll find a way of how we select matters and select them but get the buy-in of the legal profession to say, once our matters have been selected to go to mediation, we will consent. Because that's the other aspect. We need buy-in from the other role-players. So, upfront I agree with you that mediation can help, and I agree with you that properly structured engagements between the key role stakeholders, the profession, the judiciary and the officials of the Department of Justice, especially when I talk about the Maintenance Courts, that's important if we can all come to the table and understand where the blockages are and actually put mediation in there. Because as you know, Maintenance Courts' issues, it takes a long time before a matter reaches a Maintenance Court stage. There's a lot of dilly-dallying, avoiding and whatever until people lose hope, but yes, I think once both parties are engaged, and they are brought to a mediation table, I think a lot can be achieved in terms of obtaining fast resolution of maintenance claims.

Commissioner Matolo-Dlepu:

I think my second issue I want to hear you on, is the developing the jurisprudence on socio-economic circumstances that affect South Africa. And one of the things that I really, I still maintain that we haven't developed South African Law, as South African Law and saying that I always feel that we seem to look at our Customary Law as one of those things. It's like a pain and not elevate it to where it's supposed to be. So, how do you think this can actually go into, especially even with the African, our African countries, because we are on the same culture, the same thing that, how do we have so synergies

of developing South African Law in line with African Law? I just want to hear your take on that.

Judge President Mlambo:

Perhaps we can start with the Traditional Courts Bill. That's been a bill for I don't know how many years. I've been on public platforms, talking about the development of Customary Law to say it needs to be taken seriously because it is our law, as Africans. And we need to ensure we stop people with no interest in the development of African Law, dictating terms to us about how we can apply African Law. It's a very involved court space. I can do as much, I can talk in public platforms, but I think we've got lawmakers in this room, whose task it is to make sure that some of these laws see the light of day. So, I would encourage our law makers to confront this issue because it's reality. I paid lobola for my wife, and lobola follows Customary Law rules, isn't it? My son paid lobola and the engagement between the two families, and the discussion around the table, tells me that African Law and culture is alive amongst us. So, what is stopping us from ensuring that it goes a step further. I mean, I remember talking to judges in Botswana, when they were talking about their Traditional Court criminal justice system. They made one admission that true African Law has no jails or true African Law doesn't sentence people to jail, it's all based on conciliation. But that was their situation there because they have an interest in cattle theft. Therefore, the panel provisions of their Customary Law have their interests but doesn't have the interest of the whole country.

So, I'm just citing that example to say, we need to be bold as Africans to ensure that our law is not dictated to by outsiders. The history of the Traditional Court's bill being stuck where it is, testifies to that fact, that we may have allowed a lot of external interests to stop the process, or to stymie the process, if I may use that word. So, it is important, I agree with you, that as African people and as representatives of a lot of people who are voiceless, we need to find a way to speed up these processes and ensure that, especially, African Law finds it's equal placing in the South African law books and statute books.

Commissioner Matolo-Dlepu:

Thank you, lastly, I just want to, it's a question that I want to pose on the *Al Bashir* matter. I mean, it was a case that shook the country and everybody. But what I just want to hear from you, what learnings, as South African, should we have gotten out of that case,

especially with the international treaties and international laws, that we sign and most of the people in the country don't even know that we've got those agreements with international organizations?

Judge President Mlambo:

It's a function of educating society about what we do as arms of government. The Rome Statute is law in South Africa. They took the Rome Statute from the international arena and domesticated it and it became law here, in South Africa, as long as it confirms to our constitutional, our Constitution, it is law here and it has to be applied and it is for that reason that the court took the decision it took.

So, it's a question of us, when we sign and have these obligations, just like the SADC tribunal case. South Africa's assent of the Act that confirmed that South Africa as a State party is a signatory to the SADC Tribunal. I think I'll call it the rotocol. We, as members of the three arms of government, need to properly understand what we sign, what the implications are in what we sign and what our responsibilities are arising from what we sign in the international arena. I think that's all I can say, I can't take it further than that.

Commissioner Matolo-Dlepu:

Lastly, I just want to, I know that you were a proponent of assisting with making sure that briefing patters are elevated, and you were taking steps to try and assist that. It's true that briefing patterns are unequal, so if you were to be elected as the CJ, will you still proceed with that program? Because it really helped us and we had confidence that somebody out there is actually looking at it.

Judge President Mlambo:

Certainly, I will restart the process. I took those stats until, I can't remember how many years ago, probably three or four years ago, but those who wanted those stats, I provided those stats. But there was one reason I did it as Head of Court, was we talk about briefing patterns in this Commission, in public platforms, but we talk without any empirical evidence. So, I said, as Head of Court, I'm in a position where I can ensure that in each of the matters that appear, the legal representation is clear. So, all that has to happen is that the court clerks were to translate that legal information as to the race and gender of

the people appearing there. In the Unopposed Motion Courts, Opposed Motion Courts, Special Motions, you name it. I had those stats and they confirmed overwhelmingly, especially when it comes to the banks, that most of the people who were briefed by the banks, were white law firms which translated into white male advocates in the main. I mean, at some stage in that process I, perhaps I was out of line, but I asked for a meeting with Standard Bank, because there are a lot of Standard Bank matters that comes to the Courts. Fortunately, the CEO is someone who served articles under me, when I was at Bowman's, so they acceded to the meeting. Because I just wanted to ask how is it that them as a big bank, all their work is done by white professionals. Are they saying black professions can do the work or not? You know? I had that engagement, but I stopped, I didn't go to other banks, because I don't think it's actually my place as Head of Court to do that. I think it's for the leaders of the professions to actually undertake those interrogations. Because once you have the empirical evidence, it's not easy for people to deny that this is happening. And it's easy then to try and find ways of how to address that problem. Yes, it's something that I can gladly go back to.

Commissioner Matolo-Dlepu:

Thank you, Justice Mlambo. Thank you, Acting JP.

Deputy President Petse (Chairperson):

Thank you, Commissioner Matolo-Dlepu. Commissioner Shabangu-Mndawe?

Commissioner Shabangu-Mndawe:

Thank you, Deputy President. Good afternoon, JP.

Judge President Mlambo:

Good afternoon, Commissioner.

Commissioner Shabangu-Mndawe:

And how are you?

Judge President Mlambo:

I'm trying my best under the circumstances, Commissioner, thank you.

Commissioner Shabangu-Mndawe:

Thank you. JP, I know a lot has been said under transformation, but I want to align myself with the comment made by NADEL, that you are an epitome of transformation, that since you became a judge, you were giving, or you are still giving opportunities to women to come and act as judges. And I must confirm that we are one of that organizations that approached you to give you a list of names of our members who we thought were able to or were ready to come and act and you assisted us in that regard. And those members, they came back to report to us the assistance that you were giving to them and the support that you were giving to them. And you also, in 2021, arranged a very intense training through SAJEI, where you trained those women. I don't know whether you want to say something on that, JP?

Judge President Mlambo:

Thank you very much for that credit, Commissioner Shabangu. I confirm that I continue to find ways to advance transformation, because in my book, transformation is not only changing the colour and gender of the people we bring to the Bench, but also to ensure that once they are on the Bench, we empower them to go even further in their careers. When I say further, it's like, when you come to act, I must ensure that you always get a good spread of the work that comes, and you also have a chance at doing what is called difficult work. So, I confirm what you've just said about those efforts and fortunately, there are other judges who are like-minded, especially on the training aspect, who heeded the call to ensure that we arrange that training program, and it went along with. We need to arrange another one.

Commissioner Shabangu-Mndawe:

Thank you, JP and on behalf of my organization we'd like to thank you on that one. JP, you spoke about courts, and you mentioned some of them. It is a fact that sexual offenses take time to be finalised in most of, in the courts, whether it the Lower Courts

and High Courts, and also Family Law matters. They find themselves being heard by not so conversant magistrate or judges in Family Law matters, issues. What is your take on the idea that maybe we need to have specialized Sexual Offenses Court and Family Law Court where we will have a well-trained magistrate and judges who will be hearing those matters?

Judge President Mlambo:

I think insofar as Sexual Offenses Courts, you will remember that some time ago we did have those Courts and I think they were brought to an end. I can't remember, that was long, in my early days on the Bench. It was based on an outcry that they were centres where fair trial rights were not applied because of the speed at which those matters were handled, because I understood that the prosecution had had dedicated teams, that upon arrest, they would start investigating to ensure that they fast-track the placement of those matters on the role. I think that was then.

I've not kept track with the issue of Sexual Offenses Courts, but I think for me, the problem lies elsewhere. The problem lies with case management. In almost all the High Courts, we've got the trial roll and the pre-trial roll, and we introduce the pre-trial roll deliberately, because when matters are transferred from the lower Courts to the High Courts, when they land on the High Court roll, they are not ready to run. It is for that reason that especially in my division, Gauteng, when a matter transferred from the lower Court to Gauteng, it doesn't land on the trial roll because we know it won't run. It lands on the pre-trial roll, and it is allocated to a judge. The judge will case manage it until it's trial ready. Once it's trial-ready, the case then gets put onto the trial roll and when it's put there, it's ready in all respects. It runs. So, I think to me, the slow movement of cases is, we need to instil a bigger sense of using case management. That's about the criminal trial roll because that's where the civil offenses fall in. It would be good if we could have specialist Sexual Offenses Courts, especially as you put it, where we have knowledgeable judicial officers, who know or specialize in that type of area. I think it would be good. I say so because in Gauteng, we have a dedicated Family Law roll. It's started more with Rule 43s, but I think two terms ago, if not three terms ago, we actually ensured that instead of having one judge per week on the Family Law roll – we have two! That all trials that are on the civil trial roll, that are Family Law orientated, were simply cascaded onto the Family Law roll. And that worked wonderfully! And I was lucky in that term because all the people that are allocated to that roll, were Family Law specialists. Right? And it assisted in ensuring that those matters are heard and fast-tracked and resolved very

quickly. So, in answer to your question, I think I would offer those comments, Commissioner Shabangu.

Commissioner Shabangu-Mndawe:

Thank you, JP. My next question, JP, you alluded to the fact that Gauteng Division has sexual harassment policy.

Judge President Mlambo:

Yes.

Commissioner Shabangu-Mndawe:

Yesterday we heard that the judiciary doesn't have even the maternity leave policy and by the look of things, we ... you are attracting young female judges, who still have to start their families. If there's no maternity leave policy, I don't know how they are going to survive. If appointed as the Chief Justice, do you think maybe you can make some efforts that this policy is also in place and also consider your division also, because I didn't hear you talking about it?

Judge President Mlambo:

It's true that the Bench now is attracting more younger and younger judges and in the transformation program that I mentioned, it would be good to also have that issue of dealing with maternity issues, let me put it that way. I have in mind the ... I think I've read that the Cape Bar has a maternity policy that sort of prevented the disastrous effect of members going off on maternity and coming back and finding that they'd accumulated serious debt in terms of Bar fees, etc. etc.

So, it would be a good initiative to also look at the issue of maternity benefits. You heard me when I said in the fourth pillar, that I talked about that there is an aspect where one has to do with internal health and welfare issues of judges. It is under that aspect that I think it can be done. Although, I may mention, my last two daughters were born when I was a judge. I remember when my daughter, who is 23, was born it sent shockwaves on the Bench to say we still have judges who are getting children, you know, but yes, if the

Bench continues to attract younger judges, it's an aspect that we need to think about and implement.

Commissioner Shabangu-Mndawe:

JP, my last question. Earlier on you were asked about allegations of sexual harassment. Were you made aware that you were going to be asked questions regarding these allegations?

Judge President Mlambo:

No.

Commissioner Shabangu-Mndawe:

Thank you, JP.

Commissioner Malema:

Follow up, Acting Deputy President.

Deputy President Petse (Chairperson):

Thank you, Commissioner Shabangu-Mndawe.

Commissioner Malema:

Follow up.

Deputy President Petse (Chairperson):

Yes, Commissioner Malema.

Commissioner Malema:

JP, earlier on you were asked a question about you running away from the Supreme Court of Appeal. Were you made aware that you were going to be asked such a question?

Judge President Mlambo:

No.

Commissioner Malema:

Thank you.

Minister Lamola:

Maybe follow up, Deputy President.

Deputy President Petse (Chairperson):

Yes, you may proceed, Honourable Minister.

Minister Lamola:

Ja, JP, what is the convention of this commission on allegations that they may want to ask a candidate, that you are aware? I know you've been a member this sitting.

Judge President Mlambo:

Well, from where I sit and having participated in the affairs of this commission, if there is no complaint in writing against a candidate, or if there is nothing in writing and the candidate has not been warned that an issue of that nature will be raised with her, it is never raised with the candidate. That's what I know to be the operations of this Commission.

Minister Lamola:

Thank you, Deputy President.

Commissioner Cane:

May I please have a follow up, Deputy President?

Deputy President Petse (Chairperson):

Thank you, Honourable Minister. Yes, you may, Advocate Cane.

Commissioner Cane:

Thank you. Justice Mlambo, during the lunch adjournment and even now, there are messages flooding into my WhatsApp. Many of the judges serving in your division, and I'm just seeing if I have leave to mention their names specifically before I do so, many senior counsels at the Bar and juniors, are all raising the issue that has just been addressed. I'll read one such message as an example. *(Reads message)*

'I have never been told by an attorney, advocate, clerk, aspirant judge, acting judge or judge of any improper language or behaviour on the part of JP Mlambo. I am a known feminist and was a senior judge and most likely person to have been so approached had there been any such behaviour. Rumours have been started; the agenda is suspicious. If there's no complaint there can be nothing to be discuss, comment or act upon.'

Similarly, many of the judges and members of the Bar mentioned that they are the kind of people that have acted in women's interests for many years and would have been approached had any women within the realm of the judges' or advocates' profession had been the experience or recipient of anything untoward on your behalf and many of the messages are to the effect that they have worked, these women have worked with you for many years and found you to be a person with whom they feel safe and supported. Thank you, Deputy President.

Deputy President Petse (Chairperson):

Thank you, Commissioner Cane.

Commissioner Madonsela:

President, just a point of order. Are we now going to be allowed to read all the messages that we receive from people, because we are also receiving messages?

Commissioner Malema:

I have a message as well; I can read it?

Commissioner Madonsela:

As we speak, now, because if this is going to go on and on and on like this, we are going to be really running in circles. Really, I'm receiving so many messages.

Deputy President Petse (Chairperson):

Yes, I take your point, Commissioner Madonsela. I think that's a matter, if Commissioners, the point has been exhausted with the candidate and if anything arises out of that, perhaps it would be best to reserve whatever we say and we can debate about this during our deliberations. Thank you. Professor Schlemmer?

Commissioner Schlemmer:

Thank you, Deputy President. Good afternoon, sir.

Judge President Mlambo:

Good afternoon, Prof.

Commissioner Schlemmer:

I really like some of the things, most of the things that you said about in your vision for the judiciary. I think they are laudable and if we were to have a Chief Justice that can implement these things, it will be to the benefit of South Africa and the judiciary as a whole. And linked to that, I would just like to ask you a couple of questions on some of the things that you said. One of the things that really interests me, how do you see the

single judiciary function? Are you thinking of something like a professional career as a judge? How do you see the single judiciary?

Judge President Mlambo:

Well, thank you, Commissioner Schlemmer. The single judiciary concept that I mentioned when I made my presentation is to just say the issue of the magistrates still being fully under the executive and not being fully with the OC is an issue that must be addressed. Because magistrates are judicial officers. In fact, when they commented on the institutional model that I mentioned earlier, they also mentioned that they are judicial officers like judges and would like to be under one home and one roof, like judges. So, I mentioned it in that aspect.

Look, if I come to whether I was thinking of it as a professional line, I think the way things work, as we speak, people practise law and then when they feel they want to be members of the judiciary, they avail themselves for acting stints and then they apply for appointments. I know there are countries where that is a profession track, where you don't even go into practice, you go straight, you know, but I don't think I was talking about that. I was just thinking about having one arm with all judicial officers as judges, because in other countries we've got magistrates called judges.

Commissioner Schlemmer:

Thank you for that. Linked, I think, to having just a single judiciary and having everyone then under the umbrella of the OCJ, will mean a lot of additional money will have to go in that direction. Now, linked to that is the question that the Minister asked you about Section 52, I think it was, of the Superior Courts Act in terms of which it seems, and if I understood the Minister yesterday correctly, it has never happened that the Chief Justice has come with specific requests to the Minister, which he must then consider when it comes to additional funding for the judiciary. How would you approach this if you were to be the Chief Justice, the issue of the budget where you are entitled to, and the Minister must then consider and address the request?

Judge President Mlambo:

Commissioner Schlemmer, I did mention that there's phase two where those issues will be pertinent to be addressed. The Minister was correct when he read that section. Phase two is where the judiciary leadership engages the executive and charts out the way to total judicial independence and not only judicial independence in terms of judicial functions, but totally in terms of operations as well. So, the Minister said the document is with Cabinet, or it's further than that, that the executive is preparing to engage the judiciary. So, I would say, I would look forward to seeing what is in the mind of the executive in going on that path. Because you are correct, were the magistrates to come under the OCJ, it has serious budgetary constraints. Right? And that's all envisaged in phase two, to say what increased budget are we looking for and how do we place that necessary support structures to ensure that the magistrates are also supported like judges are being supported. So, I'm not sure I'll be able to answer, all I can say is, yes, it's an aspect that's on the table, phase two, budget ...

Right now, we do get a budget and the Minister of Justice is the one who speaks to Parliament about our budget, right? So, once we engage, this to-ing and fro-ing will hopefully come to an end. I undertake to ensure that, if I'm appointed, that things go according to how we, as the leadership of the judiciary, with the members of the judiciary, see how things should be. Because I think it's a consultative process. I mentioned a colloquial. You know, after the OCJ was declared, we should ideally have had a colloquial for members of the judiciary to understand. We now have one step in that direction, but it's only the superior judiciary. The law judiciary is still outside. What is entailed? What are the timeframes and the thinking in terms of going the next step? That's why I said, as Chief Justice, it's something that I will ensure I look at and I ensure that there's discussion that is goal driven.

Commissioner Schlemmer:

Thank you for that. Another aspect that you mentioned, that's also going to acquire or require, I think, a fair amount of additional money, is the improvement of jurisprudential excellence and also you spoke about the capacitation of the intellectual capacity of judges. How do you envisage, you spoke about continuous judicial training through SAJEI, for instance? What exactly do you have in mind and how do you think will it be achieved?

Judge President Mlambo:

Well, there are two aspects that I can speak about. There are budgetary issues regarding the accessibility of online libraries, or online research engines that the judiciary can access. That needs to be addressed, right? So that the research needs of the judiciary are not restricted by the sites that they can access and those that they can't access. So, that's capacitation on that front and there's a committee, a sub-committee of Heads of Courts called the Law Reporting Committee. JP Tlaetsi serves on it. It is meant to come up with a judiciary law report. We have countries that have judiciaries that have their law reports.

I'd like to refer to what Chief Justice Mogoeng always says, to say '*... we spend time hearing matters, doing research, writing judgments, the next thing those judgments are sent to outside agencies who print and polish and reprint them and send them back to us.*' We need to address that, to say that money can come in handy regarding other aspects of our needs. So, it's a project that I think needs to continue. It was stopped by Covid because when Covid struck there was an educational torment for Kenya to observe their law reporting processes there.

So, I'm saying, access to proper relevant research engine sites and the complete development which will ensure easy accessibility of law reports and judgments, is an issue that needs to be sped up. In addition to the continued judicial education programs, I mentioned. But there's also a case for seminars, judicial seminars. Judicial seminars where we share the platform with legal scholars. Because it's all aimed at ensuring that our jurisprudence develops in such a way that it is relevant to South African society. I think that's the message I'm trying to send out.

Commissioner Schlemmer:

Thank you for that. Just my last question and maybe we should speak about this offline as well. You finished your LLB in 2019, what was your experience with the LLB, as a sitting judge, the content that we offer students? If you don't want to answer in public, that's fine, then we can go offline.

Judge President Mlambo:

No, I can answer.

Commissioner Schlemmer:

But I would like to hear your views on that.

Judge President Mlambo:

I can answer. My problem is, because I came with a lot of practical experience of applying the law, I found that I would be given low marks because when I answer a question I come with a practical take of things, that's how this law is applied and you have young lecturers, who have never practised law, who think no, the study guide doesn't talk about this thing, where are you coming from. So, that was my experience. Especially with Labour Law, I was very angry because I get 52%, 53%, yet I thought that was my specialist area.

Commissioner Schlemmer:

Thank you, JP. Thank you.

Deputy President Petse (Chairperson):

Thank you, Professor Schlemmer. Commissioner Magwanishe?

Commissioner Magwanishe:

No, thank you very much, Deputy President. I think you have brought relief in me, Justice President. *Thina with amadoda score*, I think we are at par with judges. No, thank you very much. Just few issues. Under institutional model, I'm not sure whether I heard you correctly when you were doing the benchmarking, you said something to the effect of operationally you want to benchmark around the Office of the Attorney General, did I hear you correctly?

Judge President Mlambo:

The Auditor-General.

Commissioner Magwanishe:

The Auditor-General?

Judge President Mlambo:

That's correct. That's what in the institutional model document, that we have.

Commissioner Magwanishe:

Oh, okay, I thought you said Attorney General, I was going to have a challenge. And then the other issue that I would like to get your views on, you said earlier on you give an opportunity to advocates, attorneys and academics. I know that there has been discussion in the JSC about prosecutors and State advocates, what are your views as the incoming, possible incoming Chief Justice around that?

Judge President Mlambo:

Thank you for the question, Commissioner Magwanishe. I think what needs to be added are magistrates. Because when we have a single judiciary concept, it is a career path for magistrates to also come to the higher superior, the Superior Courts. And I have had a number of magistrates acting and some of them appointed permanently. So, I just wanted to add that. They are also in the equation.

The issue of State lawyers, if I may use that term, and you use prosecutors, but I have in mind, it's a broader context. You have State law advisors. I mean, one, the former Chief State Law Advisor, is acting in the division as we speak, but he had to retire from the department for him to be eligible, to be appointed to act. Simply because the professions, especially the advocates' professions, have made serious objections to the appointment of State lawyers. Pardon me for using that term, but I think I might be found remiss for that term. And it's an issue that has been discussed at the Heads of Courts level. And I would want to be reminded, but I think there's currently an embargo against the appointment of State lawyers. When you put it to prosecutors, the only time they are appointed is when they retire. I've had a number of former State advocates, when they go into retirement, to help in the Criminal Law Courts because that's where their experience is based.

So, it's an issue that we've discussed, and we've said it needs to be revisited and discussed to see if there is scope to appoint State lawyers. I mean, the objection at appointing State lawyers is that they would be sympathetic to Government, and they would be executive minded. That's the objection.

I want to reserve my comment about whether that concern is founded or not. But that's the situation as we speak. And probably, as Chief Justice, if I'm appointed, that issue needs to come back onto the table, and the professional bodies need to be brought to the table to discuss this, if there are still, or if the problems remain, that State lawyers cannot be appointed. I'm not saying there's no merit to the concern raised by the professional bodies, that's why I say I'll refrain from expressing a view about it, but it's an issue that needs to be discussed because you can't dictate how things should be. I mean, the professions, the NPA, are all relevant Court stakeholders. It's a matter that requires all of them to sit together and see how they resolve it.

Commissioner Magwanishe:

Thank you very much, Judge President. I think when you were articulating your vision, you made mention of the issue of the welfare of the judiciary, but I thought you were very broad. In your experience of over 20 years, what do you think are the main issues that needs to be addressed that affect the judiciary, in terms of their welfare?

Judge President Mlambo:

Thanks for the question, Commissioner Magwanishe. I think one aspect has to do with the availability of appropriate tools of trade. When I talk about tools of trade I will talk about, when Covid hit, I was shocked that there were judges who had ten years or longer laptops, whose webcams were no longer operational. So, there needs to be proper system where once a laptop, just as an example, reaches its sell-by date, after three years, that it's replaced. Not depending on you asking for it. There needs to be a system that identifies that these tools are now obsolete, they need to be replaced.

I remember saying or Gauteng, we no longer want hardcopy calendars and diaries, because I said, you can use electronic diaries, that's on your laptop that the State buys for you. Why do you need an extra, so the budget for those things needs to be redirected to other needs of the judiciary? So, tools of trade is one aspect. I mentioned access to relevant law research engines. I mentioned the proper capacitation of the research

capacity that supports judges. Right? So that you alleviate judges from doing the initial research on their work.

Then there are the so-called soft issues. The so-called soft issues like our medical aid, to start with. I think it was Commissioner Shabangu-Mndawe who mentioned maternity benefits. When I took ... when I joined the judiciary, our medical aid *Parmed*... I was paying a third and the two-third was subsidised, but the situation now is the other way. I know that the EFF took a case, I don't know what's happened to that case, about challenging the *Parmed* arrangement. But it's a problem. Last year, in particular, there were a number of problems that were experienced by judges regarding *Parmed*. Like you go to particular medical service providers, you pay cash, you request a refund, you wait long, sometimes you don't get that refund. Those are issues that can be resolved, but we need to go back to basics and understand our benefit level regarding access to medical aid.

If you're bringing a younger Bench, that's a very relevant issue to look at and see how it's resolved. And there's then the vex issue of the salaries of judges. I mention it because it is an aspect that has been mentioned to me and I know to other Heads of Courts, that the way this issue has been treated, is dissuading people who may be interested in coming to the Bench, who won't come because of the salary structure, the salary levels. So, the unfortunate part is it's been a long time, that judiciary salary structure always enjoyed, goes through a review every eight to ten years. The last time the judiciary salaries were reviewed, was I think 2007, if I'm not mistaken. We are now in 2022.

I know that the Commission that's looking at the salaries of office-bearers, is still at it, but it's been long that it's been at it. I think it's a relevant issue that needs to be looked at. So, let me stop there, because I don't want to waffle along until I'm stopped that I'm talking too much. I just thought, let me mention those issues.

Commissioner Magwanishe:

Thank you, Deputy President. Thank you, JP.

Deputy President Petse (Chairperson):

Thank you, Commissioner Magwanishe. Commissioner Mmoiemang?

Commissioner Mmoiemang:

Thank you, thank you, Deputy President. Good afternoon, JP.

Judge President Mlambo:

Good afternoon, Commissioner Mmoiemang.

Commissioner Mmoiemang:

At the beginning of your vision that you presented to the Commission, you gave the context as a preamble to those seven pillars, and you referred it to also as scanning the environment. Now, the question that I want to pose related to that, relates to your seven pillars, where you said there is a need to rightfully assert the place of the judicial arm of Government along the other two arms of Government.

Now, the question I want to pose, but clearly with the commitment to strengthen of the judiciary along the same line as the executive and the legislative arm of Government, relates to some of the objections that was raised and how you dealt with it. Objection two from the PP, was requested to tamper with the panel that you had allocated to deal with one the matters that involved the Public Protector and you positively acceded to that request. The request to remove Judge Fabricius. Now, the question that I want to pose is, by so doing, was that not in conflict with the clear proclamation by Section 165 about protecting the independence of the judiciary. And can any litigant make a request, approach JP's office to say, I don't want this judge, can you replace him with this other one? Thank you.

Judge President Mlambo:

Thank you very much for that question, Commissioner Mmoiemang. In the request by the PP's office for me to consider removing Judge Fabricius from the panel, it's a letter I received from the PP's lawyers, legal representatives. They motivated a case that was well-founded to me in my assessment that there was a perception of bias on the part of Judge Fabricius, and it happens every day.

When a case, or a case is made out that this judge has expressed himself in this fashion, in this matter, it tells me as a litigant that I'm not going to get a fair hearing from this judge. It's a legitimate concern that I have to take onboard, and it was on that basis that I found that just perception, not that the judge was biased, but if it is raised with me, to avoid a full-blown recusal hearing, let me do it as requested and ensure that another judge replaces him. That does not interfere or threaten judicial independence. It's my function as Head of Court to be alive to requests of this nature when they come to me.

Commissioner Mmoiemang:

Thank you, thank you, JP. The second question relates to the point that was raised earlier on around the perception of biasedness towards the executive arm of Government. But clearly, with regard to some of the judgments, that that was presided over by JP.

The one that comes to my mind, that prompted me to pose this question to you, what is the difference between judicial overreach and judicial restraint because... other accuse the judiciary of being, of legislating from the Bench and there are instances where you expect the Court to give a line of march and then the Court takes a backseat. If you can just probably make a distinction between those two. But prior to that, let me just, because in the case of, that will make reference to when you responded, the Minister of *Finance v Oakbay* the Court refused to give a declaratory order that the Minister has no obligation and right to interfere in a relationship between a bank and its client, because the Court said that is a moot point. All of us know that the executive authority has the authority to tell the bank what is the position of the law.

If you can just make a distinction between judicial restraint and judicial overreach? Thank you.

Judge President Mlambo:

Thank you very much, Commissioner Mmoiemang. Judicial restraint is when the judiciary must be cautious not to stray onto the terrain, to exercise that restraint on itself, from delving into the terrain of another arm of Government, which would translate into overreach, if it happened. There are instances, and that's why the constitutional arrangement, I think in Section 172 of the Constitution, I may be mistaken, to say if there will a separation of arms, separations of arms harm, the Constitutional Court as the

highest Court is the one who needs to ensure that it has explored and a proper case has been made for it to go to the extent it goes to.

So, judicial restraint is simply to say, as a judiciary, we need to know that we police our boundaries and we are restrained in terms of not interfering with the affairs of the other arms of Government.

I think Justice Moseneke expressed his principle very aptly in the *OUTA* judgment where he reversed an interim interdict that was granted by the Pretoria High Court against the e-Toll programme. So, that's judicial restraint. And as I say, judicial overreach is where the judicial arm of Government, goes into the terrain of another arm of Government and actually starts dictating to that arm how it should go about doing its work, which is not allowed. The judiciary can't do that.

If it's called upon on review, to pronounce on probably the legality of some executive conduct or executive action, it needs to ensure that if it finds that it will set it aside. It cannot then, itself, say this is what should be done. It should defer to that arm of Government to do what it's meant to do. Let me stop there.

Commissioner Mmoiemang:

Thank you, thank you, Deputy President. The reason why I posed this question is in relation to the fact that earlier on you mentioned the *Al Bashir* case as one of the judgments that you listed as a reference point.

Judge President Mlambo:

Yes.

Commissioner Mmoiemang:

What would you say if one said that in that case of *Al Bashir*, given the fact that the AU had convened, the AU meeting, in South Africa. It was not a South African conference, but the AU had to use the venue of South Africa for the Heads of States to meet and in terms of Chapter 7 of the National Development Plan, it is categoric in terms of what guides the foreign policy of our country?

It says the gateway to the international or global world is through Africa and what is quite critical international interest as a starting point and in that situation, those South Africans signed that treaty, that put an obligation on South Africa to arrest Al Bashir, but given international interest, given the fact that the gateway to the ICC itself is definitely AU. Don't you think that the Court should have treated the matter with restraint? Thank you.

Judge President Mlambo:

Well, the Court didn't treat the matter with the restraint that you are articulating. I think the Courts simply focus on the facts before it. If you recall, Commissioner Mmoiemang, I'm trying to recall the facts of that case, the executive arm of Government tried to guarantee the immunity from arrest of visiting Heads of State based on a regulation, if I'm not mistaken. Now, the debate that raged on in the Court was, can a regulation, temporary as it was, override an Act of Parliament that has clearly spelt out responsibilities. And the Court felt, no, it can't. Because the Act of Parliament is very clear. We've signed this, these are the responsibilities we have as a signatory to the Rome statute, so I don't think there was any scope to exercise restraint in those circumstances. And in any way, the horse was bolted because the Supreme Court of Appeal upheld that judgment.

Commissioner Mmoiemang:

Thank you, thank you, JP. Thank you, Deputy President.

Deputy President Petse (Chairperson):

Thank you, Commissioner Mmoiemang. I make it five to four now and as I indicated earlier on, when I made my housekeeping announcements, we are required to adjourn at four, just before loadshedding kicks in, after which the IT team will reset things and then we can resume at half past four.

Can I appeal to the Commissioners who still have questions, to ask, I think about nine of them, to please streamline their questions and possibly not preface your questions with long preludes, unless it is absolutely necessary. Thank you, we will adjourn at this stage and resume at half past four.

Commissioner Mpofu:

Acting... oh sorry... [interferences]

Deputy President Petse (Chairperson):

Yes, Commissioner Mpofu?

Commissioner Mpofu:

Thank you very much, Deputy President. I wanted to ask you just so that I don't, I hear what you're saying, I thought I would try and make this follow up right at the end, but if we are running out of time, if you can just give me the remaining five minutes just to deal with something very quickly?

Deputy President Petse (Chairperson):

By all means.

Commissioner Mpofu:

Thank you very much. JP?

Judge President Mlambo:

Advocate Mpofu.

Commissioner Mpofu:

Yes, will take literally about five minutes because I'm going to pose it mostly as yes or no answers. You agree that two of the most serious scourges in this society, are corruption and gender-based violence?

Judge President Mlambo:

Yes.

Commissioner Mpofu:

Commissioner Madonsela asked you about allegations of corruption and rumours that you are biased in favour of Ramaphosa, President Ramaphosa, correct?

Judge President Mlambo:

Yes.

Commissioner Mpofu:

If that was true, if those rumours were true, it would be a serious and impeachable offense?

Judge President Mlambo:

Yes. If it can be proven and if they can articulate it.

Commissioner Mpofu:

Yes. And were you told before the interview that you would be asked that serious question?

Judge President Mlambo:

No.

Commissioner Mpofu:

Commissioner Cane asked you about rumours about judges taking brown envelopes or kickbacks, do you remember that?

Judge President Mlambo:

No, remind me please.

Commissioner Mpofu:

Well, she said when she and I were leading the Bar ...[intervenes]

Judge President Mlambo:

Oh, I see. Yes.

Commissioner Mpofu:

... there was an issue about judges taking kickbacks.

Judge President Mlambo:

Yes. I remember it.

Commissioner Mpofu:

Again, if that is true, that would be an impeachable offense, correct?

Judge President Mlambo:

If it is true, yes.

Commissioner Mpofu:

Yes. Were you told before the interviews that you would be asked that question?

Judge President Mlambo:

No.

Commissioner Mpofu:

And then I asked you about gender-based violence, allegations at least and again, if true, that would be impeachable?

Judge President Mlambo:

Yes.

Commissioner Mpofu:

Now, do you think that we will ever overcome the scourge of gender-based violence in particular if that issue is treated in such a way that it, unlike all the other serious issues, must be hushed and hushed and those rumours and if women, in particular, are suggesting that an issue of that seriousness should not be raised, so that you can clear the air.

Is that the correct approach?

Commissioner Cane:

Sorry, Chair, if this is supposed to be my suggestion, it certainly isn't.

Commissioner Malema:

But he never said it's your suggestion, he never mentioned your name. I'm not talking to you, *wena mahn...* I'm not talking to you. We are not going to harassed here by a journalist.

Deputy President Petse (Chairperson):

Commissioner Malema?

Commissioner Malema:

No, there's a journalist here, I don't know if she took her medication here or what. Every time we speak, she speaks here at the back. She must not do that.

Deputy President Petse (Chairperson):

I've noted.

Commissioner Malema:

Ja, she comes here with some white tendency, and she thinks she's superior than all of us here. I'm not going to take that from her! I'm not going to take that from her.

Deputy President Petse (Chairperson):

I've heard you, Mr Malema. I will ensure that that incident is dealt with appropriately.

Commissioner Mpofu:

Chair, can you protect me from interruptions of ...[intervenes]

Deputy President Petse (Chairperson):

I think the best, let's take an adjournment now because it's four o'clock already.

Commissioner Mpofu:

Well, unless I wanted to wrap this up now. If you are going to allow me to continue after ...[intervenes]

Deputy President Petse (Chairperson):

Sure.

Commissioner Mpofu:

I'd rather finish it now and get it over with.

Deputy President Petse (Chairperson):

Make it quick, Commissioner.

Commissioner Mpofu:

I promise, I promise, Deputy President.

Deputy President Petse (Chairperson):

Thank you.

Commissioner Mpofu:

In fact, okay, then I'll wrap it up in one question. Do you accept that questions about serious allegations which may be impeachable offences against a potential Chief Justice, must be put to that person so that they can clear the air?

And that does not mean that any of these persons, whether it was Commissioner Cane or Commissioner Madonsela or me, for that matter, subscribe to that issue?

I can put it out there that I don't think you are guilty of sexual harassment, but I will never be a party to the suppression of any allegations of such a serious matter as gender-based violence and I think it's only fair that you've confirmed that you were aware of these rumours before I raised them, correct?

Judge President Mlambo:

Yes.

Commissioner Mpofu:

And that is all that has happened here and ...[intervenes]

Judge President Mlambo:

What do want me to respond to?

Commissioner Mpofu:

No, I'm asking you whether you agree or not that you should be given an opportunity to clear the air if such serious allegations are around, yes, or no?

Judge President Mlambo:

I agree ...[intervenes]

Commissioner Mpofu:

Thank you.

Judge President Mlambo:

... that I need to be given the opportunity to clear the air but the issue, and you can't just restrain me, Advocate Mpofu.

Commissioner Mpofu:

No, I'm not.

Judge President Mlambo:

The issue is the fairness of that. If the Commission is aware of things like that, it's only fair that the candidate is warned beforehand to say these issues are going to be raised with you and when they are raised, it's only fair that these issues are documented properly from a member of the public or an identifiable whistle-blower. It's a question of fairness, Advocate Mpofu.

Commissioner Mpofu:

Yes. No, I accept, but that fairness only attaches to gender-based violence but not to corruption allegations?

Judge President Mlambo:

It attaches to everything.

Commissioner Mpofu:

Thank you.

Judge President Mlambo:

Ja. And for the record, the issue of the brown envelopes, I was misquoted by a radio station as saying judges were taking bribes.

Commissioner Mpofu:

I know.

Judge President Mlambo:

And that's why I force them to retract, because I never said that.

Commissioner Mpofu:

Sure.

Judge President Mlambo:

Thank you.

Deputy President Petse (Chairperson):

Thank you, Commissioner Mpofu. Commissioner Shabangu-Mndawe, you will have to wait until after our resumption at half past four. I'm afraid. Thank you. We are taking a 30-minute adjournment at this stage. Thanks.

[break 7:12:56.4]

[resume 7:39:44.0]

Deputy President Petse (Chairperson):

Before we resume with the questions, I just want to take this opportunity to make two announcements. First one, questions were put to Judge President Mlambo about rumours doing rounds relating to allegations of sexual harassment made against him. Although Judge President Mlambo elected to answer those allegations, and in fact refuted them, given the fact that he was not forewarned that those rumours would be raised with him during his interview, and coupled with the fact that we have nothing concrete by way of writing, submitted to the Commission.

It is my view that fairness dictates that we should not have regard to those rumours, so in effect, my view is that the questions and answers, questions posed to him and answers given by Judge President Mlambo, should be regarded as *pro non scripto* and be expunged from the record.

The second one is directed to the members of the media. I would like to make an earnest appeal to them to observe and respect the decorum of the sittings of the Commission. No one amongst them is entitled to make any utterances in response to or retort to what members of the Commission say during the proceedings. I hope that clearly understood and that I would not find it necessary to make this announcement again. Thank you.

Yes, Judge President Tlaletsi?

Judge President Tlaletsi:

Deputy President, on the first issue, you say you take a view, and I would request you to make it clear that it is your ruling. So that there should not be debated, it's only a view that you expressed, and you should not revisit this issue again. Thank you.

Deputy President Petse (Chairperson):

Commissioner Xaba?

Commissioner Xaba:

Yes, no, thank you very much. Indeed, any rumour that insinuates that women who were promoted to positions got there via sexual favours is offensive and objectionable. And I, Vusumzi Cyril Xaba, distance myself from such insinuation. It's regrettable that this was aired in this meeting, whilst without having primed the candidate that these matters were going to be aired in this meeting. In that way I support you, Judge President, when you say you must expunge this from the record. Thank you.

Commissioner Lucas:

Deputy President, can we call order?

Deputy President Petse (Chairperson):

Yes, please.

Commissioner Lucas:

You have made a ruling, and can we not discuss it further? If anyone is allowed to start a debate, everyone must be allowed, so can I request that your ruling be respected, and we close this part of the debate.

Deputy President Petse (Chairperson):

Thank you, Commissioner Lucas.

Commissioner Mpofu:

Sorry ...

Deputy President Petse (Chairperson):

There's nothing further to say except to emphasize that what I said earlier, in relation to this issue, is the ruling that I make.

Commissioner Mpofu:

Deputy President.

Deputy President Petse (Chairperson):

Commissioner Mpofu.

Commissioner Mpofu:

Ja, no, no, I'm supporting the fact that I think this matter, if we're going to have all these concurring judgments, it should be left to the deliberations, at any level. Let's just move on and we'll deal with it during the deliberations.

Deputy President Petse (Chairperson):

Commissioner Mpofu, I've made a ruling.

Commissioner Mpofu:

Yes.

Deputy President Petse (Chairperson):

There's nothing to deliberate on in due course.

Commissioner Mpofu:

Well ...

Deputy President Petse (Chairperson):

Commissioner Xaba?

Commissioner Xaba:

Deputy President, good afternoon and good afternoon to JP. JP, I just want to take you back to one of your pillars. You know, you spoke about the total independence of the judiciary. I must say, I cringed when you made to total independence because I know that ...[intervenes]

Deputy President Petse (Chairperson):

Commissioner Xaba, sorry to interrupt you, I just want to ask you to please raise your voice, some of us are hard of hearing.

Commissioner Xaba:

Oh, yes. Thank you. In your presentation, you referred to the total independence of the judiciary. So, I say, Judge President, I cringed, you know, because you see... because I know that there is no unanimity on the definition of judicial independence. And however, there is a common thread that runs through all the definitions, you know... that talks about how the judges are appointed, security of tenure, how judicial complaints are handled and how judges are removed from their position. And, but taking it to the level where you even suggest that they must develop, the judiciary must develop its own policy.

Do you think that is the best way of addressing what we have seen as the tension between or amongst the arms of State and the other believing that there is encroachment into its space? One also, the other as well, also saying, look, our independence is undermined, or we are being ... there's interference with our jobs or responsibilities.

Do you really, honestly believe that this is the best way of dealing with the issue of judicial independence, and self-governance as you put it in one of your documents?

Judge President Mlambo:

Thank you very much, Commissioner Xaba. I expressed a statement that's in the document that I referred to. I don't know if Commissioner Xaba has read it or if you've seen it ...[intervenes]

Commissioner Xaba:

It refers to self-governance and that's the document which is... it comes from institutional models committee.

Judge President Mlambo:

Yes. Now, I want to allay your fears that don't cringe when I say total independence. I think the road to wherever destination we want to go as a judiciary, will be the subject of engagement and discussion. That is a standard position, but one aspect. If you've read that document, is when we are in phase 2 and if we go there as currently drafted in the document, the way we account is dealt with there. That is, we will account in the same way as the Auditor General accounts, that there's a special select committee that the judiciary will account to. Now, and that will be accounting to Parliament.

So, that's one aspect that you say in the current model, the way it's crafted, that's how we're going to deal with accountability. So, it doesn't suggest, when I say total independence, because I thought that's the language I saw in the document, that says the road to, or it says complete independence, I think that's what it says. It says complete independence, judicial independence, that is jah! But it doesn't mean that we are unaccountable, we will be unaccountable. We'll have to find a way to account and, in any way, that's on the table. It's a position that we have adopted as members of the judiciary. And I don't think it can be taken as the final position. It's not.!

So, maybe let me stop there and see if you are satisfied with what I'm saying, or whether we can take it further here.

Commissioner Xaba:

Well, I'm satisfied when you say that you took it from the document, which is now a stated position of the judiciary.

Judge President Mlambo:

Yes.

Commissioner Xaba:

But just to take the question further, so that I understand the document. Does it in any way give examples of jurisdiction where there is total separation between or amongst the different or the various arms of Government?

Judge President Mlambo:

Yes, by all means. Because this study was in-depth research and good practice as they call it in the document. Examples were cited in terms of countries that have this model.

I can't remember them offhand, but they are mentioned in this document, yes. There are countries that have the model.

Commissioner Xaba:

No, thank you very much. My last question to you, you spoke about a functional judiciary that has lived up to the promise of the Constitution. Is it the view of the judiciary as a whole, that the South African judiciary, the confidence in the South African judiciary, is on the decline?

Judge President Mlambo:

I was mentioning on indexes that are published about the views and about the performance of the South African judiciary when I said I did an environmental scan. But overall, Commissioner Xaba, I listen to radio stations, a number of them and not only the white, so-called white radio stations, I listen to so-called black radio stations, and you hear disturbing comments from members of the public about perceptions they have, right, about the judiciary. Say this is a corrupt judiciary.

'I had a case on that date, the docket vanished, or this is what happened to me therefore this judiciary is not delivering'. It's a common thing. And I was talking to that, and I'm being honest, because it worries me as a member of the judiciary, to say if this is a

perception from out there. Something drastic needs to be done, to make sure that we present the correct picture and if there are aspects that require attention to make sure that we restore that confidence in the judiciary, to the levels that are in our view acceptable.

We should do that. So, that's where I come from. It could be perception; it could be there are real facts. I mean, if you mention the maintenance area, Commissioner Xaba. It's a matter that is of concern nationally that Maintenance Courts are not serving their purpose and clearly, with a situation like that, there cannot be confidence in members of the public who have not accessed justice there, that the judiciary is performing, because they have experienced non-performance of the judiciary.

Commissioner Xaba:

Thank you very much. The other questions have been covered, President. Thanks, JP.

Judge President Mlambo:

Thanks, Commissioner Xaba.

Deputy President Petse (Chairperson):

Thank you, Commissioner Xaba. Commissioner Nyambi?

Commissioner Nyambi:

Thank you, Deputy President. Afternoon, JP Mlambo?

Judge President Mlambo:

Good evening, Commissioner Nyambi.

Commissioner Nyambi:

Oh, it's evening?

Judge President Mlambo:

Oh, good afternoon, sorry, it's not five o'clock yet.

Commissioner Nyambi:

Thank you. How are you this afternoon?

Judge President Mlambo:

I could be better. I had a cup of coffee so... It's perked me up a bit.

Commissioner Nyambi:

Let me start by commending you for being able to have, be the one leading the establishment of the Limpopo and Mpumalanga Division, probably somebody who is running the busiest division in our country. If you can just share with us that journey, how are you able to balance that?

Judge President Mlambo:

Thank you, Commissioner Nyambi. I think I realized, and I made this point when I was interviewed for the position of Judge President of Gauteng, that I will not shy away from dirtying my hands in ensuring that the program of the judiciary happens.

The Limpopo Division building project had come to a standstill. For a number of years before I took over and as I said, when I address the law societies or law professions in those provinces, I told them that my program is to work myself out of the job of being responsible for these provinces. They must have their own High Court and their own Judges President. That's what I mentioned!

The starting block was, to say to the professions in Limpopo, because there was a building, the old Regional Court structure that was used there, to say, instead of sending one judge once every ... one week every six weeks to attend to whatever civil work is there. I will send them permanent capacity, every term, that there will be a judge for the ten weeks of the term, not judge, not one, two. And there was a special roster in which the work would be done. That was to say to them, stop sending your work to Pretoria,

issue here and your work will be heard here. So, to start saying to them, access to justice. The twin objective was to engage the Department of Public Works and the Department of Justice, to say, let's put this thing back on the project. What happened? The contractors have left the site, what are the issues the contractors and all those things, just to make sure that building starts.

I remember that when the tender was re-awarded, it was re-awarded, I think to a company called Group 5, we're not involved as the judiciary in all those things. My interest was to see progress and I used to go there to go on site and they used to ensure I wear safety clothing. I could share with you the pictures of me wearing the *macarapas* and the overalls, just to go and see if things were happening. That's my way of ensuring that things happen. Right?

So, with Mpumalanga as well, when I talked to them, look you'll have a High Court, they laughed at me. They say, *'you're joking, we'll never have a High Court in Mpumalanga'*, but it's happened. So, it's a question of being committed to make sure that you achieve this and when I handed over to JP Magoba, I said *'thank you very much, objective achieved.'* Last one is Mpumalanga, and when I handed over to JP Legodi, was I happy to say *'I'm now going to stay in Gauteng.'* So, that's what I can say about why ... it was total commitment to ensuring that each province must have its own High Court. Functional, running, and granting access to justice to people of that province.

Commissioner Nyambi:

Thank you, JP. As you have explained the current challenges in terms of maintenance of those beautiful buildings, if you can be given the opportunity and be a CJ, what will be your immediate solution to those challenges faced by those beautiful buildings in these two divisions.

Judge President Mlambo:

Thank you, Commissioner. I think the issue is, and that's the reality. As the OCJ we need to work through the Department of Justice which then goes to the Department of Public Works to ensure that these huge infrastructure projects find traction. That's how it works! And the first port of call, of course, is to ensure that there's an engagement with those departments and I can assure you that in the PEEC structure that I chair, in Gauteng, I mean, the Pretoria Magistrate's Court was burnt. When they were repairing it,

they stopped and mould developed in the roofing level. The Mamelodi Court was on standstill for many years. These are real infrastructural failures if one may call it that. So, as Chief Justice, I'll have to energise it and that's why I think, because I've seen that the question of pushing officials to do what they must do, it's a function of ensuring that leadership is committed to making sure that officials do what they must do. So, PEEC has failed in Gauteng.

They've tried, they've given up. Soweto Court for some six months operated without water, because they were sharing water with the police station next door. The Court would only sit for about two hours a day and if you went there after the Court is adjourned, you wouldn't last five minutes because of how it smelt. I had to say to Acting Chief Justice Khampepe, '*please intervene*' and they came to the party, and they solved the water issues.

So, I'm saying, it's a question of engaging the relevant stayers, that's why I said, the NEEC, where the Director of Public Works, Director General of Public Works will be there. The Director General of Justice will be there. Sector-General of OCJ will be there, to say you are the executing authorities.

Give us the project execution plans and we will hold you liable if you don't meet your targets. So, that's the way to go, because if then there's a failure at NEEC level, that's when it will be go the meeting of the leaders of the three arms of Government.

Commissioner Nyambi:

My last question, it's your view on law as a tool for social and economic justice?

Judge President Mlambo:

Yes, it can play a very meaningful role in that regard. I can cite examples internationally and here at home that law can be used as a tool to advance socio-economic justice, I agree.

Commissioner Nyambi:

Thank you, JP Mlambo. Thank you, Deputy President Petse.

Deputy President Petse (Chairperson):

Thank you, Commissioner Nyambi. Commissioner Mapisa-Nqakula?

Commissioner Mapisa-Nqakula:

Thank you very much, Deputy President. Good afternoon.

Judge President Mlambo:

Good afternoon, Madam Speaker.

Commissioner Mapisa-Nqakula:

Judge President Mlambo. Are you okay, though?

Judge President Mlambo:

Under the circumstances, I'm trying to be okay, Madam Speaker.

Commissioner Mapisa-Nqakula:

Thank you. Now, the last ... the first question was the last part of Commissioner Nyambi, which I wanted to raise with you. The next issue is a matter which we have really been talking about, all of us here, which was raised even yesterday about the fact that the judiciary does not have a sexual harassment policy... anti-sexual harassment policy and this afternoon, or earlier on you raised it and you said in fact, the only Bar which has it is the Western Cape Bar. Am I correct?

Judge President Mlambo:

Yes, and I also mentioned that in the Gauteng Division we have a sexual harassment policy.

Commissioner Mapisa-Nqakula:

Okay, alright. The issue I would like to ...[intervenes]

Judge President Mlambo:

Sorry. Sorry, to disturb you. The Cape Bar policy I mentioned is a maternity benefits policy.

Commissioner Mapisa-Nqakula:

Maternity benefits, even that, I think, JP. We should urge you that in the event you were to be appointed, that you would ensure that this maternity policy is not just a maternity policy for the Western Cape, it should be across the country in the entire judiciary, not just maternity but also paternity.

Judge President Mlambo:

Yes.

Commissioner Mapisa-Nqakula:

Yes. Now, the next issue which you raised quite earlier in your submission, right at the beginning, before you even outlined the seven pillars, you raised a matter which I thought I should take further with you and just seek clarity as to whether it has impacted negatively in your work as the judiciary and that is the, you mentioned that the environment is toxic at times and the political space is polarized.

Judge President Mlambo:

Yes.

Commissioner Mapisa-Nqakula:

Have you felt the impact of this and in what way? I think it would be interesting for me because you are correct. It's a toxic environment. Yes, it's a polarized political space, okay? But I want to hear how it impacts on the judiciary and your work as the judiciary.

Judge President Mlambo:

Thank you for that question, Madam Speaker. I think, let me refer to one example that illustrates why I'm talking about that. When we had the July problems of looting and whatever.

You will recall that there were threats that were made online and in voice notes against the judiciary. And there were threats made that the Courts were going to be burnt down. I am the head of a division that has many judges. Some of them, female single-headed and run and judges called me to say '*JP, we feel threatened because some of the voice notes say we know where these judges live.*' Another example, and I'll mention it because you've asked me the question, and this goes deep into like judges' wellness and judges' security.

When the judge who had the former President's case here, Judge Matojane, I'll mention him by name. You will remember, after the ruling, that there were vicious threats issued against him personally. I don't know how many times I had to speak to him and assure him, because he was really worried.

We even got SAPS to go and make sure that they keep vigilance around him. Because the threats issued against him, were seriously worrying. Now, this is the impact. If judges are going to feel that level of threats against themselves personally, what do you think they will do when they get confronted with these cases? Doesn't that erode their independence and impartiality? Are they not going to start ruling in a way that says they're not going to be threatened? It worries me! It worries me deeply!

And I think as head of the judiciary, if I'm appointed, it's an issue that needs to be emphasized because these threats mostly have got political undertones. That's why I said political. Polarized political arena because that's where they come from.

There needs to be serious discussion by the leadership of this country to say how do we effectively deal with this because you can't just let them say '*no, these are hotheads, just talking, it's not going go anything.*' It erodes our own confidence as judges that we can do our work without fear, favour or prejudice.

I just thought, let me give you that one example as to the effect on us.

Commissioner Mapisa-Nqakula:

Thank you very much, Judge President. And then there was another matter which you raised, another matter which you raised which I found very interesting and that is the perception of South Africans on the Constitution of the Republic of South Africa. How would you deal with that?

Judge President Mlambo:

Thank you for the question, once more, Madam Speaker. I raised it, you will remember, Madam Speaker that when there were the Fees Must Fall campaign, almost every student leader said this Constitution has not served us and some of them went as far as suggesting that former President Nelson Mandela sold out.

We are live to these, we hear them, and it worries us because this is a document that was achieved, as I said earlier, out of the sweat and blood of a lot of people. So, if there are people who will feel that this Constitution has not delivered and it's not delivering, it should worry any South African and we should explore in what respects it hasn't.

And sitting from where I sit, I think there is some credence to, not saying the Constitution has failed, but to say the delivery of some of the constitutional promises has not happened. And it would be justified in certain sectors. I mean, someone was saying the other day, Ms Grootboom, who got the Constitutional Court to affirm her right to housing, died without getting a house. Those are constitutional failures, and they can be only ascribed back to the Constitution as not delivering. So, I was talking about that, just to contextualize.

Commissioner Mapisa-Nqakula:

Thank you very much, judge. My last question, 7.1 pillar... 7.1, where you mentioned the need to ensure that there's a strong accountable judiciary. And I've been thinking about this, because how will you do it as the Chief Justice of the Republic of South Africa. How will you ensure that this accountability happens?

Judge President Mlambo:

Thank you for the question again, Madam Speaker. We do have accountability measures as we speak in terms of the judiciary – Annual Judiciary Day. Where we tell the South African society what we've done in that annual period.

But what worries me is, it's one thing to tell the South African public that we've had so many matters, but it took so long for these matters to be finalized. We have so many judges that have reserved judgments for this length of period. We're telling them but accountability says, what are you doing about it.

And as Chief Justice, if I'm appointed, I've said there should be consequence management. There's no consequence management against judges who reserve judgments for very long periods. And that's another area that erodes confidence in the justice system. If you wait for a judgment for two years, when it comes, it's already academic in certain instances. So, I'm talking about accountability to that extent if I could give you that example.

There are other examples I can cite.

Commissioner Mapisa-Nqakula:

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

Deputy President Petse (Chairperson):

Thank you, Commissioner Mapisa-Nqakula. Commissioner Malema?

Commissioner Malema:

Thank you very much, Deputy President and good afternoon, JP.

Judge President Mlambo:

Good afternoon.

Commissioner Malema:

I was very happy when you spoke about the Court in Soweto, and Soweto has got a huge population and that population is even bigger than many other neighbouring countries. Shouldn't Soweto get a High Court of its own? Based in Soweto to service that big constituency which some of it is bigger than some of the countries next to us as part of your plan to make judiciary accessible to our people where people can just go and litigate in High Court, without getting a taxi or anything. They just walk there and they get matters listened to and attended to without spending too much money which they don't have.

Soweto has got as well a mixture of different classes of society, which litigate all the time. I mean, if you were to go to Johannesburg High Court, a lot of people you find there come from Soweto. And not only Soweto, per se, you've got the suburbs as well on the south, which can also litigate in Soweto.

Have we not reached a point where we must establish High Courts in areas like that, to deal with apartheid spatial planning? Because for us to resolve matters through the Court, we must go into some white establishment. Because that's where Courts are found, as part of making our people access ... I'm giving Soweto as an example, as part of making people access justice.

Judge President Mlambo:

It is, thank you for the question, Commissioner Malema. Yes, it is an access to justice gap that we continue to use apartheid infrastructure, as you say.

The High Courts were planned to be in Johannesburg to service large areas or areas that have big concentrations of persons who are sued in the High Courts. So, it would happen, and you would be interested to know that when I took over as JP, for about two years I would send judges to go and sit in Soweto, to go and actually hear cases in Soweto.

I did that but I had to stop because the Magistracy leadership says '*JP, when we give judges space to work here, we're actually pinching ourselves, because there's actually no space, right?*' So, you ... that point I agree with totally. But the issue is, there's a to-ing and fro-ing in terms of finding land to build the Magistrate's Court, you know? But if the land, I mean, the City of Johannesburg, must have land that it can identify for this purpose.

And it could combine to say you will have the Magistrate's Court there and the High Court there, because in other countries it's like that. You walk this way, that's the lower Courts, that's your Magistrate's Court. You walk this way, that's the High Court, in the same premises, so I agree with you.

Commissioner Malema:

On a different matter, JP, in line with transformation. Shouldn't we bury our heads in shame that 30 years into democratic society, almost, we have never had a Chief Justice who's a female or even a Deputy Chief Justice who is a female? And when we talk female, we talk exactly what other Commissioner spoke about, people who come with the necessary qualities. Who have always been there since the dawn of democracy, yet we have not find it in our own wisdom, to appoint either a female Chief Justice or a female Deputy Justice?

Shouldn't we bury our heads in shame as people who are proponents of judicial transformation?

Judge President Mlambo:

Transformation is a journey, Commissioner Malema. It a journey, sometimes some journeys are slower, and some have reasons why they are slower. Yes, we've not had a female Chief Justice or a Deputy female Chief Justice. We've only had them at an acting level at some stage. I make that admission unreservedly but as to whether we should bury our head in shame, I'm not sure I can go to that extent.

But I agree with you, yes, we should find a way of ensuring that we push transformation in line with the constitutional dictates.

Commissioner Malema:

When I say burying our heads in shame, I mean, can we like now in a public platform declare that we are not proud of that, it's a regrettable development taking into consideration what you are saying, that it is slow. I don't know why it makes it slow when it comes to women.

It didn't become slow when it came to African men because we know it will come from a white-dominated society but men just came in, it was not slow for them and all of that.

So, burying our heads in shame, I simply mean we are at a point where we must not be very proud that we are almost 30 years into democracy and we have never produced neither a Chief Justice who is a female and a Deputy Chief, it's not a matter we can be proud of.

Judge President Mlambo:

The question is, should we make a declaration that we have failed? I don't understand the question.

Commissioner Malema:

We were failed and if we don't want to go there. We are not proud of this account that as leadership of the judiciary and as the Commission and as proponents of transformation in the judiciary, we cannot sit here and be proud that almost 30 years into democracy we have never produced a CJ or DCJ who is a female.

Judge President Mlambo:

As I said earlier, the journey has been slow in terms of achieving that particular milestone. Kenya has a female Chief Justice for the first time, but it took them more than double the time we've had since our democracy dawning to have a female Chief Justice.

So, these journeys are slow. That's, I'll give you that answer.

Commissioner Malema:

So, appointing you with all the qualities that we have, which I do not question, and I agree that you are one of the fine brains our country has produced. So, appointing you as a Chief Justice, in terms of transformation, which box are we going to be ticking and say your appointment is an advancement of transformation in the judiciary?

Judge President Mlambo:

Well, my answer is, we all bring different qualities to this body. And it is those qualities that must be looked at to find a candidate who is relevant and suitable at this time, to be the Chief Justice. And that's why the President has shortlisted four of us.

So, I'm saying, I am a candidate, I bring my own expertise. I'm a judge, a Head of Court in my own standing like President Maya says, don't look at her as a woman, but look at her as a judge. As a Head of Court. Look at me, I bring my qualities and I'm saying, I have advanced transformation, especially gender transformation in what I do.

I've shared statistics about the efforts I've made at bringing an appointing more women to the Bench. The question should be, in all those qualities and our transformational thinking about how things can be done, who is best suited at this time to be appointed Chief Justice to continue on that transformative journey. And that's the answer I will give you.

Commissioner Malema:

JP, unfortunately, you're not giving me an answer, you're giving me a question. Because in your concluding statement you said, the question should be and that's not an answer. Me and you we sit in this body, and we fight a lot with a lot of people including Heads of Courts about ticking boxes in the transformation.

I agree you've got all types of qualities that no one can dispute. But I'm asking you to help me so that when I go into the deliberations and eventually you are appointed, we can stand proud and say *'in terms of this form of transformation, the appointment of JP Mlambo ticks this box and that's how we came to a ... in line with transformation.'* Not the qualities, the expertise that you bring. That I agree, I'm going to consider that in the debate. But as a person and a proponent of transformation, I want to be persuaded in terms of the transformation agenda as to, in the support of your appointment, which agenda in the context of transformation will I be pushing. Which box am I ticking when I say, here is JP Mlambo, the new Chief Justice of South Africa, appointed and he's going to advance, or his appointment is an advancement of transformation?

Will your appointment tick any box in the form of transformation?

Judge President Mlambo:

The President will make that call if my appointment ticks the box. I think, Commissioner Malema, the issue is whether, in terms of ticking boxes, whether the qualities that I bring, the experience that I bring, at this time of the South African judiciary, whether it is the right mix that is required for a leader of the judiciary.

That's my answer, I can't take it further than that.

Commissioner Malema:

Ja, but, then it means we must leave, because you're saying the President will make a call and we are sitting here asked by the President to come and help him to choose the best and we are being excluded in that process that the President will make that call, if I'm making the right transformation appointment.

I'm just saying, JP, I'm going to argue that in your answer to this question, then you exclude us and said '*no, leave it to the President*' when we also have a duty to recommend to the President a proper, suitable candidate who tick all boxes including the box on transformation.

On the separate issue ...[intervenes]

Judge President Mlambo:

Can I respond to that?

Commissioner Malema:

No problem, sir.

Judge President Mlambo:

Thank you. Commissioner Malema, I'm not excluding anyone. The President nominated me to be interviewed for the position of Chief Justice. That is not a simple thing. His expectation of the JSC is to look at the four persons he has nominated and for the JSC to tell him that in our view, we have looked at these things, at all these qualities, we have looked at the current context where we find ourselves. We have looked at whether all the boxes will be ticked, transformation and everything. We know that this one has done this,

has done this, has got this. In our view, this is what we think, having interviewed this candidate.

So, I'm not excluding you, it is correct. The President will make the call at the end of the day, but he has consulted the JSC to assist him in that process. So, I'm not excluding the JSC.

Commissioner Malema:

JP, you've done very well with regard to case management and making sure judgements have been made, delivered on time, and judges are being held accountable when there are such delays. In the, where I come from, in the EFF, there is what we call seven non-negotiable cardinal pillars. So when you said seven pillars, I was like, '*what's happening now.*'

So, I didn't hear you taking us through about what you are going to lead in the immediate which is the Constitutional Court. What are you going to do at the Constitutional Court, one? Two, what are you going to do to make sure that the Constitutional Court delivers judgments on time? Because the way they deal with cases there is completely different from how you deal with them at the High Court.

You've got so many judges sitting on one matter, and they must all be making those, you know, inputs and all of that, and colleagues asking for extensions and, and, and... And as a result, the matters just get delayed and we never get to actually get judgments on time. So, I want to know, what are you going to do to make sure that Constitutional Court delivers judgments on time? There was a matter that was so embarrassing of that review that Dali did on Zuma's case in the Constitutional Court. What do you call it?

Judge President Mlambo:

The rescission application.

Commissioner Malema:

JP, the country got so excited, lawyers were told Friday, submit this on Sunday and then by Monday the matter was heard, so everything had to be done within two, three days because it was done by other people. When now the Court heard the matter and was supposed to deliver a judgement the same way they were making people run. The Court

just took forever, and the country was burning, and we thought that judgment was going to help us, you know, resolve the problems we were confronted with, as a country.

The matter by its own nature, was extremely urgent, which would have required ordinarily judges not sleeping because there is this issue that the country is confronted with. Even with that practical evidence like you said you listen radios, you can see, no, it took forever to be delivered.

What are you going to do as a new Chief Justice to make sure that the Constitutional Court delivers judgments on time and what is it that need to be fixed to make sure that also the Constitutional Court delivers judgments on time?

Judge President Mlambo:

Thank you, Commissioner Malema. Let me start by saying, in my seven pillars, when I dealt with pillar number four, I mentioned that the way the Constitutional Court works has to be looked at. I didn't go into detail, but it's there. And now that you've asked me the question, I worked for five years at the SCA and I want to use that example.

The Supreme Court of Appeal, when you go home on recess, you go with your boot full of records, so that when you come to the term, you are ready to run and hear matters and when that term ends, you must have written all the judgments emanating from the hearings of that term. I think one, that's the best example, that's best practise. A best practise example that I can cite and there's a reason how the SCA does that. When you go home, you know which matters have been allocated to you to scribe. It's like that in the Constitutional Court.

And, when you hear a matter, after you've heard the matter in the SCA, all of you go to the presiding Judge's chambers, to debate the outcome of the matter, how you see the case, in terms of the facts and the law, you debate it, at the end of which, if there's a unanimous agreement about we're going that way, a scribe goes and writes in line with that. And if there's a dissent, the dissent, he will wait for the majority judgment to come, but it doesn't mean he'll wait and do nothing, because he has heard the views, right?

So that when the majority judgment is circulated, he will see if he still wants to dissent or whether he has become persuaded, but that process is not allowed to delay the handing down or delivery of the judgment.

In the Constitutional Court, I am told, I've not presided, I was supposed to be in court today, but I'm in Court here. But I'm told that the issue of retiring to the senior judge's

chamber, or the most senior presiding doesn't happen, you must write a post-hearing memo to all the colleagues, saying this is how I've seen it. And then, you'll pardon me, because this is what I've heard when I ask, how do you guys come to judgments.

My view is that this in itself will result in delays. The post-hearing memo, then there's a debate on email everything, then there's a conference held, probably a week or so or two weeks after the hearing. Then there's debate, then there's a view to say okay, I agree with the direction but I don't agree with this reasoning and whatever, and then you find that separate concurring judgments start germinating. By the next time you look, from the date the matter was heard, it's easy for two months to have come and gone without any realistic prospect of a full judgment seeing the light of day in the next month or so. That's what I think, Judge President Tlaetsi sat there, he finished last week, he can correct me where I'm wrong. But as I'm sitting here, I see emails where judges express views about drafts that are still doing the rounds. And you can check when those matters were heard. I think as Chief Justice it calls for a necessary discussion as to whether all these roundabout ways, of ensuring that the judgment is quality, cannot be short-circuited. I think that's one thing that I will engage colleagues to say *'guys, this is not on. Let's see how we can do better in this regard.'*

And talking about an urgent matter, you know, we run divisions where we've got an urgent roll. A judge who hears an urgent matter knows that a judgment must come out within a week. Under all circumstances, and he would have heard the average number of matters in the Urgent Court in Gauteng, is about sixty a week. That's a lot, but we still try. Some of them take longer than a week, but we understand the matter is urgent, it needs to be dealt with. I can't compare the High Court and the Constitutional Court. But I'm just saying, a serious rethink of how they approach judgment writing in that Court, has to be undertaken to ensure that there's remedial action taken.

Commissioner Malema:

I'm rushing my ten minutes, I wanted to converse that point, but let me go to a different point.

Former CJ Mogoeng Mogoeng once said we shouldn't reach a point where when matters are sent to that Court, and they are sent to so and so, we already know where the direction of the matter will go. Have we not reached that point with Pretoria High Court where we already know, if this one goes there the judgment is going to go the other way? Perception is everything in the judiciary and that's a perception held in a lot of quarters

that once the regime goes to Pretoria or you take the regime to Court in Pretoria, you're guaranteed the establishment is going to win. And this, I couple with this research that was presented to other candidates that people have lost, people are losing confidence in the judiciary.

And one of those things that makes people lose confidence in the judiciary, is the obvious outcome that we know. If these ones go there, they are going to win, it's a given. What are we going to do to change that, especially when you are leaving a division with such a perception and going to assume a much more bigger responsibility? What plans are there in place? I'm not talking rumour, I'm talking perception.

Judge President Mlambo:

Yes.

Commissioner Malema:

Yes, where people just like ah, Pretoria. Some of us even know that if we win in Pretoria, we jump like school kids, because we've already concluded, that we won't come back alive.

So, what do we do to deal with such a perception, JP?

Judge President Mlambo:

Thank you for the question. I think, let me start by saying, it's unfortunate that such a perception is doing the rounds that Gauteng Division in Pretoria is executive-minded. It is not executive-minded! The cases that come to us with particular facts dictate to us as judges how we rule on those matters. It is unfortunate that people think, if you go there, you're going to go this way. You said it yourself, if we win, we jump like school kids. So, it doesn't mean you lose everything, does it? It doesn't mean that. So, it is unfortunate that such a perception is there. It is an unfounded perception.

It's a question of educating the public in understanding, like the exercise I went through this morning, in explaining the State capture judgment and the CR17 judgment. If you back down those facts to their bare essentials, I didn't, we didn't flip-flop.

So, it is unfortunate that people think that. It's not like that. And in any way, it's not only in Pretoria that such results are found. Even in Joburg. Even in other divisions, you know? So, you can't say that if, say the case of former President Zuma comes to the Western Cape High Court, he will win but if he goes to Pretoria he will lose. You can never say that because it's not like that.

Commissioner Malema:

That's the impression I have that if he goes to Western Cape, he's likely to win.

Judge President Mlambo:

Can you tell me one that he won there?

Commissioner Malema:

The last question, JP, before the ... Acting Chief Justice called a press conference to respond to a political statement or a political article.

Judge President Mlambo:

Yes.

Commissioner Malema:

Do you encourage that? Don't you think that descending into the arena compromises the judiciary because I come from a school of thought that suggest such articles, Ministers who are responsible for judiciary, are better placed to venture into that space. That's why there is a political head, if you want to say so, who looks after the judiciary and accounts for its activities, politically and otherwise in the form of a minister.

Now, when we've got judges coming to debate political issues that are raised by politicians, and also critiquing the Constitution and the performance of our Courts and judges and all of that.

Do you think it was a wise move for Acting Chief Justice to do so and in the same spirit, the Acting Chief Justices says he consulted before he did a press conference, that's what he said in the press conference. I want to know if you were consulted and if you were consulted, what was your view before he went to the press conference?

Judge President Mlambo:

Thank you, Commissioner Malema. It is correct, we were consulted as Heads of Courts and we were given the full text of the article written by the Minister. And in consulting us, the Acting Chief Justice said he is minded to issue a statement to rebut the allegations made against the judiciary. And he invited us, those of us who were so minded to provide him with content that he would put in the media statement that he would issue.

I'm one of those Heads of Courts who responded and say we agree that you can issue. I agree, you can issue a media statement and I also suggested some part of what he could say in the media statement.

It was his decision, the Acting Chief Justice, to decide instead of issuing a statement, he'll hold a live media briefing. It was his and I want to suggest to you, Commissioner Malema, that there comes a time when you are a leader of an institution when you must take a decision and you take a decision whatever form it comes. He took that decision and I cannot fault him. If that's what you want from me. If I would have done that, that's a different question because it's happened, but I'm with him all the way in taking the decision to do what he did.

And by the way, it's not the first time that it happened. You will recall that a few years ago, when a lot of statements were being issued by faceless people that judges were paid R200 000,00, R300 000,00, whatever. Chief Justice Mogoeng Mogoeng convened the media briefing and addressed the media about that issue. So, there comes a time, sometimes, when a Head of Court or the Head of the Judiciary, finds it necessary to take such action. So that's my response. Thank you.

Commissioner Malema:

When appointed as CJ, we are likely to see you in press conferences, exchanging with politicians?

Judge President Mlambo:

I said, in answer to the question, whether I would have done it the same way is a different story.

Commissioner Malema:

I'm now putting it to you?

Judge President Mlambo:

Not necessarily no. We have a communications policy, I'm sorry, I think you were still asking me?

Commissioner Malema:

No, no, I'm done, I'm with you, JP.

Judge President Mlambo:

We have a communications policy in the Office of the Chief Justice and the judiciary, I chair that committee and it is clear that whenever there are issues that arise, say about a particular Court, we source, the spokesperson contacts the head of that Court and sources the response and then provides a response. Mostly it's media statements.

So, it is, during the Matojane saga, when a lot of things were said, he as Judge Matojane wanted and implored me to say issue a statement or call a media briefing. I discussed it with the Acting Chief Justice and we agreed that '*no, we will be giving oxygen to this thing.*' Let's not do that, it will die down. And we persuaded him.

So, I'm saying, I will make a judgment call depending on what comes out and by the way, our consultation by the Acting Chief Justice was about that part that I also felt was offensive to us as the leadership of the judiciary. To be labelled house niggers, spittle of the master classes, you name it, colonized minds. That's not criticism, it goes far deeper than criticism. It's offensive and that's why I say I'm with the Acting Chief Justice in the position he took.

Commissioner Malema:

The last question, last, last, last. Are judges allowed and if they are, how does that help enhance the good image of the judiciary, for judges to visit politicians in their houses? And when that matter is exposed to the public, and judges are asked, what were you doing in a politician's house and a judge says, *'we're discussing a matter of national importance'*, not readily available to divulge what were you doing in a politician's house, which suggests that a judge might be having some secrets with a politician. Which is different when you go and meet the Minister of whatever to discuss the issues of maintenance of Courts and all that. When you are asked, you say *'No, I met the Minister of Public Works, we were discussing maintenance of Courts because Polokwane Court is collapsing and Mpumalanga Court is collapsing, so I saw the need to meet them.'* The same way you said, voluntarily here, I've met Standard Bank because I don't know if it was my place or not, but I felt I needed to engage them on their briefing patterns. If someone comes and says, you met the CEO of Standard Bank, what were you doing with them, you are able to say, *'I met them because their briefing patterns got me worried, but I realised, it's not something I should continue with it.'* That's being transparent and open. Now, you are told as a judge, you went to meet a politician in his house, please confirm, you confirm. What were you discussing? *'No, it's a matter of national importance.'* Leaving the nation to speculate and when we start speculating and making those unfounded allegations, you come and say the judiciary is being attacked. Do you think it's an acceptable thing for judges to be visiting politicians and having some confidential discussions with politicians which cannot be shared with the public?

Judge President Mlambo:

I don't agree with that. In my book that is not on. It should not happen. And it's some of the issues we discuss in judges' meetings. I can tell you, Commissioner Malema, that I have had judges approach me to say I've been approached by this person, he says *'He's sent by that Minister to say they want to meet with me. To discuss what? Well, to conscientize me about how we should rule in matters'* and I said, *'you don't touch that space. You don't touch that space.'* So, if a call comes to me to say *'I would like to meet you, say from a Minister, I say okay, explain to me what are we discussing. If it's an agenda that I don't have a problem with'*, I say *'where are we meeting. Is it appropriate that we meet there, why don't we meet there?'* Right? And so that when you are asked why did you meet this Minister, you say we met to discuss the following things. To say it's

a matter of national importance without disclosing what it is, makes it even worse. So, in my book, I don't agree with that.

Commissioner Malema:

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

Deputy President Petse (Chairperson):

Thank you, Commissioner Malema.

Minister Lamola:

Follow up.

Deputy President Petse (Chairperson):

JP Tlaetsi was the one to first indicate, Minister, if you will bear with me.

Minister Lamola:

Thank you.

Unknown Speaker:

Me too, follow up.

Judge President Tlaetsi:

Thank you, Deputy President. JP, I'm sorry, I will just take you back, I didn't want to disrupt Commissioner Malema's trail of thought by following up on this aspect. You touched on something that I believe is quite important which is Section 174 (3) where you say the President is consulting this body.

Now, I want your view, given the experience you have and that you've been serving on this body, on what is the President expecting from this body through this process? I mean, it's for the first time to start with that this process takes place and we've got more than one candidate.

And if I may remind you of Section 174 (3) of the Constitution, it says '*the President, as head of the National Executive, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, appoint the Chief Justice and the Deputy Chief Justice.*' I will end there; the rest refers to the Supreme Court of Appeal. Now, what I want to understand is, are we expected to interview all four candidates and say to the President, '*we have consulted, we have interviewed them, they meet the requirements for consideration for appointment,*' or is our function, perhaps if I put it bluntly, to eliminate some of them and say we give you only two or three names? What is your understanding of this process? Thank you.

Judge President Mlambo:

Thank you, Judge President Tlaletsi. I think the first aspect that has to be considered is the issue of suitability. Are the candidates that we've interviewed suitable? And this body, which is being consulted by the President, will have to express views on that, on suitability of each candidate. And then the next one is on appointability. Nothing prevents this body from either saying, we're not going to comment on appointability, although I think it would be shedding its responsibility, if it says we're not going to say anything about appointability.

I think this body, and this is my own view, this body needs to look at each one of us, what this body has found ticks us off or ticks us on, and to express a view on each of our candidatures to the President, right, and then to say, we think they are all appointable. We found that this one has got this strength, this strength, he is eminently appointable. This I think is what the job of this body is. And then let the President then take the final call as to having considered, looked at what you have sussed out of all of us, whether he is persuaded on one candidate or on another candidate. And that's it. I would say that would be my take about what this body should do.

Judge President Tlaletsi:

So, your understanding is that the President has not delegated his power to appoint to this body, but merely to consult and say tell me your views on these candidates?

Judge President Mlambo:

Definitely. He has not said recommend either in line of preference, as far as you are concerned or whatever. He is just saying, tell me what your impressions are of these candidates to help me come to a final decision. It is his decision to appoint.

Judge President Tlaletsi:

I see, thank you. Thank you, JP, thank you Deputy President.

Commissioner Madonsela:

Follow up, follow up, President?

Deputy President Petse (Chairperson):

I don't think that it is appropriate, solicit the opinion of a candidate on how we should deal with this. Even more so, when we have not given the other two candidates an opportunity.

Commissioner Malema:

Is that a ruling, Chair?

Deputy President Petse (Chairperson):

It is.

Commissioner Malema:

Let them respect it.

Unknown Speaker:

It's one that's dealt with in the deliberations.

Deputy President Petse (Chairperson):

Honourable Minister, did you want to weigh on this?

Minister Lamola:

No.

Deputy President Petse (Chairperson):

Okay, thank you.

Minister Lamola:

I respect your ruling, Chairperson.

Deputy President Petse (Chairperson):

Thank you. No, I would have informed you that if you wanted to weigh in on it, I'd already made a ruling, so I wouldn't have allowed you to ...[intervenes]

Minister Lamola:

I don't want to be thrown out, Chairperson.

Deputy President Petse (Chairperson):

Thank you.

Minister Lamola:

Mine is in relation to the access to justice question on the Soweto matter that Commissioner Malema raised there.

JP, I just want to get your view, you are aware that there is this process that we have appointed the former Deputy Chief Justice to help us with the issue of the rationalizations of the Courts and also this issue of the spatial planning and it came out as a result of many complaints that we are receiving on that and it's a project that has not been done since 1994 to really deal with the judicial establishment and the accesses. And where exactly it should be, and we also received lots of complaints, for example on people within the area of your jurisdiction, but they are outside. The people of Mabopane. They raise issues that they can only go to the North West High Court when they are just two minutes from Gauteng.

So, my question is, how do you think, while we are dealing with that process, can the rules be used to help us to maybe even, or yourselves, to allow litigants to institute cases in the Circuit Courts where they are, where there could be Circuit Courts and so forth. And even in the Eastern Cape, I think we have the same kind of problem where people from East London have to jump Bhisho and go to, I think it's Grahamstown, if I'm not mistaken. You will correct me, you might not have the experience but something like that where the former Bantustans arrangements, are still within the boundaries of our Courts.

Judge President Mlambo:

You are correct, Minister. Those boundaries still persist to this day and I think you sit here; you head the Justice Portfolio. You lead that portfolio. I think it's something that needs to be seriously factored into.

When I was Chair of Legal Aid South Africa and found that East London, Bhisho, Grahamstown dynamic, I was shocked. But in this day and age, why are things still happening this way? They shouldn't. That's my view. If that's what you want to hear, that's my view. They shouldn't.

When this Mabopane issue arose, we had been consulted as a judiciary and we cautioned the executive team that you're going to be causing problems if someone who lives in Mabopane can get into a taxi and travel for 20 minutes into the Pretoria High Court and you expect that person to say now, he needs to get into a taxi where he travels

for three or four hours to access justice. It does not make sense! It can be addressed through the usage of Circuit Courts.

You know, the Labour Court scenario, Minister, when the two High Courts were being built, in consultation with the JP of the Labour Court, we said people in Polokwane, in Thohoyandou, with their labour matters have to come to Johannesburg. That's not on. They should be given space in this new court that's coming up to bring access closer to them. Same with Mpumalanga!

So, what I'm saying, Minister, is we need to seriously overhaul completely this apartheid boundaries that we still subscribe to and should you appoint me as Chief Justice, I'll ensure that we'll bring to the table necessary evidence and input that will assist in refining, reforming and redrawing these jurisdictional boundaries, because it's not on. People actually resort to getting addresses within Gauteng, but he knows, she knows, in North West, here and I know someone who's in Gauteng and they use that address to actually find in the jurisdiction of the Gauteng division. You can't make people resort to those measures to access justice.

Minister Lamola:

Ja, maybe it's to ask whether, as the Head of Court in Gauteng, are you making such inputs to that process of the former Deputy Chief Justice because we are hoping that you will advise us comprehensively. As you can see, some of them I can't remember in terms of the boundaries, but I have learnt in these two years, that there's a lot of such challenges.

Judge President Mlambo:

Yes. Well, we've not been contacted as Heads of Courts. We are actually talking about it and when I left the division, I warned the two DJPs to be on the lookout for an invite to go and make input. We are ready and that, I think my understanding was that it was going to also look at the adequate or appropriate capacitation, the judicial establishments of those judges. So, as far as Gauteng is concerned, I can say we are ready, so immediately the DCJ and his team contacts Gauteng, I think he'll get the necessary input.

Minister Lamola:

No, thank you. I think he will. Thank you, Deputy President.

Deputy President Petse (Chairperson):

Thank you, Honourable Minister. Commissioner Singh?

Commissioner Singh:

At last, thank you very much, Deputy President. After many follow ups and I hope I'm not the one who'll lastly and I last for 20 minutes.

Commissioner Madonsela:

Sorry, Deputy President, I think you forgot me.

Commissioner Singh:

Okay.

Commissioner Madonsela:

I think you forgot my follow up.

Deputy President Petse (Chairperson):

I beg your pardon, Commissioner Madonsela.

Commissioner Madonsela:

Yes, and ...[intervenes]

Deputy President Petse (Chairperson):

My apologies, Commissioner Singh. He said of a follow-up, you have an interruption and a delay of whatever questions you wish to put to Judge President Mlambo.

Commissioner Madonsela:

Yes, just one question. Good afternoon again, President Mlambo.

Judge President Mlambo:

Good afternoon, Commissioner Madonsela.

Commissioner Madonsela:

What are we to make of the fact that you are making yourself available to be the first amongst equal in the Constitutional Court, a court that you have not as yet sat on and acted in as a judge, until now?

Judge President Mlambo:

Nothing turns on that! Nothing turns on that! The fact that I've not acted there doesn't not denigrate, if I may use that term, my candidature. I'm an experienced Head of Court. I've been in different environments. I can hit the ground running anywhere.

And I've given you a vision that has seven pillars, that is exhaustive as to what, as Head of Court, I would regard as things that I should look at as Head of the Judiciary.

Commissioner Madonsela:

The reason I ask the question is that in response to Commissioner Malema. I did not, what Commissioner Malema asked you, and it was of interest to me, is what are you going to do in order to deal with the problems in the court... The Constitutional Court relating to delays in judgments, and I did not understand you to be answering that question directly except that you did mention that you were, you have... You told us about what happens in the SCA and how those problems are resolved.

But having not been in the Constitutional Court itself, and understanding the challenges of that court, how can it be that you can offer a solution in relation to the problem you are not aware of?

Judge President Mlambo:

Well, I think I answered that question. I explained to Commissioner Malema, what my impressions are about how they deal with judgments in the Constitutional Court and I did mention that you know, as Head of Court, my leadership style is not to impose solutions. It's a consultative process where there's buy-in, everyone, to say '*colleagues, where's an issue about the delay we are taking in delivering judgments. What is it that's causing the delay?*' Together we identify those issues and then we say, what is the corrective action, with a view that the corrective action will eliminate the issues that cause the delays in terms of judgments being handed down? So, I answered that question fully.

Deputy President Petse (Chairperson):

Yes, I entirely agree with you, Judge President Mlambo. Thank you. Commissioner Singh?

Commissioner Singh:

Thank you, Deputy President. I think it will be appropriate for me to say good evening, JP Mlambo. Because it's six o'clock already.

Judge President Mlambo:

Good evening, Commissioner Singh.

Commissioner Singh:

Firstly, thank you very much for presenting your seven pillars this morning and not only presenting them as problems but solutions. They were solution oriented and I think that's a good thing that somebody can come up with solution to the problems that they see within the judiciary.

And I think one of the cornerstones of your pillars was the lack of resources being an impediment. Whether they're financial or human resources. And you spoke about maintenance issues and sometimes from my own experience, maintenance issues, you know, border from the sublime to the ridiculous. From roofs needing repair to judicial officers being asked to bring their own toilet paper. And it happened in a Regional Court, you know, in the area where I come from.

But having said that, we've gone the State Capture Commission and two of the reports have been already handed to the President. And there are a number of recommendations and many of them would require the courts and the prosecutorial authorities to act. Because we can't allow this just to be a soap opera, never ending soap opera. In soap operas you find that yes, there's always a happy ending, people live happily ever after, but here, we're not going to find that.

And I'm linking this to resources and earlier on, you spoke about interns and resources being sought from outside sources.

Do you think if you are Chief Justice, you would recommend that? If we as a country can get resources from outside, from anybody that's committed to ensuring that judicial independence and we have an effective judiciary and we try these matters as soon as possible, would you be adverse to that kind of suggestion, that we get outside resource to beef up capacity within the NPA and within the judiciary to deal with these matters as expeditiously as possible?

Judge President Mlambo:

Let me answer the question this way, Commissioner Singh. I think we have a document that I think, Chief Justice Langa, was part of, I think it's the Bangalore Principles if I'm not mistaken. It's a document that provides guidelines about how the judiciary should behave and it touches on private funding aspects. Its point of departure is that it should not happen. That's its point of departure.

But I think it also says, I've not read it for some time, but I think it says if there are instances where it has to happen, and I've done it. I've told this Commission, I've done it, care should be taken that the judiciary should not be compromised or be seen to be compromised by having accepted such financial assistance from such an outside entity. Right? So, I'm saying, it's an issue that says, affecting the Courts, to say you need, talking about the judiciary, it's a question of sourcing or having more judicial officers to sit

in these matters. You can't source judicial officers from outside. It's a question of sourcing them from here.

So, it could be a question of saying, the resources that you have, in terms of the interns of the prosecutors, so, we've got a prosecution agency, it will decide whether it has the capacity and if it doesn't have it.

So, I think we will have to identify the scope within which we think we need outside assistance. And from what you tell me, I'm not sure that there's a good case to be made out to look for funds outside because Treasury is here and properly motivated and properly identified the areas where added capacitation is needed. I'm sure we can deal with that issue without going outside.

Because remember, Commissioner Singh, we're dealing with State Capture that tells us that this country has experience, malfeasants of magnifying of certain magnitudes... of malfeasants. In certain instances, outsiders are alleged to have been complicit in these malfeasants. So, I think extra care has to be taken whether we go out and look for money to actually start carrying out the recommendations of the State Capture Commission Report. So, I would voice that caution, Commissioner Singh.

Commissioner Singh:

But you're not adverse to it? However, we have the Honourable Speaker and Minister here, I think who are hearing us loud and clear, because South Africans deserve, you know, to get answers and they deserve to see people being prosecuted for all this malfeasance that you speak about.

Judge President Mlambo:

Yes.

Commissioner Singh:

My second question, Honourable JP, is you could in April be sitting there, chairing this JSC, because we have a session in April. Today as Honourable Lucas said, you're on the other side answering questions and it's not Court.

Now, whilst I respect the ruling of the Chair on the issue of sexual harassment and how we deal with it and it should be expunged from the record. I put it to you that thousands of viewers on television and listeners on the radio have already been exposed to what has happened for about two hours.

And having said that, we may expunge it from the written records. Do you think that if you are chairing this session, or even as a member of this JSC, which you will become in April, we should not have a serious in-camera discussion, as the JSC, on how we approach these matters of founded or unfounded allegations? Because this is not the last, first and the last. It's going to happen. What would your suggestion be if you are sitting on the chair, on how we approach these matters of allegations?

Judge President Mlambo:

Thank you, Commissioner Singh. You will recall that in April this issue was discussed by this Commission to say what do we do when we get to. You remember, we dealt with the complaints against Judge Langa, at that stage, to say there are people who have complaints that they can lodge to the regulatory bodies that deal with particular candidates who come here, but they don't lodge anything.

They wait until there's a JSC process, and then they send their objection here. I don't know if you remember that discussion, to say we need to establish a small committee here, that comes out with rules about how we deal with these aspects and other aspects. You are correct, I think this body needs to do a serious rethink as to how it deals with the material that comes here.

Commissioner Singh:

No, thank you. The other question would relate to your questionnaire. I mean, when we read your questionnaire, we find strong administrative skills and knowing the way you run your current Court, we can see that.

And I think you spoke a lot about CaseLines management and modernization which is something that we must aspire to, sooner rather than later. Now, I believe that you convened the Justice and Administration Information Technology Committee, and I would just like to know, what are your views on the cyberattacks, on the Court system in October? How do we marry those attacks with the online system, electronic system?

What solutions can you can you proffer to ensure that the online system is secure and that there can be no interference?

Judge President Mlambo:

Well, it's a question that the IT geeks will tell you that security and more security and more security. Because that's what we need. When the Office of the Chief Justice's system was hit in 2018, and it happened on my birthday, I think, on the 18th of September. That's when it hit and it's a question, as who said, you must tell us what was the security arrangements in place, right, because some of these cyberattacks are opportunistic.

If they find the environment impenetrable, they look elsewhere. So, my short answer is, we need to always be secure. The CaseLines has never been hacked. It's unhackable, let me put it that way, but there's a reason it's like that.

So, in all our platforms, online platforms, we need to ensure that we have the best security systems that prevent these cyberattacks. Because you know, Commissioner Singh, no security system is full-proof, let me tell you that. These cyber geeks who sit somewhere in the dark space. They are always researching how best to penetrate whatever systems. They are hitting banks, you know, so all I can say is, we need to ensure that we beef up our security and we review this security on an ongoing basis to make sure that when some new techniques come on the market, we also beef up our security in line with that. That's all I can say.

Commissioner Singh:

And lastly, and that will be the last, Deputy President. I think, Commissioner Malema and others spoke about restoring confidence in the judiciary and the actual barometer survey shows that people are not happy about the way the judiciary, in general, is performed. For various reasons, you know, delayed judgments, the high cost of going to Courts, etc.

But as a layman, I just want to know, and you're a jurist of long-standing, in the recent President Zuma matter of contempt, it was referred directly to the Constitutional Court. Is that a normal thing to happen that a matter of contempt goes right to the apex court of the land? What is your view? And I know hindsight is the best sight, and I know you would not want to speak against the, in your parlance, brothers and sisters. But I just as a layman want to know, you know? What prompted that to happen?

Judge President Mlambo:

Before the Constitutional Court hears any matter, Commissioner Singh, the first test that it looks at is whether the matter triggers a constitutional issue. Right? The second issue is if it doesn't trigger a constitutional issue, is whether it raises an arguable point of law of general public importance. That's the test.

Once that test has been satisfied, when it comes to issues of direct access, the Court loathes this, being the Court of first and last instances, because it has acknowledged it can benefit from the view of other Courts, in some of these matters.

Now, you mentioned the contempt of court issue, ordinarily, ordinarily, I want you to hear me, that matter shouldn't be a matter of first and last instance, ordinarily. But what happened was, there was an application by the secretary of the Commission to the Constitutional Court. President Zuma against whom the application was directed, chose not to oppose that matter. You'll recall that. The Constitutional Court was at pains to say, does this matter trigger our constitutional jurisprudence? Yes. Having done that, are there exceptional circumstances that we as a Court can find that we can use to say 'yes, *we must hear this matter*'. And the Constitutional Court went through that exercise and found that there were. It was highly critical of how the Commission had dealt with the matter at certain stages, but it found that despite that criticism, it still thought that there were exceptional circumstances that it could use to say 'yes, *we can hear this matter as a matter of direct access*.' So, I've answered your question in the sense that is it normal, it's not normal.

It takes some seriously abnormal, exceptional circumstances for the Court to do that. It has done that in a number of cases, but very sparingly.

Commissioner Singh:

Thank you very much. I'm sure your response will trigger many more questions as follow ups. Thank you very much, Deputy President, my ten minutes is ...[intervenes]

Commissioner Mpofu:

Deputy President?

Deputy President Petse (Chairperson):

Thank you, Commissioner Singh. ...[intervenes]

Commissioner Mpofu:

Deputy President?

Deputy President Petse (Chairperson):

You shouldn't have invited follow-ups to the questions that you posed to Judge President Mlambo.

Commissioner Mpofu:

Just a follow-up, not on that issue.

Deputy President Petse (Chairperson):

Yes, Commissioner Mpofu.

Commissioner Mpofu:

Thank you, yes, no, I can't make a follow up on that issue. Justice Tlaetsi and myself can't talk about it. He was on the bench and I was arguing. Just on a separate note, good evening, JP.

Judge President Mlambo:

Good evening, Commissioner Mpofu.

Commissioner Mpofu:

Yes. Now, I just wanted to, one of the questions from Commissioner Singh related to a matter that the Chair has made a ruling on which we all respect and I can assure you it

will be raised at a different forum, but I just want to ask you, if you go to page 12 of the small book of the questionnaire, the questionnaire that all candidates had to fill.

Judge President Mlambo:

My questionnaire?

Commissioner Mpofu:

Yes, yours.

Judge President Mlambo:

Yes, I've got it.

Deputy President Petse (Chairperson):

Commissioner Mpofu, we are waiting for you to pose a question to him.

Commissioner Mpofu:

Oh, I'm sorry, did you say yes, I thought he was still finding it. I'm sorry, I'm sorry. Did you find it?

Judge President Mlambo:

You said Section 12?

Commissioner Mpofu:

No, page 12.

Judge President Mlambo:

Yes, I'm on page 12.

Commissioner Mpofu:

Page 12, paginated page 12.

Judge President Mlambo:

Yes.

Commissioner Mpofu:

There's a question there, I just want to be sure so that if it arises, I can deal with it. Question 19 that is asked to all the candidates. It says, are there any circumstances known to you which may cause you embarrassment in seeking the appointment for which you have been nominated and your answer there is no. You stand by that answer?

Judge President Mlambo:

Yes, I stand by it.

Commissioner Mpofu:

Thank you.

Deputy President Petse (Chairperson):

Commissioner ...[intervenes]

Commissioner Malema:

Chair, I don't know how we're going to enter it, Chair. Because my worry is that if we ask it the way Commissioner Mpofu does and JP responds this way, then we are going to have a problem because the JP in his answer unless your ruling is that even on the other side, it won't be raised.

Because, if it's going to be raised the way Commissioner Mpofu is going about it, then the argument is going to be that the JP in his response said there's a former judge who raised this matter with him and when this matter was raised by the former judge, why was it not put in that questionnaire, because it is now brought to his attention? So, I don't know ... I'm happy to leave it, I'm not big on it.

Deputy President Petse (Chairperson):

Would it not be best perhaps to deal with that at an appropriate stage?

Commissioner Malema:

Fine, Chair.

Commissioner Mpofu:

I agree, Deputy President.

Deputy President Petse (Chairperson):

Commissioner Dodovu?

Commissioner Dodovu:

Alright, thank you very much, DP. Good evening, Justice Mlambo.

Justice Mlambo:

Good evening, Commissioner Dodovu.

Commissioner Dodovu:

You must be tired by now, after this long grilling? Are you okay?

Justice Mlambo:

I'm okay. I can continue.

Commissioner Dodovu:

Okay, thank you very much. Firstly, I must express this disclaimer that I know Justice Mlambo for about ten years now and very interestingly, when I met him, he was a presiding judge. I was an accused and when he came to the Court. I saw a person who was very decisive, very firm, who wanted things to happen because he wanted to fast-track the case itself and having read your profile here, the work that you've done, it clearly shows that you are that kind of a person. And even the leadership that you have exercised in different positions that you held, clearly demonstrates that what underpins your conviction is to get things done and thank you very much for that.

I must say this, because I've said this to all the candidates who appeared before us.

Now, as you are aware, this position you have applied for is a leadership position. What are your key leadership principles that drive you to achieve what you have achieved in the positions that you have held in the past, including the Judge President?

Judge President Mlambo:

I think to embrace it all is, I believe as a leader, I take everyone along with me. Mr Bonang Mohale has written a book saying, '*Lift as you Rise*', which says, '*as you rise in your leadership steps, don't rise and leave the grassroots. Rise with them.*' Because that's how you get buy-in, in whatever leadership initiatives and interventions you take.

So, I believe in a consultative leadership, accessibility, engaging as well as decisiveness.

Commissioner Dodovu:

Yes, and those who taught us are saying that a Chief Justice which is the highest position in the land, in the context of South Africa. That person who must be appointed or home that office, must possess a modicum of Solomonic wisdom.

Do you think that you have that, to ensure that if you are appointed, you can take this division or this Apex Court to the levels that you articulated in your seven pillars?

Judge President Mlambo:

I think my experience as a leader in various portfolios, has equipped me. I've learnt the, I'm experienced in institution-building initiatives in ensuring that institutions are stabilized and strengthened and become effective. So, I want to believe that my experience stands me in good stand to accent to this position should it be the view that I go there.

Commissioner Dodovu:

Now, in one of the seven pillars you articulated. You said you want to finalize matters expeditiously. Now, I want to bring to your attention a matter here of CC147/2016. This matter, just to sketch a background because we don't have any information, is about the murder of Wandile Botswana. It started in 2016, six years down the line, the matter is not yet finalized and one of your pillars is to ensure that you finalize matters. In this instance, what could be the blockages, and what could be the constraints which impede a case of this nature? Because this is a high-profile nature and the country wants to know what has happened and six years down the line, it is not yet finalized?

Judge President Mlambo:

Talking from the top of my head, I've not looked at it recently, is that ... in fact, I'm not sure whether that matter has reached the trial stage, whether it has started?

Commissioner Dodovu:

It has started, to just fill you in. The State concluded its case. Those accused applied for Section 174, to be acquitted. They were rejected and they need to take a stand. That is where it is.

I'm raising this matter because it is dragging, and it is in the interest of justice and in the interest of the families affected. Even the accused themselves, that this matter must be finalized, and my point is, it's a principal point, the point is it is six years down the line, the matter is still stuck.

Judge President Mlambo:

Yes, I don't think it's the only one. There's also the matter of *Barnard v Porritt*. Now, you do have these matters. It's not the general trend, let me put it that way and I take it as Head of the Court, that perhaps the matter could be expedited, right? I will have to go and check why it has been slowed down. Fortunately, the *Porritt* matter.

I'm aware, that it took a lot of turns to the Constitutional Court, and to other Courts to resolve certain points until it reached the trial stage. Even when it reached the trial stage, a lot of shenanigans were entered into to make sure that it was delayed. So, I take the point that it's happening on my watch in Gauteng, it's been delayed. I don't know what the circumstances are, yes, it's one instance that you cite where expeditious finalization of a case has not happened.

Commissioner Dodovu:

Thank you very much. The last point, and I want to take you back to this issue of the Legal Aid Board and it is quite clear, it's apparent that in the 17 years that you served as a leader of the Legal Aid Board, you made great strides in improving the situation. Your contribution is immense and immeasurable in that sense. And even how you explain the work that you did, but there's a matter for me, and that matter is the fact that, and this is a perception that people have about the Legal Aid Board judge, sorry, lawyers, that they don't have confidence in them, they rather in some instances represent themselves, not the Legal Aid lawyers. Do you think that there's a need for adequate training for lawyers who are from the Legal Aid Board so that the confidence that people must have in the justice system, but always be there?

Judge President Mlambo:

I'm actually surprised that such a perception exists because it's a perception that existed in my early stage of chairing the Legal Aid Board and we had to adopt particular strategies as to how we deal with it. The issue of employing experienced legal practitioners is one option that we used. We have a justice centre model and in the justice centre model, we have a High Court unit.

In the High Court unit, we employed experienced legal practitioners, not beginners to serve the High Court. Because we were addressing these issues Legal Aid Lawyers are inexperienced, they're green ones, they know nothing. So, that's why I'm saying, I'm surprised that such a perception exists because it's a long time since I've heard people

say the service offering of Legal Aid leaves much to be desired. But I know that they undergo serious performance measurement initiatives. They also undergo focused training inhouse and sometimes they source outsiders to come and train them on particular aspects. So, that's the answer I can give you.

Commissioner Dodovu:

Thank you very much. Good luck. From where I stand, I can see visible leadership. Thank you very much, JP.

Judge President Mlambo:

Thank you very much.

Commissioner Malema:

Just a quick follow up.

Deputy President Petse (Chairperson):

Thank you, Commissioner Dodovu.

Commissioner Malema:

Quick follow up, Deputy President.

Deputy President Petse (Chairperson):

Commissioner Malema?

Commissioner Malema:

JP, because this thing, it keeps on coming. On the matter of Commissioner Dodovu, were you a presiding judge or you went there for case management?

Judge President Mlambo:

I went there for case management.

Commissioner Malema:

Yes, thank you.

Judge President Mlambo:

And his lawyer used the Section 174 route to get him off the route, I think if I'm not mistaken.

Commissioner Malema:

Yes, but you were not presiding ...[intervenes]

Judge President Mlambo:

But I was not presiding.

Commissioner Malema:

... it was Judge Jackson Mabizela

Judge President Mlambo:

That's correct.

Commissioner Malema:

Yes.

Deputy President Petse (Chairperson):

Thank you, Commissioner Malema. Commissioner Notyesi?

Commissioner Notyesi:

Thank you, President. Good evening, Judge President Mlambo.

Judge President Mlambo:

Good evening, Commissioner Notyesi.

Commissioner Notyesi:

I must as well as has been done by others, disclose that I have known you for many years, I serve you in the Legal Aid Board. I've known you for many, many years and I've ... I hold high regard for yourself as a leader, as a judge, as a Judge President.

JP, I will have a few questions that I want to canvass.

Perhaps, if I may point out, I'm looking at the submissions by CASAC and the DGRU. They do a very important job there when they outline some criteria that they say we should as well, use one of them, to which they both agree, is that first the Chief Justice, the role of the Chief Justice includes (a) being the Head of the Judiciary, to which we all agree, the Head of the Constitutional Court and the Chairperson of the Judicial Service Commission.

So, in each of these three, I think we just have to reflect. As I understand from your plan, you dealt much with the first question as to the Head of the Judiciary where you outlined the plan, and talk broadly about the judiciary.

We have not dealt, extensively with (b), that of the Head of the Constitutional Court itself. I want us to focus briefly on that. And I will be looking at the requirements because others we have dealt with throughout the questions that have been asked. One where they say among other things that we must possess, that is you must be an intellectual, he's intellectual leadership in considering that a candidate must be able to take intellectual leadership of the Court to guide the trajectory of the jurisprudence and must have experience in a broad range of areas. This must be assessed with reference to the candidate's judgments but also published academic or other extra curial work.

Now, my question is from your questionnaire, you accept first that you haven't published any document.

Judge President Mlambo:

Yes.

Commissioner Notyesi:

That you have no publication. The second point is that in your engagement with, I think it's Commissioner Madonsela, you conceded that you haven't written any judgment on socio-economic rights, you haven't written a judgment ...[intervenes]

Judge President Mlambo:

I mentioned one, that was when I was in the Labour Court.

Commissioner Notyesi:

No, you said you write, that one concerns the equality which ... the one of [crosstalk 9:33:09.6] What was that judgment?

Judge President Mlambo:

That was the *Congress of South African Trade Unions v the Western Cape Government*.

Commissioner Notyesi:

The one that we ...[intervenes]

Judge President Mlambo:

The socio-economic rights protest action.

Commissioner Notyesi:

The one that...

Judge President Mlambo:

That is protected in terms of the LRB.

Commissioner Notyesi:

Yes, alright. And that must have been the judgment written sometimes in 20 ... 2012?

Judge President Mlambo:

1998, I think.

Commissioner Notyesi:

1998? But in recent years you haven't written any judgment in the area of socio-economic rights. Secondly, when I look at the list of the judgments that you have written, particularly as the Head of Court. In most of those judgments which I would categorize as those judgments that turn on key issues of public interest, you always write there as the Court. That is, you write a joint judgment.

Judge President Mlambo:

Yes.

Commissioner Notyesi:

Now, my point is, how then would we in such circumstances, how can we be in a position to meaningfully make this assessment in absence of recent judgment in the areas... Because that's what, in the Constitutional Court you would be dealing with almost daily questions on socio-economic rights. Those are cases that would be going through that Court, in many of the time.

How do we make that, how do we mitigate the fact that we don't have information, but we do have an assurance from other work that you are a competent, you are a diligent, hardworking judge, but how do we balance that? Because we have to make that assessment.

Judge President Mlambo:

Well, one aspect, and it's reality that you need to factor in in that assessment is that the socio-economic litigation that comes to the courts, has basically dried up. It's a problem to have socio-economic litigation coming to the Courts. I know that previous Chief Justices have mentioned this. So, it can't be played on my door that I've not written any, I can't write something that hasn't come to me. That's one aspect I can mention as far as that is concerned.

But in terms of judgment writing, I mean, if you're really looking for judgments where you just want my name as the scribe, you will struggle because even in the Supreme Court of Appeal, where we sit as five in matters, you will be the scribe, you'll carry the burden of writing the judgment but there'll be serious contributions into that judgment by other colleagues. You'll be the scribe. So, I can't take it further than that.

I've been involved in heavy lifting work and I've mentioned that we allocate each other sections, and what to write because it's a Court judgment and that's how we've dealt with these matters.

Commissioner Notyesi:

Now, there is the second question that I want us to debate here, relating to the complaints by the Public Protector, but not much about the complaint. You receive a complaint, in fact, you allocate the Bench, three judges identified, here are the three judges. I do understand, once that is done, they are given the files. They take the files. Should you be further involved in that matter, especially if the issue that arises concerns the proceedings, recusal of judges on allegations which is part of the proceedings, or other aspects of the proceedings, in relation ... because what you have done, you have allocated the case, you have constituted a Bench, it has a senior judge, it's fine that he's there, why should you be further involved?

Judge President Mlambo:

Well, I'm Head of the Court. If the issue is raised with me as Head of the Court to say this matter is coming on in two months' time, this is the Bench, we have a problem with the Bench, I should be mindful to that. It happens all the time, Mr Notyesi.

Commissioner Notyesi:

No, JP. No, JP. Let's get it right. Let's get it right. The independence of judges, as I would understand, includes the process of the functioning of the judges themselves. Your duty there is that of administration, which is allocation. Whilst the case is allocated, it then becomes a part of those three judges. They have a senior judge. If there is somebody who wants one of the judges to recuse, he must go to court and make that application. It is a call that must be made by the judge who is being requested to recuse himself.

You can't just come, somebody meets you somewhere or write to you and say, look, that judge, I'm not happy with him being in that matter, whatever the reasons are. You can't just cut in there. Am I wrong?

Judge President Mlambo:

You are very wrong. Very, very wrong! It's my... one of my responsibilities as Head of Court to say when these issues are raised, it's akin to me allocating the matter to judges. If it's raised with me before it's heard, and I think I mentioned a very important consideration to say, the matter is given a date and you want to avoid costs, time, delays in this thing being argued, if you can already see that a case has been made out of a perception of rights.

So, you're wrong, Commissioner Notyesi. I can tell you, I do it all the time and it has nothing to do with judicial independence.

Commissioner Notyesi:

Let's look onto that further, before we leave. Do we accept that there is what we call forum shopping?

Judge President Mlambo:

Yes.

Commissioner Notyesi:

And how does forum shopping arise according to your experience?

Judge President Mlambo:

Forum shopping is the reason that when we publish the duty roster in Gauteng, we don't mention the judges in the Urgent Court roll, for a simple reason that practitioners used to check who is in the Urgent Court in a particular week, and then they would tailor-make their cases to be on that judge's roll, whenever it can, because they perceive that judge to be sympathetic to their cause. That's forum shopping. Or, to decide that I'm not going to launch my case in Pretoria, I'm going to launch in Johannesburg, when you can easily launch it in Pretoria, that's the classical interpretation of forum shopping.

Commissioner Notyesi:

Sorry, sorry.

Judge President Mlambo:

But asking for a judge to be removed from a panel is not forum shopping.

Commissioner Notyesi:

Yes, but that's where my problem is and I'm sorry if we don't agree on this, I will leave, I would ask for the last time. Judges are allocated, they are given files, there is a senior judge in that panel, there's a panel. Somebody for some reasons is not happy with one of the judges, for one reason or the other, is it the business of the Judge President to come and say I remove, I mean, that one, he must be removed from this?

Judge President Mlambo:

It happens all the time. I don't see anything wrong with it and I think it's one of my functions to say, if there's a well-motivated concern raised, with a particular judge about that judge's participation in a matter and I apply my mind and sometimes I also consult the DJP and if we agree, we say okay, we tell the judge, look, and we send the issue to the judge to say look, there's this thing that's raised against you participating there, we think you should consider getting out. So, let's agree to disagree.

Commissioner Notyesi:

We should.

Judge President Mlambo:

Ja.

Commissioner Notyesi:

We should. Now, let's move on to the question of a commitment to the Constitution. I'm just asking this question in relation to the order that you issued in that matter of the *President of South Africa v Public Protector, EFF*.

I look on the ... the first order is that the application is dismissed but my problem is with paragraph 2 of that order where it is said, the President is directed to appoint a Commission of Enquiry within 30 days headed by a judge, solely selected by the Chief Justice who shall provide one name to the President.

Now, if one has regard to Section 83 (2) (f) of the Constitution, that section empowers exclusively the President to appoint commissioners, to deal with the appointment of commissioners. Is that order, whatever your reason, I do understand from your previous explanation that you look onto the rationality of the remedial action, the reasons given by the Public Protector, but is the order in itself not trampling upon the separation of powers. Is it not violating the separation of powers? Constitutionally speak.

Judge President Mlambo:

Yes. I mentioned in my earlier response, Commissioner Notyesi, that the criticism of that judgment in academic circles is on that very point, on the separation of arms, not on

anything. And the criticism is that we did not discuss separation, the impact of our order in the separation of arms context. And the answer is simple, the legal team of the Public Protector, no, not of the Public Protector, of the President that attacked the order, was solely focused on the legality of the remedial action that was issued. So, we did not have the benefit of any argument on the separation of arms in that case.

Commissioner Notyesi:

No, I read through that judgment properly. They raised the issue of Section 83 (2).

Judge President Mlambo:

Yes.

Commissioner Notyesi:

They raised the issue of the ... they raised the question of the powers to whom the power of appointing the commissioner lies with... they do. But remember, JP, I'm not trying to review that judgment with you, I'm just trying to see if you reflect back on this order and understand that now you are going to head the Constitution. This is the reason why I'm asking and the fact that that judgment was never appealed... It seems to have faded away, it did not proceed any further. That's why I'm asking. It's not for any reason to review it, no, no, no, I'm not.

Judge President Mlambo:

Yes. No ...[intervenes]

Commissioner Notyesi:

But I want you to reflect to say, no, here it is correct that we did go far in this, but we have realized, that's all what I'm ...

Judge President Mlambo:

You want me to make that...

Commissioner Notyesi:

If you can. If you cannot, okay.

Judge President Mlambo:

We applied our minds and as I said, I sat in that matter. The pointed argument raised was not on separation of powers, but on legality of the remedial action.

Commissioner Notyesi:

Okay. Oh, now, I think this will be my last question. We just focus on two things. One, you have never acted in the Constitutional Court. Your appointment of which I must congratulate you has just been recently made. I'm sure, after your shortlist or your nomination, is that the position?

Judge President Mlambo:

No, I knew in December.

Commissioner Notyesi:

December this year?

Judge President Mlambo:

In December last year, when the Acting Chief Justice told me that ...[intervenes]

Commissioner Notyesi:

Ja, but it was after the nomination has been made. Remember, in December we have already, you know, made the roadmap for these interviews.

Judge President Mlambo:

Yes.

Commissioner Notyesi:

The point I'm trying to make is this. That appointment, of course for good reason, was it made to prepare you to understand the workings of the Constitutional Court, or it was just an ordinary appointment that they do in the ordinary course of events where they simply identify persons to act in the Constitutional Court?

Judge President Mlambo:

I can't answer that question. I didn't apply to be appointed to act in the Constitutional Court. The Acting Chief Justice called me out of the blue to say, the President ... In fact, I think if I'm not mistaken, you can clear it with him tomorrow, that he ... I may also be wrong that I knew in December. I think the discussion was initiated by him to say... you should be happy to know that I've recommended you to be appointed to come and act in this Court. That could have been before. So, I don't want to venture into the realm of speculation, that's why I was appointed this time, I can't answer that question.

Commissioner Notyesi:

No, I'm asking this because somebody is outside there, because I mean, your appointment was, it was made at the same time, your appointment and that of David. You were appointed at the same time for this ...[intervenes]

Judge President Mlambo:

Judge Unterhalter?

Commissioner Notyesi:

Yes. You are appointed for this term and one of the questions that were keeping on coming in the last interview, for the Constitutional Court was one of whether a candidate has acted in that Court or not. That was one of the questions that keep on coming.

You know, on the face of it, somebody would say look, this appointment has been solely made to make this candidate, to prepare these candidates for the interviews, because both of you, David is shortlisted for April, you are shortlisted for this one. It can be right or wrong, as you say, it's a speculation, we don't know, but what's on the face of it, would appear to be. But there's nothing wrong about it.

Judge President Mlambo:

If that's the speculation, I've not heard about it, but it remains speculation. You're busy putting serious speculative notions to me. I can't respond to that.

Commissioner Notyesi:

Yes. And then, this is my last question.

Deputy President Petse (Chairperson):

Commissioner Notyesi.

Commissioner Notyesi:

It's the last question. You know, one of the things I don't do, I don't even ask for follow ups, because I don't want to disturb, that's why ...[intervenes]

Deputy President Petse (Chairperson):

Please pose your very last question ...[intervenes]

Commissioner Notyesi:

It's the very last question.

Deputy President Petse (Chairperson):

... Commissioner Notyesi.

Commissioner Notyesi:

It's the very, very last question.

Deputy President Petse (Chairperson):

Thank you.

Commissioner Notyesi:

JP, this is the last question. This question it relates only to if one is to fix a problem, one of the first things is to understand what the problem is. Now, among other things, is to, you say, what you have to do is to fix the problem at the Constitutional Court, but I can vouch from where I'm sitting, you don't know the problems at the Constitutional Court. You haven't been there. You don't know what the problems are. You still need to be there so that you can understand what the problems, particularly this time will allow you that understand how they operate, and how they work because it goes beyond the issue of reserved judgments.

It goes to the question of how they make those judgments, the leave to appeals, all the things that the staffing, question of research, the capacity and all, those are the things that I cannot, I would be unfair if I want to debate those matters with you now, so that's why I don't want to even debate them.

Judge President Mlambo:

Well, I'm surprised you're adopting that, because when I was asked about what I can do fix that particular problem you mentioned, at the Constitutional Court, regarding delayed

judgments, I agreed readily. Anyone sitting anywhere will know that there's a problem that judgments are delayed. So, I know that there's that problem and I specifically said I will engage colleagues to say guys, there's this problem, let's identify what's causing this problem and let's find remedial action to solve these problems. So, it's incorrect to say I don't know what's happening there.

Commissioner Madonsela:

Thank you, JP, I have no further questions. Thank you very much, President.

Commissioner Malema:

Follow up.

Unknown Speaker:

Follow up.

Deputy President Petse (Chairperson):

Thank you, Commission Notyesi.

Commissioner Malema:

Follow up, Deputy President.

Deputy President Petse (Chairperson):

Commissioner Malema, what is happening now?

Commissioner Malema:

JP, I just want to make a quick follow up. This morning you said any judge who cannot write does not have a place in the judiciary like you don't deserve to be there.

Am I correct, am I quoting you correctly?

Judge President Mlambo:

I said a judge who reserves for too long.

Commissioner Malema:

No, about writing, there was something you said about a judge who can't write, doesn't deserve to be there. But that's fine.

I have a problem because part of what is going to be expected from you as a Chief Justice, is to write judgments and I need to know if you can write good judgments and your answer now says, if you want the judgment that is me with my name there, you're going to struggle, because even in the SCA this is how we've done it, and in the Gauteng, this is how we've done it.

But I thought to have a senior judge there, especially on this matters of national importance, which draw a lot of attention, is for that judge to write that judgment, with the input of, then circulate to everyone, they will make input, but we know the custodian of this judgment is the senior judge. Especially on matters that you sat on which some of them have become law in South Africa, yet we can't say, exclusively, this judgment belongs to Judge Mlambo.

How do we navigate that one I really struggle to accept that you don't have a judgment that we can just run around with it and say, you can say all that you want to say, here is his judgment?

Like yesterday, Judge Maya says to us, I've sat on 600 matters, I've got 200 reported or something, then I've got two which got reported in a green book, the same volume, following each other which is very rare. Now, this person is already inciting you to go and check, oh, what were these matters that got reported on the same book, which is very, she says it's her and judge so and so, who have ever done that, you know, that judgment is her judgment.

Now, which judgment can we just, leaving here, say this one it's the one that we are going to find the name of JP Mlambo and not the name of the Court, where they say it's a Court judgment, because it's really troublesome, JP. I think it's an opportunity for you to shine and say to us, no, the following judgments, if you want to know who I am and how I write,

go to the following judgments. Because now, if it's a Court judgment, I can't sit here and say to you, okay, which portion was written by you in this Court judgment, because I wouldn't know ...[intervenes]

Deputy President Petse (Chairperson):

Commissioner Malema, I think you have made your point, let Judge President Mlambo respond.

Judge President Mlambo:

Thank you very much, Commissioner Malema. I can write judgments; I have written judgments. It's a style of judgment writing which I adopted when I became Head of Court, especially in Gauteng, that when I put full court, I make sure that we write court judgments, not just individual judgements.

You can criticize me for doing that, but it serves a very beneficial value to do things that way. But you want judgments in my name, there's a lot of them. In the LAC, the *Barnard* case, I wrote it, for the LAC., the one that went all the way to the Constitutional Court and was upheld.

And there's a lot of them in the SCA that I sat in, that I wrote. So, I invite you to go and look at all those judgments. I wrote those judgments and even now, where I sat alone in Gauteng, I wrote those judgments.

Deputy President Petse (Chairperson):

Thank you, Commissioner Malema. Judge President Mlambo, I said good morning to you when I welcomed you earlier this morning. So I think it would be proper for me to say good evening before I pose some few questions to you.

Commissioner Mpofu:

Sorry, Deputy President. There were two follow-ups on this side. Quick ones. If you are wrapping up.

Deputy President Petse (Chairperson):

Who ...[intervenes]

Commissioner Mpofu:

It was Madonsela and me.

Deputy President Petse (Chairperson):

Yes, Commissioner Madonsela?

Commissioner Madonsela:

Yes, thank you Deputy President. Judge President Mlambo, I've been resisting to make this comment, it is worrying me. Is it correct to say that a judgment relating to the right of employees to protest engages the socio-economic rights? Is it a socio-economic right to protest?

Judge President Mlambo:

Yes. Because the right embedded in the protest action was a provision of sporting facilities and recreational facilities in black schools.

Commissioner Madonsela:

I thought a socio-economic right was a right that engaged resource allocation by the State?

Judge President Mlambo:

Providing sporting facilities, doesn't that engage socio-economic rights?

Commissioner Madonsela:

Well, I beg to differ. I'm sorry, I'm really struggling with the concept. I think, in my book, the right to protest is not a socio-economic right.

Deputy President Petse (Chairperson):

I think, just bear with me, Judge President Mlambo. I think we should leave it at that. Otherwise, you are now, you know, engaged in a dialogue with Judge President Mlambo.

Commissioner Madonsela:

Thank you.

Deputy President Petse (Chairperson):

Thank you. Commissioner Mpofu.

Commissioner Mpofu:

Thank you. Mine is a very quick one, Deputy President. JP, good evening again.

Judge President Mlambo:

Good evening, Commissioner Mpofu.

Commissioner Mpofu:

Yes. A very, very quick one. When Commissioner Notyesi spoke to you about how it got about that you were acting in the Constitutional Court, you answered that some time December the Acting Chief Justice called you and said the President, and then you stopped. What was that, what did the Acting Chief Justice say?

Judge President Mlambo:

I think, you remember I corrected myself. I think he called me to say you have been appointed, but as I say, I then went back to say, actually he had called me previously to

say I have recommended your appointment in the Constitutional Court. So, I can't remember whether it was November, right, so, I was going to say he called me to say you have been appointed, I'm just waiting for the letter from the President.

Commissioner Mpofu:

Thank you.

Deputy President Petse (Chairperson):

Thank you, Commissioner Mpofu. Judge President Mlambo, during your presentation of your vision, you mentioned something about corruption within the court operations and as an instance of that, you mentioned the issuance of fraudulent Court orders. What I want to know from you is whether any measures have been put in place to minimize, if not to entirely eliminate that problem?

Judge President Mlambo:

Well, what we've requested those, especially banks and the Department of Home Affairs, I think, is whenever they receive orders seeking either a person saying we are married to a South African or whatever, they should double check the authenticity of that Court order. Because sitting from where I am, I can't prevent people trying to fraudulently produce Court orders that look like Court orders.

But what we have done, wherever we have discovered that there have been orders that are masquerading as Court orders and we can identify the people who use those Court orders, we have gone to the police station to open cases and we've requested the police to expedite the investigation and refer the matter to the prosecution. We have done that.

You remember early on, because I chair that committee, it's called the Court Order Integrity Committee, we made submissions to SAPS some years ago, probably eight years ago, to say they must regard conduct that deals with fraudulent activities relating to Court operations as priority crimes. And that was acceded to. So, in keeping with that, we have requested the police to make sure that they expedite the investigation and arrest, if possible, and the prosecution of those matters.

Deputy President Petse (Chairperson):

Thank you. Reserving a judgment for upward of two years, does not verge on subversion of the course of justice?

Judge President Mlambo:

Well, it can be viewed as that. I think it was in that context when I said a judge who cannot write. I was meaning, if you've heard a matter and you can't write the judgment, you don't belong in the judiciary space. It's completely unacceptable to do it.

Deputy President Petse (Chairperson):

And my follow up question on that aspect, could one therefore make out a case that when a judge cannot perform his or her core function which is to go to Court, hear cases, render a judgment, that judge suffers from incapacity as contemplated in Section 177 (1) of the Constitution?

Judge President Mlambo:

Yes. That's why I mentioned two cases that I've referred to where I am the complainant as the JP, that these judges consistently reserve judgments upwards of a year to two and longer in certain instances, and I know that my division is not the only division that has judges who reserve for very long periods.

Deputy President Petse (Chairperson):

Yes. If that is prevalent, which is the impression that I gain from what you have said, is it not a matter which should be treated with the utmost urgency, lest the judiciary is brought into disrepute?

Judge President Mlambo:

That is correct. And that's why I took it upon myself to refer a complaint, and the matter is no longer in my hands.

Deputy President Petse (Chairperson):

During the course of the questioning, it was suggested to you that litigants chose to litigate in Gauteng, because you as the Judge President would pick and choose judges knowing that those judges would ensure that a pre-determined outcome is achieved. Doesn't that suggestion impugn, not only your integrity, but the integrity of the judges to whom those matters are assigned?

Judge President Mlambo:

Well, it does, unfortunately, but it's an unfounded perception that all matters are pre-determined that are heard in Gauteng.

Deputy President Petse (Chairperson):

Because its implication, in my view, is that, suggest that there is some form of collusion or connivance amongst all of those judges?

Judge President Mlambo:

Yes. And I think a follow up issue I can raise is if indeed there is such collusion, I think one shouldn't exclude an investigation as to how those matters have fared on appeal.

Deputy President Petse (Chairperson):

Yes, in fact, that was going to be my next point, because Chapter 8 of the Constitution, apart from establishing the judicial authority, goes further to establish the various Courts, your Constitutional Court as the Apex Court, your Supreme Court of Appeal, the High Courts, so litigants, if dissatisfied with the outcomes of the litigation in the Court of first instance, they have got the Full Court, the SCA and the Constitutional Court.

Judge President Mlambo:

That is correct, Deputy President and from where I sit, in those matters that I've heard, except for the State Capture judgment, which I think never went on appeal, in all the others I think it was upheld, upstairs.

Deputy President Petse (Chairperson):

In matters that you classified as intellectually challenging, in which you presided, you still managed to render your judgments expeditiously?

Judge President Mlambo:

Yes.

Deputy President Petse (Chairperson):

At some point, a point which was, an aspect which was probed by Commissioner Barnard, you said that judges are backstabbers, gossip mongers. Is that statement not sweeping into general, impugning the integrity of some 240, 250 South African judges because quite frankly, speaking for myself, I find it extremely offensive, because it paints all the judges of the country with the same brush.

Judge President Mlambo:

I think my answer was there is backstabbing and gossip in the legal profession. That includes judges, lawyers, advocates. So, I don't think I can be heard to have said everyone in the judiciary is a backstabber or a gossip. The fact of the matter is, it happens and that's how I would like my response to be understood.

Deputy President Petse (Chairperson):

But then, Judge President Mlambo, when you say judges, I would have understood if you had said some judges, not judges, because the implication, if you say judges, is all of the 240, 250 judges in this country.

Judge President Mlambo:

Well, I think I take your point, Deputy President. Perhaps it's unfortunate usage of sweeping language and I take your point that perhaps I should have said there is backstabbing and gossipmongering amongst some members of the judiciary.

Deputy President Petse (Chairperson):

Thank you, Judge President Mlambo. Do you have anything else you would wish to say that may in your view be of assistance to us, during our deliberations before we adjourn the proceedings.

Judge President Mlambo:

Thank you very much for that opportunity. I think what I would like to say to this Commission is, they've heard me today, they've listened to me, they have explored my candidature from all angles. And I want to believe that I gave it my all. I answered all questions put to me. I want to believe I possess, and my experience in leadership circles, equips me eminently to be appointed, or to be recommended for appointment as Chief Justice. I want to believe that I provided a credible and context specific vision for how one can look and fix some of the problems that are there in the judiciary, as well as maximise on the good aspects of what the judiciary in South Africa has achieved, thus far. So, with those few words, I think I've given it my all. I've answered all questions put to me and I can't take it further than that.

Deputy President Petse (Chairperson):

Thank you, Judge President Mlambo for availing yourself and for your answers to the questions posed to you by the members of the Commission, some of which, I must say, were difficult questions. So, all of that will be taken into account during our deliberations. You are at this stage excused. Thank you very much.

Judge President Mlambo:

Thank you very much, Deputy President and Commissioners.

Deputy President Petse (Chairperson):

Fellow Commissioners, this brings us to the end of our sitting today. So, we are adjourning at this stage to continue tomorrow morning. It is eight, half past seven tomorrow. Oh, nine. At nine.

[crosstalk 10:13:27.3]

Deputy President Petse (Chairperson):

Thank you, until nine o'clock in the morning.

Unknown Speaker:

The house is adjourned, Madam Speaker.