



Judicial Service Commission Interviews

5 April 2022

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Constitutional Court Interviews

Interview of Gauteng High Court Judge D N Unterhalter

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15 **Chief Justice Zondo:**

Good afternoon, Justice Unterhalter.

Judge D.N. Unterhalter:

Good afternoon.

20

Chief Justice Zondo:

How are you this afternoon?

Judge D.N. Unterhalter:

I am very well. How are you, Chief Justice?

5 **Chief Justice Zondo:**

No, at least you are asking me how I am. I am fine, thank you.

Judge D.N. Unterhalter:

Good.

10

Chief Justice Zondo:

Thank you very much for making yourself available for consideration for one of the positions on the Constitutional Court. I know that at least this is the third time you are making yourself available for a position on the ConCourt. Thank you very much for making yourself available. A number of us here in the commission took part in your interview in October. We have before us the transcript of that interview, so we are quite familiar with a lot of information about you and of course we have got your questionnaire and your CV.

Speaking for myself, I do not propose to ask you a lot of questions precisely because I did benefit from the interview that I, we gave you in October. It may well be that there will be other commissioners who will take the same position as me, but there are commissioners who were not there in October and who might wish to ask you quite some questions to get to know you better. But even those who were present in the October interview might wish to ask you a little more questions. So, I will ask you some questions aimed at just refreshing our memories on some basic information about you and after that I will allow commissioners who wish to put questions to you to do so. In terms of your qualifications you possess, you hold four degrees. The first being a BA which you got from Cambridge in 1080, is that right?

30

Judge D.N. Unterhalter:

That's correct, Chief Justice.

Chief Justice Zondo:

5 And you got your LLB degree from the university of Wits in 1984, is that right?

Judge D.N. Unterhalter:

Yes, that is correct.

10 **Chief Justice Zondo:**

And then you got your BCL from Oxford in 1985, is that right?

Judge D.N. Unterhalter:

Yes.

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Chief Justice Zondo:

And you got your MA from Cambridge in 1987.

Judge D.N. Unterhalter:

20 Yes.

Chief Justice Zondo:

I do recall that from the October interview that by the time you made yourself available for appointment to the bench or by the time you got appointed to the bench you had been in practice for something like 27 or 28 years. Is that right?
25

Judge D.N. Unterhalter:

Yes, I think it's 27 years, Chief Justice.

Chief Justice Zondo:

- 5 Yes. Yes. And in your practice, you appeared in many courts, including of course the High Court, the Competition Appeal Court, the Supreme Court of Appeal and the Constitutional Court. Is that right?

Judge D.N. Unterhalter:

- 10 Yes. That's correct.

Chief Justice Zondo:

And with special reference to the Constitutional Court there is a long list of reported cases in which you appeared over the years, is that correct?

15

Judge D.N. Unterhalter:

Yes. I have had the privilege of appearing in that court for a very long time, almost since the inception of the court.

20 **Chief Justice Zondo:**

Yes. Yes. And you have written also numerous articles that have been published and you have also, I think if I recall correctly, made some contributions in books as well.

25 **Judge D.N. Unterhalter:**

Yes. That's correct. I did pursue an academic, a set of academic positions at the same time I was at the Bar and so sought to publish as best I could and some of those efforts are reflected in my CV.

Chief Justice Zondo:

Yes. I do not propose to go through a lot of information because it is before us in your CV, in your questionnaire, in the transcript. We are aware of it, but I know
5 that you are currently acting in the Constitutional Court, is that right?

Judge D.N. Unterhalter:

Yes, that's correct.

10 **Chief Justice Zondo:**

And is that from mid-January this year?

Judge D.N. Unterhalter:

Yes. I started in the middle of January and I'm going to act, I've acted for the first
15 term, and I've been asked to act for the second term this year as well.

Chief Justice Zondo:

Yes. How have you found that experience?

20 **Judge D.N. Unterhalter:**

It's been a very, very enriching experience. Having appeared before that court for so many years, of course to see it all from the other side is a very different matter, but it's been an enormously enriching experience. It's a very collegial court where I've been welcomed. The cases are enormously interesting and challenging. It's a
25 hard-working court. There's been a great deal for me to learn about the court and the way it works, but it's been a very, very good experience for which I'm very grateful.

Chief Justice Zondo:

Yes. You have now been a judge for what? Four years or four and a half years?

Judge D.N. Unterhalter:

5 Just, yes, just over four years.

Chief Justice Zondo:

Sorry?

10 **Judge D.N. Unterhalter:**

Just over four years. Four years [intervenes]...

Chief Justice Zondo:

Just over four years, yes.

15

Judge D.N. Unterhalter:

...and four months, I think.

Chief Justice Zondo:

20 Yes. Okay. Have you handed down any judgements that you have written in the Constitutional Court or not yet?

Judge D.N. Unterhalter:

No, not yet. Those [intervenes]...

25

Chief Justice Zondo:

Yes.

Judge D.N. Unterhalter:

5 ...are still in the process of being [intervenes]...

Chief Justice Zondo:

It will happen soon.

10 **Judge D.N. Unterhalter:**

It will happen soon, yes.

Chief Justice Zondo:

15 Yes, okay. I will now allow commissioners who may wish to ask you questions to, I will allow them to do so, and I just want to mention that in doing so to a very large extent they will be seeking to see how your appointment would satisfy the selection criteria that were approved by this body in 2010 which continue to apply. And without reading all of them, I just mention that some of them are whether you are a person of integrity and whether you are a person with the necessary energy
20 and motivation and whether you are a competent person, technically competent, whether you have capacity to give expression to the values of the constitution and whether you are experienced in regard to values and needs of the community.

25 And what message your appointment would give to the community at large if you were to be appointed. Of course, there is a question of whether you are appropriately qualified and whether you are a fit and proper person. Very largely commissioners will ask you questions seeking to see how your appointment would satisfy these criteria.

Judge D.N. Unterhalter:

Yes.

Chief Justice Zondo:

Thank you. Commissioner Nyambi?

5

Commissioner Nyambi:

Thank you, CJ. Ja, afternoon, Judge.

Judge D.N. Unterhalter:

10 Good afternoon.

Commissioner Nyambi:

I'm on your right.

15 **Judge D.N. Unterhalter:**

I'm sorry, I didn't see where you were.

Commissioner Nyambi:

20 I'm very close to where you are. The first question it's about the previous interview as CJ has indicated that you were interviewed twice last year.

Judge D.N. Unterhalter:

Yes.

25 **Commissioner Nyambi:**

Probably you might have gone through the transcript and anything that you might want to reflect about out of what was said in the previous interview coming here today that you think it's more than significant that can assist you to stand out that you might have, not have ample time to deal with it then or you have reflected about it and you have changed your views about it, about what you said to us in your previous time you were here twice last year?

Judge D.N. Unterhalter:

No, there's nothing in particular, but I'd be very happy to take any questions that arise from it.

Commissioner Nyambi:

Okay, linked to that, as you came twice last year, sitting here today what is it that totally different to the judge that we interviewed last year twice so that we must seriously consider as this commission this time around?

Judge D.N. Unterhalter:

Yes. Well, obviously I have had the privilege of acting for a term in the Constitutional Court and since that's the court that I aspire to sit in on a permanent basis, I think that's been a very, very helpful experience, both in understanding how the court works and engaging in the important work that it does. So, I would say that that is a relevant factor that is an additive to the things that I've already placed before the commission for the purposes of considering my position.

You will also see that I have sent through to the commission a number of the judgments that have written in the Supreme Court of Appeal and I think that's a not inconsiderable body of work, much of it reflected in the Law Reports and I'd be happy to take questions on that. But I think it reflects both my interest and the way in which I go about deciding cases. So, I would say those are the two things you might want to reflect upon.

30

Commissioner Nyambi:

My last question, it's about section 167(2) of the Constitution.

Judge D.N. Unterhalter:

Yes.

5

Commissioner Nyambi:

The quorum of the Constitutional Court.

Judge D.N. Unterhalter:

10 Yes.

Commissioner Nyambi:

If you can share with us your view about it.

15 **Judge D.N. Unterhalter:**

Is there some specific question about the quorum?

Commissioner Nyambi:

The issue of having eight.

20

Judge D.N. Unterhalter:

25 Yes. I think there are different views as to precisely what the quorum should be. I –
my own view is that if the Constitutional Court, as it is intended to, hears cases of
the greatest importance which resolve issues of law that then become a durable
part of our constitutional and legal framework, I do think that a quorum of eight is
generally speaking the appropriate quorum, because one does want the benefit of
all the minds that can be brought to bear on the very important questions that the

court considers. And so, although I know there are other proposals about structural change, and I'd be happy to address those if it's of interest, for the moment in the structure of the court as it stands, I do believe that that quorum is the correct quorum.

5

Commissioner Nyambi:

What about a situation where you have got a split of 4/4?

Judge D.N. Unterhalter:

10 Yes. Well, that can give rise to the somewhat unfortunate results, but then the decision that prevailed in the Court of Appeal from which the appeal lay would then prevail by default. So, it can be an unfortunate consequence. Generally speaking, it's obviously better that more of the judges should sit, but there are also exigencies around other duties that judges have and other commitments that don't always
15 make it possible. So, you may well be right. Perhaps an uneven number is the better number and so perhaps nine would be better, but one has to also be practical about is it always possible to assemble that quorum. And we have seen in the past that it has not always been possible. So, I'd completely take your point, it's
20 much better that a decisive outcome is achieved rather than an equality that simply gives rise to a default rule, but one has to also yield to some practicalities.

Commissioner Nyambi:

Thank you, Judge Unterhalter. Thank you, CJ.

25 **Chief Justice Zondo:**

Thank you. Before I go to Commissioner Notyesi, Justice Unterhalter, when you were here in October you had occasion to mention some of members of the Bar that you had been able to assist or give support to. Is there anything arising from what you said then that you might wish to revisit?

30

Judge D.N. Unterhalter:

Yes, indeed and thank you for the opportunity, Chief Justice. I – a query was placed with me yesterday as to my reference reflected in the transcript at page, I think 62 where I referenced Counsellor Baloyi. I've since, as my communication which I
5 hope has reached you indicated [intervenes]...

Chief Justice Zondo:

It only reached me now.

10 **Judge D.N. Unterhalter:**

I'm sorry.

Chief Justice Zondo:

Ja

15

Judge D.N. Unterhalter:

I did send it first thing this morning, but I did indicate that I had checked that reference and I, it was my error. I had made a mistake because in the matter of MTO Forestry and the Competition Commission, I had thought that I had led
20 Counsellor Baloyi whereas in fact she acted for a respondent and we were effectively on the same side, but I was not leading her. I have, if it would be of any assistance to the commission, since drawn up a list of those junior counsel, some of them are, have since become senior counsel and some judges, who I did work with who were black practitioners and women and I'd be very happy to make that
25 available because that is a list that has been checked. So, if it's of use to the commission, I could make that list available.

Chief Justice Zondo:

Yes, maybe they might be able to make copies for [intervenes]...

Judge D.N. Unterhalter:

Certainly.

5 **Chief Justice Zondo:**

...everybody if that facility is available at the secretariat. Ja. Okay, all right. They will probably take it after.

Judge D.N. Unterhalter:

10 Certainly.

Chief Justice Zondo:

Okay, all right. Commissioner Notyesi?

15 **Commissioner Notyesi:**

Thank you, CJ. Good afternoon [intervenes]...

Judge D.N. Unterhalter:

Good afternoon.

20

Commissioner Notyesi:

25 Firstly, I note the Law Society of South Africa speak well about your judgment and [Indistinct 00:17:03] but my attention is particularly drawn to what Natal is saying. I will read for you; I think paragraph 53 of their comment. "Advocate Ncube told his nomination essentially entails three considerations. The first is that the candidates acting stints have been, have played a role in developing the country's jurisprudence. The second is that his judgments demonstrate his strong judicial skills.

The third is that the candidate's judgment also demonstrates a commitment to the underlying values of the constitution".

Judge D.N. Unterhalter:

5 Yes.

Commissioner Notyesi:

10 That's a huge statement from those two organizations to which I can find no fault and obviously even on the last occasion. There's been a question I've asked from all the previous candidates. The question is, if you are sitting at the SCA as a judge, leave to appeal served before you and shortly thereafter you are appointed to the Constitutional Court. That leave to appeal comes to the Constitutional Court, are you entitled to sit?

15 **Judge D.N. Unterhalter:**

If the – if it's an appeal from the SCA [intervenes]...

Commissioner Notyesi:

Yes.

20

Judge D.N. Unterhalter:

...the answer would, I think, be not unless that, unless there's some distinctive feature of the case, but no. I think the answer would standardly be no.

25 **Commissioner Notyesi:**

Ja. I'm asking you this question, Judge, because in the course of my preparation for this interview, I came across two orders. The one issued by yourself and Judge [Indistinct 00:19:00] in the SCA on 8 August [intervenes]...

Judge D.N. Unterhalter:

Yes.

5 **Commissioner Notyesi:**

...in the matter of Ken Lindeque, Eskom Holdings SOC Ltd and Mogale City. In that matter you dismissed the special leave [intervenes]...

Judge D.N. Unterhalter:

10 Yes.

Commissioner Notyesi:

...to appeal. Shortly thereafter, this year you sit in the SCA in the full court comprising of Justices Kollapen, Madlanga, Majiedt, Mathopo, Mhlantla and others.
15 You sit in that bench for the same matter, and you dismiss the leave to appeal by those parties. That's a serious concern to me, I have.

Judge D.N. Unterhalter:

Yes, I [intervenes]...

20

Commissioner Notyesi:

I'm worried that maybe you may not have the authors. I can give it to you, but I came across this as I'm preparing for this particular matter.

25 **Judge D.N. Unterhalter:**

I must say that I [intervenes]...

Chief Justice Zondo:

Before you [intervenes]...

Judge D.N. Unterhalter:

5 I'm so sorry.

Chief Justice Zondo:

...respond, Justice Unterhalter. If you are able to respond, even though this was not given to you [intervenes]...

10

Judge D.N. Unterhalter:

Yes.

Chief Justice Zondo:

15 ...in advance, it's fine. But if you are not able because you would have made a time [intervenes]...

Judge D.N. Unterhalter:

Yes.

20

Chief Justice Zondo:

...then we might have to deal with it differently. I don't know, maybe let me first ask, are you able to deal with it?

25 **Judge D.N. Unterhalter:**

I would have to look at the two cases and see, I'm afraid. And I'd happily come back and answer as best I can. I recall very distantly the one, but I, let me have a look and I'll happily respond.

5 **Commissioner Notyesi:**

Ja.

Chief Justice Zondo:

Maybe let me [intervenes]...

10

Commissioner Malema:

Chief Justice.

Chief Justice Zondo:

15 ...let me say this. The [intervenes]...

Commissioner Malema:

Chief Justice.

20 **Chief Justice Zondo:**

Is it Commissioner Malema?

Commissioner Malema:

Yes.

25

Chief Justice Zondo:

Yes.

Commissioner Malema:

5 No, no, sorry to come in like this. The same – this matter was brought to my attention, and I gave it to [intervenes]...

Chief Justice Zondo:

Ms. van Niekerk.

10 **Commissioner Malema:**

Mr. LO yesterday because it came late.

Chief Justice Zondo:

Yes.

15

Commissioner Malema:

And I had hoped that this matter would've been given to the judge and to your good selves.

20 **Chief Justice Zondo:**

25 Yes. No, I want to address that. Ms. Van Niekerk mentioned to me that there was I think this complaint or, ja, there was a complaint from somebody, and the question was, she sought guidance as to how it should be dealt with because, as I understood the position, it's a complaint that came late or comment that came late with regard to the candidate. And I said to her because it's a complaint that came late, in terms of the decisions we took yesterday, it would not fall under the exception. So, it should not be asked to the, sent to the candidate. You will recall

that the general rule we agreed upon is that if it comes late, it should not be accepted, except if it falls into an exception.

5 And the reason why I said it doesn't fall into the exception is this, that generally speaking I don't think that a judge would intentionally sit in a matter where a decision in which he took part, or she took part would intentionally sit because they would know that they should not sit. But what could happen is that maybe there is oversight and so on. And I said, well, also the complainant, because he is late or she is late, they can lodge a complaint with the judicial conduct committee and their complaint about Justice Unterhalter having allegedly sat in a matter in which
10 he should not have sat can then be dealt with by that body.

Commissioner Notyesi:

Sorry, Chief Justice, this one is not a complaint. I'm not part of that complaint.

15 **Chief Justice Zondo:**

Okay.

Commissioner Notyesi:

I'm asking a question and I explained that it arised [intervenes]...

20

Chief Justice Zondo:

Ja.

Commissioner Notyesi:

25 ...as part of my preparation and I do not know how, and I cannot even reconcile because the court order is a public document.

Chief Justice Zondo:

Ja.

Commissioner Notyesi:

I don't need a complaint to ask this question.

5

Chief Justice Zondo:

Okay. So, you [intervenes]...

Commissioner Notyesi:

10 Because I'm [intervenes]...

Chief Justice Zondo:

What you are saying [intervenes]...

15 **Commissioner Notyesi:**

What I'm saying is I'm basing; I have two court orders here. This is what I pick up in the context of preparing as I do for each and every candidate. This one and other candidates because these are documents and I'm asking as part [intervenes]...

20 **Chief Justice Zondo:**

Yes. No, I understand you.

Commissioner Notyesi:

Ja, but I don't know about the complaint. No one has given me the complaint.

25

Chief Justice Zondo:

Yes, no, no, that's fine.

Commissioner Notyesi:

Yes.

5

Chief Justice Zondo:

But Commissioner Malema said it is a complaint.

Commissioner Malema:

10 No. No, Chief Justice [intervenes]...

Chief Justice Zondo:

Did I misunderstand you, Commissioner Malema?

15 **Commissioner Malema:**

No, no, no, but also your response is what gives me discomfort.

Chief Justice Zondo:

Yes.

20

Commissioner Malema:

And if this is how we are going to proceed, then we are going to have a big problem here. We've asked a question. Commissioner Notyesi has asked a question. The candidate has said, well let me look into this matter and then I will come back. But
25 the Chief Justice has already given an answer that I don't think a judge can sit intentionally in the matter. You have already answered the question for him, and I

don't understand what is this because we, you gave it to him. He said he needs to familiarize himself with the facts and then you go beyond that to answer for him.

Chief Justice Zondo:

5 Well [intervenes]...

Commissioner Malema:

But you don't think a judge can answer, can sit deliberately on a matter. Already the matter has been answered.

10

Chief Justice Zondo:

Well Commissioner Malema, I thought I owed you a disclosure of what happened when I was approached so that you all know, and I shared with you what my thinking was. That is what I was doing, nothing more than that. Justice

15 Unterhalter, you would like to check the facts about this?

Judge D.N. Unterhalter:

Yes. If I may, I would like to check. I know there have been a number of matters in which I was involved in the SCA where I've recused myself when those matters

20 came up for applications for leave to appeal. I'll look at this instance and come to back to you. If I've done so in error, of course I will indicate my error and make appropriate apologies.

Commissioner Notyesi:

25 Ja. In fact, Judge Unterhalter [intervenes]...

Chief Justice Zondo:

Yes.

Commissioner Notyesi:

...when a judge [intervenes]...

5 **Chief Justice Zondo:**

One second. Yes, Commissioner [intervenes]...

Commissioner Notyesi:

Yes, let me, let me explain this, Judge. The question from me [intervenes]...

10

Judge D.N. Unterhalter:

Yes.

Commissioner Notyesi:

15 ...is by no means an intention to convey some other meaning or to catch you up.
It's just a clarity on this matter [intervenes]...

Judge D.N. Unterhalter:

No, I understand.

20

Commissioner Notyesi:

...which I would accept, including the clarity such as to say well I did not see
whatever it is.

25 **Judge D.N. Unterhalter:**

I will [intervenes]...

Commissioner Notyesi:

So, I don't want this to create controversy.

5 **Judge D.N. Unterhalter:**

No.

Commissioner Notyesi:

10 If for me your answer is look, because I have these court orders, if you say I was told, check, well I see, then I recall and then that's it. We pass on. And I can assure you, take my word, it is not about catching you up. Because all I want to establish at the end of the day is how do you, for instance, between the SCA and the ConCourt when you act there, how do you manage [intervenes]...

15 **Judge D.N. Unterhalter:**

Yes.

Commissioner Notyesi:

...such situations?

20

Judge D.N. Unterhalter:

Well, as I've indicated to you, I'm completely alive to the question.

Commissioner Notyesi:

25 Yes.

Judge D.N. Unterhalter:

There are a number of cases where the record will reflect that I have recused myself precisely because I was involved in decision-making at the SCA level.

5 **Commissioner Notyesi:**

Ja.

Judge D.N. Unterhalter:

10 And I will obviously look at what you have got there and if I have fallen into error and made a mistake, I will acknowledge it.

Commissioner Notyesi:

Yes. So [intervenes]...

15 **Chief Justice Zondo:**

Okay. If you can let us have your response after checking [intervenes]...

Judge D.N. Unterhalter:

Of course.

20

Chief Justice Zondo:

...at some stage tomorrow that would be highly appreciated.

Judge D.N. Unterhalter:

25 Of course.

Chief Justice Zondo:

Okay, all right.

Commissioner Notyesi:

5 So, what is happening to me? I don't ask now, it's end of my questions.

Chief Justice Zondo:

Sorry. Sorry.

10 **Commissioner Notyesi:**

Because I was asking questions, I was stopped. I'm trying to clarify things [intervenes]...

Chief Justice Zondo:

15 Sorry.

Commissioner Notyesi:

...so, it must end here.

20 **Chief Justice Zondo:**

Sorry, Commissioner Notyesi. Sorry, Commissioner Notyesi. Well, you, Justice Unterhalter has said he needs to check and then he will revert and let us know.

Commissioner Notyesi:

Do I – because I have the order so that I stop here, I don't ask questions. I leave and everybody ask. If he's ready at the end or he's not ready, it's fine, but I had some questions that I was to ask.

5 **Chief Justice Zondo:**

Yes. No, no, no, I – you remember you have been asking one question with other witness, I thought that was the only one. You can ask, continue.

Commissioner Notyesi:

10 It's single because [intervenes]...

Minister Lamola:

Chief Justice, maybe before he goes to the next question, it's Lamola here.

15 **Chief Justice Zondo:**

I'm sorry.

Minister Lamola:

20 Ja, I hear you saying if he could answer, if he could respond tomorrow. My challenge is that according to this we are going to have deliberations. So, how are we going to handle it then?

Chief Justice Zondo:

25 Well, if he's – I don't think he's able to check before we, today. So, I thought that we might have to postpone our deliberations.

Minister Lamola:

Okay.

Chief Justice Zondo:

Ja. Ja.

5

Commissioner Notyesi:

Chief Justice, as I understand this from the Judge and I understand, if we can leave to him, he can simply say today I want to get other documents or he can say I'm in a position, because this is a court order. It shows who appeared in that court, who appeared, what is the matter.

10

Chief Justice Zondo:

Yes, okay. Justice Unterhalter, do you want to respond to that?

15 **Judge D.N. Unterhalter:**

I don't want to hold up your proceedings at all. I simply need to get access to my computer and when I do so, I'll check and see how this arises and I will come back to you and, as soon as I possibly can.

20 **Chief Justice Zondo:**

Ja. Okay. Commissioner Notyesi, is that fine?

Commissioner Notyesi:

I'm happy.

25

Chief Justice Zondo:

Thank you.

Commissioner Notyesi:

So, I will stop my questions at this moment [intervenes]...

5 **Chief Justice Zondo:**

Okay, all right.

Commissioner Notyesi:

...because we cannot take it further.

10

Commissioner Malema:

Chief Justice.

Chief Justice Zondo:

15 Yes.

Commissioner Malema:

20 My difficulty with that is that the candidate would have finished his interview and then he says he will come back to us at a very, whatever convenient time. Does that mean he will have to come back? Because depending on the type of answer he's going to give, that answer may necessitate a follow-up, wanting to follow-up on this question. So [intervenes]...

Chief Justice Zondo:

25 Yes.

Commissioner Malema:

...how are we going to deal with that because depending on how people answer questions [intervenes]...

5 **Chief Justice Zondo:**

Ja.

Commissioner Malema:

10 ...that question may necessitate a follow-up. So, how are we going to deal with that?

Chief Justice Zondo:

I think we should then say, ask him to come back tomorrow to give the answer in this forum so that if his answer generates further questions, he can answer them.
15 Would that be fine with you [intervenes]...

Commissioner Dodovu:

CJ?

20 **Chief Justice Zondo:**

...Justice Unterhalter?

Judge D.N. Unterhalter:

Certainly, I'm entirely at your disposal.

25

Commissioner Dodovu:

CJ?

Chief Justice Zondo:

Yes, who?

5

Commissioner Dodovu:

I – It's Dodovu, Commissioner Dodovu.

Chief Justice Zondo:

10 Commissioner Dodovu.

Commissioner Dodovu:

I want to speak on the same matter.

15 **Chief Justice Zondo:**

Yes.

Commissioner Dodovu:

20 I personally feel uncomfortable that we need to put this matter in abeyance because of a single question. My express view is that a candidate was asked a question. He's not certain about what transpired in that particular case. I think it's enough in the context of how we're moving forward because here we are going to set a precedence that we have to call a candidate to come and clarify a particular matter here, something that has not happened in the past. My view is that when
25 we consider the issue or the matter at hand and the candidate itself, we'll do that in the context of the information that is available at our disposal, and therefore make a view, express a view on how we must move forward. I think, in my view, that this that we have is sufficient and we need to move forward along those lines. Thanks.

Chief Justice Zondo:

Thank you. To some extent it depends whether Commissioner Notyesi, what he thinks about that because he is the one who had a question. And there has not
5 been a definite answer because the candidate must check. Do you want to say anything about that view [intervenes]...

Commissioner Notyesi:

Chair [intervenes]...

10

Commissioner Malema:

I want to [intervenes]...

Commissioner Notyesi:

15 Chair, it's just that [intervenes]...

Chief Justice Zondo:

Yes.

20 **Commissioner Notyesi:**

It's just that I do not know how to approach now. I knew exactly earlier on, because I think I was in agreement with the candidate on two things. One, that he cannot sit there deliberately, even yourself you indicated that.

25 **Chief Justice Zondo:**

Please raise your voice [intervenes]...

Commissioner Notyesi:

But [intervenes]...

Chief Justice Zondo:

5 ...a bit.

Commissioner Notyesi:

I was in agreement with the candidate, in fact he answered when he says, look, I could not sit on these matters when I was in that court and come and sit on appeal.
10 All what I think he wanted to check is this so that he's able to say, oh well, this happened, I made a mistake. I mean this is what it is, because we know the principle that he cannot sit. If that is what happened, because it's just a question of court orders, but now your view is that he need more time on this. I – to me, there's nothing. He's not in trial about this matter.

15

Chief Justice Zondo:

Ja.

Commissioner Notyesi:

20 I'm not putting him on trial, I just wanted to clarify this, not only for this candidate, but for all of us. My education, other Commissioner's and everybody listening outside there. So [intervenes]...

Chief Justice Zondo:

25 Well, if you say it's not a big issue for you [intervenes]...

Commissioner Notyesi:

Ja.

Chief Justice Zondo:

...to warrant that he should come back tomorrow or furnish other information so that we finalize everything today in regard to the ConCourt, if you say that I would
5 have no problem going ahead.

Commissioner Notyesi:

No, to me it's not a big issue.

10 **Chief Justice Zondo:**

Yes, okay. All right [intervenes]...

Commissioner Malema:

Chief Justice [intervenes]...

15

Chief Justice Zondo:

...is there anyone who feels that [intervenes]...

Commissioner Malema:

20 I'm here on virtual.

Chief Justice Zondo:

Commissioner Malema.

Commissioner Malema:

Well, that is my question as well, if Notyesi is retreating from it, I'm sponsoring it because I don't know how the question of Advocate Baloyi arose, whether it was raised seven days before or it was brought to the attention yesterday and it was
5 also processed and we're able to get an answer today. This matter was also raised and there was a space in between. It is especially for me because it has got everything else to do with the ability to make judgment for the judge. And when the argument arises that, no, you can't say that because he has answered the way he has answered. We are going to use this in deliberations, and I can't use the
10 things that we have not raised, or he did not respond to on this platform.

So, whatever we are going to say in the deliberations based on this should be coming from him and not what we suspect he said, or we assume he said this. So, that's why we should get a definite answer, because for me there are two issues. It's Advocate Baloyi's issue, it's this issue and then it has got everything else now to
15 do with the judgment or the candidate, that how do you go around making such mistakes. How do you come here and say you mentored Baloyi, or you led Baloyi in a case and not being sure and then you come and say no, I made a mistake? Then on this matter he comes and say, okay, I made a mistake.

There are two matters where a candidate for a senior position has made an error of
20 judgment and I will be using that to argue in the deliberations. And someone can't just come here and say no, leave it, you can't get an answer from him. Just use what you got. They are going to litigate and say he never said what you are saying, he said, because I know for sure on this candidate all the time there are NGOs that are ready available to attack us and that's why we must be thorough and we must
25 be clear and we must get definite answers, unless they say they are not prepared to entertain him. Then we can use that. But if he says I can entertain it, let me have an exposure to my laptop, it's going to help all of us that this is his answer.

Chief Justice Zondo:

30 Yes.

Commissioner Malema:

Thank you [intervenes]...

Chief Justice Zondo:

Thank you, Commissioner Malema. Commissioners, this is the view I take of this matter at this stage. I'm not saying it's final but let me say it to you. We are here
5 tomorrow. We are here for the rest of the week. I don't think there is anything problematic if we were to defer our deliberations, the candidate goes and checks what he needs to check. He comes in here tomorrow and at some stage when it's convenient to us, we let him come in. It might be ten minutes; he gives an answer. If there are no further questions that's it, if there are follow-up questions, he deals
10 with them. Then we know that we are done. Because it's not, I don't think it's right if there are members of the commission who feel strongly that an answer on this question should be obtained. I think that's we're – that's what I think we should do. Can everybody live with that?

15 **Commissioner Mmoiemang:**

Chair, before we do that.

Chief Justice Zondo:

Before [intervenes]...

20

Commissioner Mmoiemang:

Thanks.

Chief Justice Zondo:

25 ...let me – Commissioner Singh?

Commissioner Singh:

Ja, thank you, Chief Justice. I don't know whether Justice Unterhalter has his laptop with him, but if he does have, I think it will be very helpful to all of us, perhaps if we

adjourn for half an hour or so and through you as the chair, the documents which Commission Notyesi has on hand be provided to him just to jog his memory, because we don't expect him to come with all the answers here. And then we adjourn for half an hour and then we continue and finish our interview and we can
5 deal with deliberations perhaps tonight or tomorrow. So, I don't know if that's a possible way out of this.

Chief Justice Zondo:

Maybe what we should do is let's exhaust other questions and then at the end we
10 can then decide whether we go that route or another route with regard to this particular issue. So, in other words what I'm suggesting is that let's park this issue. Let's continue with the interview and once we are done with all other questions and the only one left is this one, we can decide at that stage whether we go the route of asking to come back tomorrow or whether we go with the suggestion
15 made by Commissioner Singh. Commissioner Xaba.

Commissioner Xaba:

Yes. CJ, thank you very much. I want to agree with your proposition that says let's park this issue and then continue with the interviews. And then the issue that the
20 advocate needs to be aware of is that we need this reply, his response to this particular question before we, our deliberations. So, we either postpone our deliberations. We are going to have the deliberations immediately after this sitting. It's either we postpone them to tomorrow morning in which case we allow him time to come back. The issue how is he going to come back, I think we can even
25 take it by, he can come online on the time that you will determine. We make a follow-up on this and then conclude and then go into deliberations. Thanks.

Chief Justice Zondo:

Ja, okay. All right. Are we agreed, we let's continue with the interviews for now,
30 with the interview and then before, when we are done, then we'll talk about this issue how we move forward with it?

Commissioner Mmoiemang:

Chief Justice [intervenes]...

Commissioner Pillay:

5 Chair, can I just raise a [intervenes]...

Chief Justice Zondo:

Okay. Commissioner Pillay.

10 **Commissioner Pillay:**

Thank you, Chief Justice. I would like to agree with Commissioner Malema. There are actually two table, two issues which are unresolved. I wouldn't want to label the one the Baloyi issue, but certainly the number of black women that the candidate has led while he was at the Bar, I think that's still an issue that's
15 unresolved. So, if we are pending issues to be discussed tomorrow, I think it's important to emphasize that there's two issues thus far that remain unresolved.

Chief Justice Zondo:

20 Well, it, as we speak, I don't know of any reason why any other issue can't be dealt with today. I know why this one that we are talking about might have to wait until later. What I'm saying, if we continue with the interviews and there is a question that somebody wishes to ask with regard to the issue you are raising, that can be asked.

25 **Commissioner Pillay:**

Except, Chair, that on the black women juniors we're waiting for the candidate to produce a list.

Chief Justice Zondo:

Okay.

Commissioner Pillay:

5 And that's why further questions will have to [intervenes]...

Chief Justice Zondo:

Ja.

10 **Commissioner Pillay:**

...follow once we receive [intervenes]...

Chief Justice Zondo:

Okay.

15

Commissioner Pillay:

...that list.

Chief Justice Zondo:

20 No, that's fine. Can we continue with the interview, Commissioner Notyesi?

Commissioner Notyesi:

...to do just for myself to complete, I want to hand over this so that, on my side so that it can see what I'm talking about.

25

Chief Justice Zondo:

That's fine. Thank you. Okay. Let's continue with the interview for now.
Commissioner Mmoiemang, had I given you a chance or not?

5 **Commissioner Mmoiemang:**

Not, Chief Justice.

Chief Justice Zondo:

Okay. May I give you the chance now?

10

Commissioner Mmoiemang:

Thank you, Chief Justice.

Chief Justice Zondo:

15 Okay.

Commissioner Mmoiemang:

Good afternoon [intervenens]...

20 **Judge D.N. Unterhalter:**

Good afternoon.

Commissioner Mmoiemang:

25 ...Justice Unterhalter. My question relates to whether there is a case in suggesting that there is lawfare in South Africa following the rule that the court plays in promoting the values of our constitution. Secondly, does the constitution stand in

the way of radical socio-economic transformation in terms of transforming the capital relations in South Africa, ownership, management and control of key economic sectors? Thank you.

5 **Judge D.N. Unterhalter:**

Well let me answer both your questions. Perhaps let me begin with the second question first. Our constitution marks out two parameters fundamentally which is that there are a bundle of fundamental rights which define a number of liberties that people have, as well as obligations that rest upon government to progressively
10 realize the socio-economic right.

On the other hand, there are a scheme of separation of powers under the constitution which give, as one would expect, considerable latitude and indeed obligations to the executive and Parliament to shape the policies that in the view of the government of the day are relevant for the country and they are elected to
15 determine. And I don't think that our constitution dictates the kinds of economic policies that are to be pursued by one government or another. They omit of a very great range of economic possibilities and by and large, those who might be committed to significant changes, to economic relationships in this country, will find that there is ample scope within the constitution for that, bounded only, as I've
20 indicated, by the fact that this is a constitutional democracy. And in a constitutional democracy there are certain fundamental rights which exist, and which are to be honored, notwithstanding what the government of the day offers. So, that would be in general terms my answer to the second question that you pose.

As far as the question of lawfare is concerned, there's been a great deal of
25 discussions as to whether the courts have become places in which political battles take place. And I don't think that the courts have ever been immune from the fact that political actors will often seek to translate their political positions into legal arguments. What matters most fundamentally is that courts don't find themselves drawn into the rights and wrongs of particular political positions.

30 And so it seems to me that when people speak about the fact that courts are overstepping, that can arise in one of three circumstances. The one is that an unsuccessful litigant does not like the way a court has decided, that's an inevitable feature of all litigation. Somebody wins, somebody loses. There are some who criticize the structure of the constitution as it exists and would have it other than it

is. Well, we know that that's a matter for constitutional change. And then there's the third question which is have the courts in any way overstepped the boundaries of what courts are there to do in upholding the constitution. It would be that third category that one would want to look at very closely, but in my judgment though
5 many issues of legal importance sometimes are the result of political battles that litigants would fight. The courts don't translate that into political partiality, they must and always should determine the matter on the basis of the law and the constitutional order as we have it reflected in the constitution.

10 **Commissioner Mmoiemang:**

Thank you, Justice Unterhalter. Thank you, Chief Justice.

Chief Justice Zondo:

Thank you, Commissioner. Justice Petse?

15

Deputy President Petse:

Thank you, Chief Justice. I've got – good afternoon, Justice Unterhalter.

Judge D.N. Unterhalter:

20 Good afternoon, Justice Petse.

Deputy President Petse:

I've got two questions for you. One is more of an observation, and I will leave it to you whether you might seek to dispute it. I see from the bundle of documents here
25 that you were nominated by Advocate Maleka, Advocates Maleka and [Indistinct 00:48:49] and Siciliana.

Judge D.N. Unterhalter:

That is correct.

Deputy President Petse:

5 And having read those letters of nomination and the motivation for the nomination, I just want to make this observation. Your wealth of experience and extensive knowledge of the law was demonstrated during your several acting stints at the SCA, during debates with counsel in court and deliberations that the members of the panel would have after the hearing. Do you wish perhaps to comment on that?

10

Judge D.N. Unterhalter:

Well, I, I've certainly had, as I've indicated earlier, the privilege of acting in the SCA and now in the Constitutional Court and there's a great deal to learn about how appellate justice works. But it has been one of the enormously enriching features of that experience that one engages in these courts with very talented counsel who come to submit before the court and getting the best out of their submissions as part of what hearings are all about. Although the questioning is often rigorous, it's intended to be in order to get the very best advantage of what counsel can contribute.

15
20 And then there is the wealth of experience and knowledge that colleagues bring to bear in thinking about cases and offering their views about it and it is out of that judicial chemistry, if I can put it that way, that we get our thinking refined and the best of our judgments ultimately come to be made. So, I've tried to make my own contributions to that process and of course also greatly benefited from how others engage in what is the fundamental work of the appellate court.

25

Deputy President Petse:

Thank you. My second question has got its genesis in the question that Commissioner Notyesi wanted to pose to you, and you are at liberty to indicate if you feel that we must park that question until tomorrow after you have had the opportunity to investigate the matters relating to what Commissioner Notyesi wanted to raise with you.

30

I don't know whether you are aware from your acting stints at the SCA which is a common occurrence there where you would have two judges of the SCA considering a partition, deciding to grant leave to appeal and one or two of those judges would make up together with three other judges the panel who, that hears
5 that appeal in due course. Similarly, from my experience in the Constitutional Court where justices of the Constitutional Court would consider applications for leave to appeal, would dismiss one straight away on the basis either that there are no prospects of success of the intended appeal or that it does not engage the jurisdiction of the court.

10 In one it happens, they would decide to issue directions, file the record and they extract timeframes for filing of the record, filing of heads by the applicant and filing of the respondent's heads and an indication of when the matter would be heard. And all 11 justices who are a party to that direction or you know, whatever the number that constituted the quorum would then hear the application for leave to
15 appeal in due course.

Judge D.N. Unterhalter:

Yes. That is entirely as I understand the procedure to be and as I understand the difficulty that's been put is that I would not have been competent to be part of any
20 quorum that would have determined the application for leave to appeal before the Constitutional Court and that's the matter that I will look into. I don't think it makes a consequential difference to the outcome because there would, I assume, have been more than a quorum available to take the decision whether my ascent, if there was an ascent, is counted out of the calculation or not. So, but I will obviously
25 look at the position and, but your understanding of the procedures, as I have come to know of them, is accurate, with respect.

Deputy President Petse:

Thank you, Justice Unterhalter. Thank you, Chief Justice.
30

Chief Justice Zondo:

Thank you. Commissioner Magwanishe.

Commissioner Magwanishe:

Thank you very much, Chief Justice. I think I must be protected from my discipline.

5 **Chief Justice Zondo:**

From who?

Commissioner Magwanishe:

10 From my own discipline, because I do raise hands and to make interventions,
because I just don't just talk.

Chief Justice Zondo:

Ja.

15 **Commissioner Magwanishe:**

I think I need to be protected from that discipline.

Chief Justice Zondo:

I apologize, Commissioner Magwanishe.

20

Commissioner Magwanishe:

No, no, thank you very much, Chief Justice. Good afternoon, Justice Unterhalter.

Judge D.N. Unterhalter:

25 Good afternoon.

Commissioner Magwanishe:

When you were responding to the question from the Chief Justice, I think I'm going to collapse two questions into one. When you were responding to the question
5 from the Chief Justice you said that you are still writing the judgments. You have not yet delivered the judgments in the ConCourt where you are acting now. Now will it be fair that you just come for a few months, you have not even delivered one judgment and then we expect you to be appointed to that court? Can you really say that you know that court?

10 I think it's linked to also the question on the fact that in terms of one of the criterias that the Chief Justice has articulated is that we must also consider the message that we are sending to society in general. Now what message will we be sending that you just come for four years, you jump to the highest court in the land and there are other judges generally who have been there for quite a long time and is linked
15 to the issue that I've just raised also with the Constitutional Court. You are appointed in January if I'm not wrong, you are appointed in January. You are still in the process of writing judgments for that court, then you are appointed. Can you assist us so that we have compelling arguments to recommend your name?

20 **Judge D.N. Unterhalter:**

Yes. Well let me be clear, the judgment that I've been asked to write, I have actually written but it's under consideration from my colleagues, so I can't do more than await their views on it which are in the process of being determined. Of
25 course, it happens that this interview comes at the end of the first term and as you will know the Constitutional Court follows a particular process by which judgments are produced. But I think that you will find that the work that I've done over the term that I've just been engaged upon has been quite considerable and the results of that will become apparent when the judgments are yielded.

30 So, although you can't know everything as to what I've done over this period, that is something that will become apparent, and I think I can give you the assurance that I have very fully participated in the work of the court and will fully participate and continue to do so in the term that is coming. So, I don't think that the proposition is somehow that I've just started and there's nothing by way of a record that is relevant to my suitability for consideration.

The other point is this, which is that generally speaking, you know, if one is privileged enough to act in that court, there is a limited time over which that takes place. So, I'm not certain entirely what is the expectation of the commission. How many times must one act in the Constitutional Court before one can be considered
5 as candidate for that court? It does seem that not only is acting not a requirement, but if it happens a period of two terms would probably suffice as a reasonable training ground for the purposes of permanent appointment and that has been a norm established over the years.

As to the question as to the period of time that I have been a judge, I've made these
10 indications to the commission before, but let me very briefly summarize where I am on all of that. In a lengthy professional career which, where I took time out from the Bar to engage in the work I did at CALS and at the Mandela Institute and so on, there is only so much one can do in a professional life and I took that time because there were a number of things that I wanted to do and achieve in the course of my
15 professional life. In addition to the time that I took to serve at CALS and in the Mandela Institute, I also spent time, as I've indicated before, at the WTO where I served on the appellate body and chaired that body for two years with a cumulative experience of some eight years of judicial service in that capacity.

Now we can talk about how useful and relevant that is, but that explains why I, as it
20 were, came to the South African judiciary relatively late in my professional career. And the ultimate question I think for the commission, and certainly the one that I would suggest to you is that the question is that cumulative experience of practice and judicial performance in the WTO, and the other things that I've done in my career, of value to a position in the Constitutional Court. And I would like to
25 suggest to you that it is.

Commissioner Magwanishe:

Thank you, Chief Justice. Thank you, Judge Unterhalter.

30 **Chief Justice Zondo:**

Thank you, Commissioner. At this stage I'm going to go to the commissioners who are attending virtually to see if there is somebody who wishes to put some question to the candidate.

Commissioner Malema:

Julius here.

5 **Chief Justice Zondo:**

Commissioner Malema.

Commissioner Malema:

10 Thank you, CJ. Judge, is it an acceptable thing that, maybe let me put it differently,
that we have observed a huge temptation to capture the judiciary, especially from
the executive and politicians who want to use the judiciary to fight [Indistinct
01:01:47] and all of us, all of us without fail, we've gone all out to protect the
judiciary against politicians who want to capture it? Would it be an acceptable
15 thing that some NGOs here must capture the judiciary to serve their own interests,
because they are not political parties? Is it acceptable if it's not political parties it's
okay that these NGOs must capture the judiciary?

Judge D.N. Unterhalter:

20 Commissioner, I think the position is very clear which is that it's critical that the
judiciary should be independent and beholden to no one but their oath of office
and to the constitution and they should be captured neither by politicians nor by
NGOs, but simply do their duty as independent judges.

Commissioner Malema:

25 Now my second question, Judge, is does experience count for anything for you?
Like do you think it's necessary for people to get an experience before they assume
certain responsibilities permanently? And let me take it further that do you still
hold the same views you're holding before you acted in the Constitutional Court, or
you think that your acting actually helps somehow to put you in a better and a
30 different position?

Judge D.N. Unterhalter:

I think experience is always helpful. I think we have had examples of very, very good judges who have had little or not experience and discharged their judicial
5 functions with great distinction. But it is always helpful to have experience and I'm particularly grateful that I have had two years on the Supreme Court of Appeal and have now had the opportunity to act in the Constitutional Court. I don't think, in other words, that you can never have an appointment without the requisite experience, but I think that it is helpful, and it has been helpful.

10

Commissioner Malema:

And will you agree with me, Judge, that acting and acquiring an experience is so helpful that it will even empower you to a point where you don't make minor mistakes, especially at that level of the Constitutional Court because that is the
15 highest court where you cannot afford to make minor mistakes, and part of the things that will make you not make minor mistakes, it is acquiring an experience?

Judge D.N. Unterhalter:

Well, [Indistinct 01:05:03] say this, that I'm afraid human error is part of everyone's
20 experience and no matter how long one pursues a particular career or a particular line of engagement, you can always make a mistake. We're all fallible, we're all human, I am, and we can make mistakes. And we have to acknowledge that and it's true of everybody, and if I've made a mistake, it's not because I believe I lack experience. It's because everyone can do so from time to time.

25

Commissioner Malema:

Judge, I agree with you, we are all going to make mistakes, but that is not my question. My question is acquiring experience, especially when you go to the Constitutional Court helps you not to make minor mistakes, underline minor
30 mistakes.

Judge D.N. Unterhalter:

Yes.

Commissioner Malema:

5 There are certain things are A, B, Cs of the Constitutional Court and if such minor mistakes are committed at a Constitutional Court, you will destroy the image of that court and once you destroy the image of that court you destroy the confidence of our people in that court. And once our people no longer have confidence into that court, it will lead into the state of anarchy. So, I'm saying do you accept that
10 experience will help you not to commit minor mistakes? Not mistakes, minor mistakes.

Judge D.N. Unterhalter:

I don't accept your proposition. I don't think that the kind of experience one gains,
15 important as it is, ever prevents a minor mistake from being made. These things happen from time to time and if they do, they're regrettable, but I also don't accept that because a, what you've said is a minor mistake if it has been made, somehow that leads ordinary people to suddenly lack confidence in the Constitutional Court or the judiciary at large. People recognize as they do in every walk of life that
20 people make errors and as long as those errors are corrected and acknowledged, then that is not threat whatsoever to the institutional integrity of the courts or any other part of our constitutional structure.

Commissioner Malema:

25 You know, it is minor mistakes that ordinary people will appreciate. Those legal jargons and whatever arguments you make there, we may not be able to pick them up, but once you start engaging in minor mistakes, then that court is going to be flooded with recission applications and it will be forced to change its own decisions. And once it starts its own decisions, it suffers image crisis and confidence crisis and
30 that leads to our people losing confidence in that court. Will you agree with me?

Judge D.N. Unterhalter:

Counsellor Malema, I can't agree with you. A recission is a very particular kind of procedure and it has been resorted to more often of late, but there are very few instances in which courts make errors. But if they do, they can be corrected, and they should be corrected, and I don't believe that it leads to this wholesale lack of confidence that you suggest.

Commissioner Malema:

My last question is, does seniority count for anything for you? I don't know anything about law and I'm not a lawyer, every time I go out with lawyers, the CJ, and then we'll go to a dinner or something, they say the senior counsel must pay because he's the most senior person there and that they always accord respect to that senior because of that seniority. Then there will be judges, I heard JP saying earlier on, he thought he was the most senior in the room and all of that. So, you've got this tradition amongst judges and by extension, I mean lawyers, and by extension judges who respect seniority.

And it's not only in the legal fraternity or in the judiciary, it's also in the church where you can't join, Judge. Today you get baptized, the following day you ask the question, where are the pastors sitting. After being baptized you give yourself some time to familiarize yourself with the processes there and allow the seniors to take through, to take you through and teach you. So, my question is, does it really, seniority, does it matter to you?

Because I'll ask you why, I'll tell you why I'm asking you this question, Judge. I respect you very highly and those who are in my legal battles respect you very highly. Some of them nominated you. But I've got a problem that we, and you can see that we consider you very highly. We appointed you and you are being given opportunities to act and all manner of things, but you are in this hurry to a point where you even want to pass the people you found in the judiciary and go and lead them at the Constitutional Court. Why can't you give yourself time? You are now acting.

Earlier on when we interviewed you and told you about acting, you had a different view. Now you are acting. Can't you give it some time to continue acting and accumulate the necessary experience, then this argument of seniority and the

minor mistakes and experience will fall off and you assume that position properly without anyone having questions? Seniority, does it matter really to you?

Judge D.N. Unterhalter:

5 Yes. Counsellor, I don't think we value seniority just for the fact of seniority. We value seniority because it sometimes represents cumulative knowledge and experience that can be usefully brought to bear and that's sometimes valuable and we take account of it for the reason of its substance, not simply because it is a rank that has been attained through the passage of time. I think in my case, it's a
10 question of how the commission, and yourself, assesses the fact that I have had a very lengthy career at the Bar in which I have done a great deal of constitutional work over a very long period of time. I have had experience across many areas of law, and I have acted in the judicial capacity in the WTO for some eight years and it's now a question of whether there has been enough further experience within
15 the South African judiciary that would suggest that I can make a contribution. I believe that I can and I'm happy to further explain what that contribution would be.

But if it is the case that you or the commission at large takes the view that it is only sitting judge show have sat for ten or more years, well then you will announce that policy and people will know where they stand. And speaking for my position, I will
20 then become too old to ever assume a position on the Constitutional Court and I will not be able to make that contribution. But that's a judgment ultimately for the commission to make, it's not one that I can. I believe I have cumulative experience of some value to a contribution I can make of the Constitutional Court and if I'm given the opportunity, I should love to do so. But if that isn't the requisite
25 combination of experience that counts for the purposes of appointment, well then, I will accept that and that is how things will be.

Commissioner Malema:

Thank you, CJ.

30

Chief Justice Zondo:

Thank you, Commissioner Malema. I don't have anyone on my list, anyone now, but I see Commissioner Singh and after that Minister intervenes

5 **Commissioner Breytenbach:**

[Indistinct 01:13:40].

Chief Justice Zondo:

10 I'm sorry, I'm sorry, Commissioner Singh. I'm sorry. I think I forgot that I was still with the commissioners who are attending virtually. Was that Commissioner Breytenbach?

Commissioner Breytenbach:

Yes, thank you, Chief Justice, if I may?

15

Chief Justice Zondo:

Yes, go ahead.

Commissioner Breytenbach:

20 Thank you, Sir. Good afternoon, Judge Unterhalter.

Judge D.N. Unterhalter:

Good afternoon.

Commissioner Breytenbach:

My question is a simple one. What in your view are the factors to consider in deciding whether or not you are sufficiently conflicted in any given matter to justify your recusal as a judge? Thank you.

5

Judge D.N. Unterhalter:

Well, a conflict of interest arises in a number of different circumstances, but it would usually be one where there is some private involvement that one has which is at stake in the litigation and hence there would be an apprehension that one could not bring an independent mind to bear. So, standardly, it is conflict of interests that give rise to recusals and that's the one category that would ordinarily require a judge to step away from a case if they had interests in the litigation or its outcome that were peculiar to their private concerns and hence, they would be operating in a conflict of interest and duty. And I think that's fairly well understood as a basis upon which a judge would recuse themselves.

15

Commissioner Breytenbach:

Thank you.

20 **Chief Justice Zondo:**

Thank you, Commissioner Breytenbach. Any other commissioner attending virtually who has a question for the candidate?

Commissioner Barnard:

25 Nothing from me, Chief Justice.

Chief Justice Zondo:

Thank you, Commissioner Barnard. Commissioner Shabangu-Mndawe, have you got any question [intervenes]...

Commissioner Shabangu-Mndawe:

Nothing from me.

5 **Chief Justice Zondo:**

Nothing from you.

Commissioner Shabangu-Mndawe:

Nothing from me, yes.

10

Chief Justice Zondo:

Thank you. Commissioner Singh?

Commissioner Singh:

15 Thank you very much, Chief Justice. Good afternoon, Judge Unterhalter.

Judge D.N. Unterhalter:

Good afternoon.

20 **Commissioner Singh:**

Firstly, I just want to confirm, Chief Justice, that if you take us out for dinner or in our case Parliament, the Speaker, then the Speaker has to pay, because that's seniority as far as I'm concerned. So, I think they must expect a big bill from all of us when they take us out to dinner.

25 I think one of the significant appearances that you made, Judge Unterhalter, when you were not a judge, and I'm speaking from a colloquial point of view in the

Constitutional Court, when you secured us, when I say "us", members of Parliament, the right to introduce private members bills.

Judge D.N. Unterhalter:

5 Yes.

Commissioner Singh:

10 And that was in 2012 where that right was not a given right at that time and late Honorable Mario Ambrosini took that matter and SC Unterhalter represented us MPs and I think that was a significant ruling by the ConCourt and it really helps us now as members of Parliament to move forward. That's as an aside. But just to say thank you again for that.

15 During our last interview, the commission spent a lot of time on your participation or appointment in a leadership role or otherwise in the South African Jewish Board of Deputies.

Judge D.N. Unterhalter:

Yes.

20 **Commissioner Singh:**

25 And I know you explained at length your position, but there were a number of articles in the papers in various publications thereafter by different people, which is not you writing, about this matter. Now I know you did explain the matter to us. Is there anything that you would want to add for those commissioners that were not here, or may not have followed or members of the public who don't have the transcript that we are privileged to have before us? Thank you.

Judge D.N. Unterhalter:

Yes, I'm not sure that I have terribly much to add. The, you know, the position as I've described it is that the Jewish Board of Deputies is a body that has long predated the state of Israel and is there to look after the interests of the Jewish
5 community and in particular deal with cases of antisemitism which is a species of racism that is particularly concerning to the Jewish community.

I joined on the basis that I could possibly in a time of COVID be of some service and that was my understanding. It was to serve that community of which I am part. I have indicated on a number of occasions that the views that the community, that is
10 the Jewish community has as to the state of Israel and so on are highly varied and that is not part, as I've ever understood the constitutional basis of the Jewish Board of Deputies to be anything more than its service to the Jewish community. I certainly acknowledge that in the light of the fact that the Jewish Board of Deputies is a litigant and sometimes a litigant at, in the appellate courts when dealing with
15 questions of antisemitism that it would not be appropriate for me to continue to serve in such a body which is also a litigant.

And it was for that reason that I stepped away from the board and I, and it seemed right that I should do so in the light of the issues that were raised with me. And as I've indicated where one is in error and there is correction to be made, well then
20 one must make the correction and not simply dig down and simply refuse to acknowledge and refuse to correct. And that's essentially what I've done.

Commissioner Singh:

No, thank you very much, Judge Unterhalter. Thank you, Chief Justice.
25

Chief Justice Zondo:

Thank you, Commissioner Singh. Minister?

Minister Lamola:

30 Thank you, CJ. Judge, my question relates to the Phaahla judgment versus the Minister of Justice and Correctional Services. One of the issues that the judgment

was attempting to cure was a dual system of consideration of parole, but I'm asking myself that you took a decision then which was confirmed by the ConCourt on the fact that the parole must be considered on the basis of the date of the commission of the offence instead of the date of sentence. But as there's a judgment, van Wyk
5 judgment, I'm sure you will also have considered it when you're considering the Phaahla. So, when dealing with the van Wyk matters, they are dealt with also differently. You can consider them before 2004. There is a kind of regime.

So, I sometimes feel like it did not really cure this issue of a dual system that the ConCourt was trying to que, but also that I sometimes sit with the parole that I feel
10 like this is a gruesome kind of an offence, but a person has to be considered for parole, even before they reach maybe 25 years which was the intention of the Correctional Services Act.

Judge D.N. Unterhalter:

15 Yes.

Minister Lamola:

Ja. Do you have any comment on that that you think could be helpful for us?

20 **Judge D.N. Unterhalter:**

Well, the dilemma that arose in that case, and which I attempted to resolve in, as part of a full bench which then went on to the Constitutional Court, was how does one understand constitutional rights in relation to parole when the legislature has changed the scheme under which parole can be considered, particularly the time
25 period relevant to when those who have been convicted of the most serious offences can be considered for parole. And as we know there was a law change that occurred and the question was well, is the regime of parole some part of the burden of sentencing and punishment that a person has to suffer or be relieved of. And ultimately, I found, and in the judgment with my colleagues and so did the
30 Constitutional Court, that there is a relationship between the consequences of one's criminal act, including any parole that might flow from a criminal sentence.

And that if, and the relevant time to determine that burden of punishment is at the time of the commission of the offence rather than at the time of sentence.

5 Now there are always anomalies when one engages in the change of law and certainly there were decisions prior to Phaahla which had looked at this in a very different way and had said that in effect, parole is a feature of executive discretion and simply doesn't engage this burden of punishment. I took a different view, so did the Constitutional Court, but there is certainly a view, and perhaps it's one that, Minister, you may be more sympathetic to, which suggests that parole is something that happens after sentencing is of a discretionary feature of executive decision making and shouldn't be implicated in the notion of punishment itself. That's not the route ultimately that the Constitutional Court took, and it wasn't the view that ultimately I held, but it's certainly a view that I fully understand the weight of.

Minister Lamola:

15 Thank you, CJ.

Chief Justice Zondo:

20 Thank you. We have taken one and a half hours already with this candidate, but I don't have any further hands. The secretariate has told me that they have been in contact with the Constitutional Court and have obtained the application papers relevant to the matter that Mr. Notyesi raised. It is possible that if the candidate was given those papers, maybe that might give him all the information he needs and he might be able to assist. I'm not sure.

25 **Judge D.N. Unterhalter:**

Yes.

Chief Justice Zondo:

Do you think that might help?

30

Judge D.N. Unterhalter:

I'm obviously very happy to look at [intervenes]...

Chief Justice Zondo:

5 To have a look. Yes.

Judge D.N. Unterhalter:

10 ...at what papers have been procured. What I had wanted to check on my own email, but with the assistance of the Constitutional Court I might be able to do it here, is [intervenes]...

Chief Justice Zondo:

Yes.

15 **Judge D.N. Unterhalter:**

...is firstly to check what application served before the Constitutional Court and check in that application how it came from the SCA.

Chief Justice Zondo:

20 Yes.

Judge D.N. Unterhalter:

25 And then to check in the scheme of the emails that were exchanged that my concurrence in the Constitutional Court is accurately reflected on the documents that have been handed to me. But I can look at whatever materials are available and see if I can ascertain the position or not.

Chief Justice Zondo:

Is your answer that looking at the application papers that have been secured may or may not help, because you might need to look at your computers then for other things?

5

Judge D.N. Unterhalter:

I think what I would be wanting to do is to check in the scheme of the emails by which one indicates a concurrence [intervenes]...

10 **Chief Justice Zondo:**

Okay. Okay.

Judge D.N. Unterhalter:

...that I did participate [intervenes]...

15

Chief Justice Zondo:

I understand, ja.

Judge D.N. Unterhalter:

20 ...as the documentation [intervenes]...

Chief Justice Zondo:

Ja.

25 **Judge D.N. Unterhalter:**

...seems to indicate. I would just like an opportunity to check that.

Chief Justice Zondo:

Ja.

5 **Judge D.N. Unterhalter:**

And it is, I'd have to get access to my computer or a computer [intervenes]...

Chief Justice Zondo:

Okay.

10

Judge D.N. Unterhalter:

...to do so.

Chief Justice Zondo:

15 And you don't have your computer here?

Judge D.N. Unterhalter:

I don't, but I'm certainly, I can certainly see what I can do to get remote access to it.

It may be possible if there's someone who can assist me with a computer, I can

20 certainly look and see.

Chief Justice Zondo:

Yes.

Judge D.N. Unterhalter:

So, Chief Justice, if I can deal with the matter today, I would obviously want to do so to assist you and resolve the question one way or the other.

5 **Chief Justice Zondo:**

I'm sorry, did you say if you can deal with the matter today?

Judge D.N. Unterhalter:

10 Well, if – it really just depends upon getting access to a computer and being able to remotely access my emails at the [intervenes]...

Chief Justice Zondo:

Ja.

15 **Judge D.N. Unterhalter:**

...Constitutional Court and [intervenes]...

Chief Justice Zondo:

Ja.

20

Judge D.N. Unterhalter:

...it may be that some of the documentation is available. So, I'm perfectly happy if it will be of assistance to try and see [intervenes]...

25 **Chief Justice Zondo:**

Ja.

Judge D.N. Unterhalter:

...what is available.

5 **Chief Justice Zondo:**

Yes.

Judge D.N. Unterhalter:

If I can try and resolve the matter today, I would obviously do so.

10

Chief Justice Zondo:

Okay, all right. Thank you. They will give you the papers for what it's worth, but from what you say they might not provide the answer because you need to see the emails that were exchanged. You want to see whatever email where you would have indicated your, you would have signified your concurrence with the order.

15

Judge D.N. Unterhalter:

Yes.

20 **Chief Justice Zondo:**

So, I think, Commissioners, let's now talk about the way forward with regard to the issue that was raised by Commissioner Notyesi, but I think Commissioner Schlemmer wants to say something.

25 **Commissioner Schlemmer:**

Yes, CJ. It seems like the secretariate has a computer available that Justice Unterhalter may have a, may use to get access to the material.

Chief Justice Zondo:

Yes.

5 **Commissioner Schlemmer:**

And if I may then I would like to suggest that we adjourn for an hour maybe and then come back to give him time to have a look at it.

Chief Justice Zondo:

10 Yes. May – Justice Unterhalter, how much time do you think you might need?

Judge D.N. Unterhalter:

15 If I can get access to a computer which allows me to get into my Constitutional Court emails, I don't think I'll need terribly long, but I could indicate earlier whether that's possible or not so [intervenes]...

Chief Justice Zondo:

Ja.

20 **Judge D.N. Unterhalter:**

...as to not detain you for any longer than is necessary.

Chief Justice Zondo:

25 Yes. Okay, well maybe we should adjourn for maybe let's say 30 minutes and if, ja, maybe after that 30 minutes you will tell us whether you have succeeded or not.

Judge D.N. Unterhalter:

Certainly.

Chief Justice Zondo:

5 Okay.

Male Speaker:

Before we adjourn and I think we can excuse Judge Unterhalter.

10 **Chief Justice Zondo:**

Well let's first see. We're agreed that we'll adjourn for 30 minutes?

Various Speakers:

Yes.

15

Chief Justice Zondo:

Okay. All right. So, let's, let me release you temporarily, Justice Unterhalter.

Judge D.N. Unterhalter:

20 Yes. I'll leave the copy of the list of counsel with whom I've worked [intervenes]...

Chief Justice Zondo:

The secretariate must take it from you.

Judge D.N. Unterhalter:

Yes.

Chief Justice Zondo:

5 Ja. We are therefore going to come back, it's now 18:05, we'll come back at 18:35.

Male Speaker:

Yes, but before we can I [intervenes]...

10 **Chief Justice Zondo:**

Okay, but you want to say something.

Male Speaker:

Yes.

15

Chief Justice Zondo:

Ja.

Male Speaker:

20 Firstly, I think [intervenes]...

Chief Justice Zondo:

After the candidate has left?

Male Speaker:

Yes. Yes.

Chief Justice Zondo:

5 Okay, we [intervenes]...

Judge D.N. Unterhalter:

Shall I – am I excused for now?

10 **Chief Justice Zondo:**

Ja.

ADJOURNMENT

15 **Chief Justice Zondo:**

Are you able to report back?

Judge D.N. Unterhalter:

20 Yes, indeed. Thank you very much for the opportunity. I've managed to get hold of the application that served before the Constitutional Court and the memorandum that was provided by Justice Madlanga. So, let me tell you what I've been able to ascertain. The document that has been provided to me indicates that a petition served before the Supreme Court of Appeal and I, together with Justice Makume, sat on that petition.

25

Chief Justice Zondo:

I'm sorry. I'm sorry, Justice Unterhalter. Thank you, Minister. The commissioners attending virtually, are you there? Are you back?

5 **Male Speaker:**

We are here.

Female speaker:

Yes, we are here, CJ.

10

Chief Justice Zondo:

Okay, thank you. Thank you. You may proceed, Justice Unterhalter.

Judge D.N. Unterhalter:

15 Yes, thank you. So, I have seen the document which evidences the fact that together with Justice Makume, I sat on a petition in the Mogale City matter, and we dismissed the application for special leave. The – there was then an application brought to the Constitutional Court by the disappointed applicant and in accordance with the procedures that are followed in the Constitutional Court a
20 memorandum was produced by Justice Madlanga in which he traversed the merits of the application and the application to the Constitutional Court was itself attached. I, my concurrence is correctly reflected in the order that I've been given and which I recall joining in respect of the dismissal of the application for leave to appeal.

25 So, it is certainly the case that I was not in a position to determine the application for leave to appeal before the Constitutional Court having refused the petition in the Supreme Court of Appeal. I can only say that it was an error. I did not recall that I had sat on the petition. Commissioners will know that many, many of these petitions come and one sits on them in their many numbers. I would indicate that
30 the application to the Constitutional Court did not in the body of the application

actually reference me or my name, nor Justice Makume. And the order itself is an attachment right at the end of the application which I certainly didn't take note of when I considered the application before the Constitutional Court.

5 So, I didn't see that I had sat, and I should point out though, I make no, it is also the case that none of my colleagues on the Constitutional Court noted this fact nor their clerks who assist them in the preparation of their work. So, it is an error that I made. It is the case, as a matter of law, that one can sit upon on a refusal of an application for leave to appeal if the matter nevertheless goes to hearing on the merits, but I accept that having sat on the petition at the Supreme Court of Appeal,
10 I was *functus officio* for the purposes of sitting on an application before the Constitutional Court. It makes no difference to the outcome in the Constitutional Court because there was a quorum of judges, even if my vote of concurrence is removed. So, nothing turns on the outcome, but I certainly acknowledge that I didn't recognize that I had sat previously and that I should consequently have
15 recused myself.

I would indicate that I am completely alive to this problem and in numbers of cases in the Constitutional Court, I have recused myself in respect of applications for leave to appeal. One of them being the HAL case against the MEC for the Orange Free State where I sat, not on a petition, but on the full court that heard that
20 matter in the SCA. As also in the Coral Sands versus Capitec application that was directed to the Constitutional Court and more recently, in respect of the Group Five and Competition Commission cases. So, I should point that I am entirely alive to this problem that having sat in a number of courts, one can, one has to be alive to the fact that you may have sat previously. This is just a petition that I did not
25 recognize I had already sat on, and I made the mistake and for that I apologize.

Chief Justice Zondo:

Thank you. Thank you, Justice Unterhalter. Commissioner Notyesi?

30 **Commissioner Notyesi:**

No, I understand you, Justice. I just want to bring to your attention that the reason why I asked you this question is because the matter itself emanate from the Gauteng Division, that is your division and then it comes to the SCA, it comes to

you. CC, it comes. It's like in my language that wherever you go, I follow you. So, that was a serious concern I have.

Judge D.N. Unterhalter:

5 Yes, no, no [intervenes]...

Commissioner Notyesi:

And with your answer that you have given, I've got it, but now this is the last point. What does then, because if I send an application, full application with all
10 attachment, even if it is a letter that is not clear, as somebody's who's going to decide, you need to see what is in that unclear paper. That's why judges will write back as a note and say can you clarify; can you send us a legible note because that one. So, now in this one, admittedly you didn't read the order itself. I accept, because your name appears. What – where does it leave us? What does it say?
15 [Indistinct 01:37:27] what can you say, I understand the apology about sitting because there are many matters, but now admittedly a document in an application that must be decided is not read.

Judge D.N. Unterhalter:

20 Well, to be fair, I don't think that that's entirely correct. I mean the application was fully read. It dealt with the question as to whether an interim application was susceptible of appeal. That was something that clearly when I read the application and the SCA, we considered there were no prospects for leave to appeal. The memorandum that accompanied the application, which I've read and refreshed my
25 memory of, made exactly the same point. So, the issue is a relatively crisp one as to when an appellate court will entertain an interim order and there are only very unusual and special circumstances where such an order is entertained by an appellate court.

And so, the principle is very clear, and I think there was, you know, it's true that the
30 very last page of the application where the actual order of the SCA is to be found, but where my name is not reflected in the body of the affidavit, is one that I didn't have regard to. But I would point out that nobody in the Constitutional Court did

either, not a single justice and not a single clerk who looked at this application. So, while of course I take responsibility for my failure to notice this, it appears to have been an error that was made by everybody and it is regrettable, but there is, I think, little to be said about it beyond the fact that it was an unfortunate error. These
5 things do happen occasionally, and one will endeavor not to repeat an error of this kind.

Commissioner Notyesi:

That concludes my questions.

10

Chief Justice Zondo:

Thank you, Commissioner.

Commissioner Notyesi:

15 And I think I'm also relieved about my concern. Wherever you go, I follow.

Chief Justice Zondo:

Ja. No, thank you. I think for the, I think I can share this. Arising out of this incident, I think we may have to consider in the Constitutional Court making it a
20 requirement that in an application for leave to appeal, the applicant should prominently list all the judges who have had something to do with that matter. And then internally within the Constitutional Court we could also say the judge who prepares the memorandum that is circulated to all the justices about that application who tells them what the application is about and so on and so on,
25 should also somewhere, first page, maybe mention all the judges in the lower, in the other courts who have had something to do with the matter so that it's prominent.

Because if in the application they don't mention the name of a particular judge and in the memorandum the judge is not mentioned, but you only see the name of the
30 judge if you go to an annexure, it's possible that these problems could arise. But if we make it a requirement that all the judges who have had something to do, from

the High Court up, who have had something to do with that matter, their names must be mentioned prominently. That might help to make sure that in future we don't have a situation where somebody takes part in a matter, not knowing that it's a matter in which they may have been involved.

5

Judge D.N. Unterhalter:

I think that will be very helpful [intervenes]...

Commissioner Malema:

10 CJ.

Judge D.N. Unterhalter:

...if I may, CJ.

15 **Chief Justice Zondo:**

Yes. Thank you. Commissioner Malema.

Commissioner Malema:

20 Ja. Firstly, I just want to raise a concern with how you chair, because a matter is put on the table. We're still engaging in it and then you come in as if you are giving a conclusion or a summary of what we had debated. Because I would ordinarily expect that you give us an opportunity to engage with the matter and then from there you may, especially if there is a candidate before us. So, that we don't sound like now we are going against what you are saying. So, I wanted to make a follow-
25 up on this matter, but now I would expect, and it's not only for the judge before us, it means that on this matter all the 11 judges did not see that you sat on this matter. Because I'm not a lawyer. I would expect that when an appeal is made, the higher court will want to familiarize itself with who heard the matters, what are the issues and all of that.

That's why even in the judgment there, your names are there. So, all 11 judges in the application for leave to appeal, none of them picks up that actually one of the judges who's going to hear this matter has actually heard this matter. So, more than the judge who appears before us, the whole Constitutional Court sat on this matter, the staff that sat on this matter could not pick up that one of the judges is actually the one who had the matter before. So, I've got a very big problem, Chief Justice, with that response, but that is not my question.

Now you have apologized to us, but before you apologized to us and to the nation, you make some sort of remarks which suggest you want to justify that action, because you say your participation will not have swayed that judgment differently and that is not our argument. Our argument is it doesn't matter whether the majority will still have ruled the way they did, but it doesn't help to improve an enhance the image of the judiciary if a person who heard this matter before, goes and sits on the higher structure to hear the appeal that he dismissed before.

We're not talking swaying here and once you're talking about it, it doesn't matter, even if I didn't participate, I was, the decision was not going to be different. That is not the point. The point is the morality of it. It doesn't enhance the image of the judiciary because remember it's not about how the judgment goes. Whoever says the judge who dismissed me before, went to sit and listen to the same thing and then dismissed me again in the higher court. Then the whole of society says how does this thing work where people can listen to the appeals against themselves.

So, it's not about which, where will you, was it going to be in their favor or not if I had not participated. That is not what we're talking about and it's about the principle of recusing yourself. It has nothing to do whether even if recuse myself they will still lose. No. It is in the best interest of justice to be seen to be done. It must not only be done. Thank you, CJ.

Chief Justice Zondo:

Thank you, Commissioner Malema. Do you want to say something, Justice Unterhalter?

Judge D.N. Unterhalter:

Not really. I don't think it's got anything to do with morality whatsoever. It's got to do with an error which I think most fair people would acknowledge can be made and as long as it's corrected, there is no harm done.

5

Chief Justice Zondo:

Thank you. I saw a hand that was up among the commissioners who are attending virtually. I don't know whether there is somebody who wanted to ask something.

10 **Commissioner Malema:**

I am, CJ.

Chief Justice Zondo:

Okay. Okay, thank you. Commissioner Xaba?

15

Commissioner Xaba:

So, CJ, so it means now we are assured that if meets the same matter in heaven, he would not repeat the same mistake.

20 **Chief Justice Zondo:**

I'm sorry, just repeat your question.

Commissioner Xaba:

25 No, I'm saying it means that we're now assured that even if he meets the same matter up there in heaven, this mistake will not happen again.

Chief Justice Zondo:

Well, I certainly intend seeing what can be done to minimize the chances that it could happen again. Yes. Commissioner Lucas.

5 **Commissioner Lucas:**

Thank you, CJ. I just put it on the record that I don't agree with the statement that Judge Unterhalter made to say no harm done.

Chief Justice Zondo:

10 Ja.

Commissioner Lucas:

15 Because we don't know what is the harm that has been done to the applicant and I agree with Commissioner Malema. Justice must be seen to be done. So, I can't agree with the statement that said no harm done.

Chief Justice Zondo:

Okay, all right.

20 **Commissioner Malema:**

CJ, can I come in on [intervenues]...

Chief Justice Zondo:

Commissioner Tshepe.

25

Commissioner Malema:

[Indistinct 01:47:22].

Commissioner Tshepe:

5 Thank you, Chief Justice. I had raised my hand many time and it is in relation [intervenes]...

Chief Justice Zondo:

I'm sorry, I didn't see it.

10

Commissioner Tshepe:

No, don't worry, Chief Justice. It relates to that issue that Commissioner Lucas just raised, because in response to Deputy President Petse's explanation on how these matters are dealt with generally, I seem to recall Justice Unterhalter - good evening,
15 Justice Unterhalter.

Judge D.N. Unterhalter:

Good evening.

20 **Commissioner Tshepe:**

Justice Unterhalter indicated that it's of no consequence, if that's the language I think he used. And now in response, he's said it again that it causes no harm. My understanding and I just wanted to ask Justice Unterhalter is that, if you are on a panel and one of the members of that panel is conflicted or is disqualified from
25 hearing a matter, does it not contaminate the panel, or does it not have an issue for the applicant? So, I just wanted us to be clear, I wasn't sure and wanted you, if you could clarify [intervenes]...

Judge D.N. Unterhalter:

Ja.

Commissioner Tshepe:

5 ...for me. Thank you.

Judge D.N. Unterhalter:

Well – sorry. I think it's a question that really turns in the follow way, which is that these applications for leave to appeal are decided by way of an application on
10 paper, where each of the justices indicate their position. There isn't a hearing of the matter. It's not like a, it's not done as a formal court case where people appear and there's an interaction as to how the matter is conducted. So, I, it doesn't – when I say that I can't really see whether the consequence is, it's because as I understand it the position is that each judge that considered the papers indicated
15 their position and there are eight judges, eight justice, apart from myself, who indicated that the application should be dismissed.

So, I didn't influence any of them to come to the view that they did. They came to their own view and that's why it's rather different from a court case which is heard where there are interactions that take place, and you might say that there might be
20 some difficulty that arises. But this is a rather different kind of case and that's why I'm not minimizing the error, I'm simply saying that each of the justices has given their concurrence in the result and I'm not certain therefore that it makes a difference.

But if there is a different view that is taken, that somehow the fact that I gave my
25 concurrence to this outcome makes some difference to the applicant, well the applicant will now be in a position to raise whatever issue they wish with the Constitutional Court. But I'm not even, I mean they must do so as they wish. I'm not, as currently advised, I can't precisely see how it makes a difference, but there may be a legal argument that they have to make and if they wish to do so, they will
30 do so.

Chief Justice Zondo:

Thank you, Commissioner Tshepe.

Commissioner Malema:

5 CJ.

Chief Justice Zondo:

Is that Commissioner Malema?

10 **Commissioner Dodovu:**

It's Dodovu

Commissioner Malema:

Yes.

15

Chief Justice Zondo:

Okay, I'll come to you. Let me first go to Commissioner Matolo-Dlepu.

Commissioner Matolo-Dlepu:

20 Thank you, Chief Justice, and good evening, Judge.

Judge D.N. Unterhalter:

Good evening.

Commissioner Matolo-Dlepu:

I just seem to recall in your last interview where I think it was a follow-up from my question of how many female, black female that you trained.

5 **Judge D.N. Unterhalter:**

Yes.

Commissioner Matolo-Dlepu:

And your response was that it's a long list [intervenues]...

10

Judge D.N. Unterhalter:

Yes.

Commissioner Matolo-Dlepu:

15 ...of them and one is Advocate Baloyi.

Judge D.N. Unterhalter:

Yes.

20 **Commissioner Malema:**

But we have been given a long list here.

Judge D.N. Unterhalter:

Yes.

25

Commissioner Matolo-Dlepu:

But to me there are about two of them who are very junior which I don't, I'm not sure whether you trained them before you went to the bench and the list actually includes male, you know. It's not the list as the impression that you give me. I
5 wanted to find out do you still remember really the people that you really empowered?

Judge D.N. Unterhalter:

Yes, I do. As I have the numbers here, there are 24 women on this list and there are
10 25 men and the fact that certain people were very junior doesn't mean that they were not given opportunities. I mean the key point about the list and the reason that I've given it to you is that what matters most for people in the profession and at the Bar is that they are given opportunities to come and work in types of cases that they would otherwise simply not get. And traditionally and historically women
15 practitioners and black practitioners have often been precluded from important lines of work and have just not been given the opportunities that they deserve.

And I have certainly sought to work with numbers of people to both give them opportunities to participate in the kinds of work that I did at the Bar and I in turn learned a great deal from them as to the things that they could contribute to the
20 cases that we did together. So, I don't think that this is a trivial list, and I don't think that my contribution was minimal.

Commissioner Matolo-Dlepu:

Thank you, Chief Justice, I don't [intervenes]...

25

Chief Justice Zondo:

Thank you. We are at 3 or 4 minutes to 19:00. I'm just mentioning that because yesterday I think we were trying to say we shouldn't, we should try and not go beyond a certain time, which I thought was 18:00, but I know that we are here
30 because of what happened. I just want everyone to know where we are with time. I'm going to go to Commissioner Dodovu and after that Commissioner Malema and then Commissioner Magwanishe. Commissioner Dodovu.

Commissioner Dodovu:

Thank you, CJ. I just want to go straight to the question. I understand that the candidate says this was an error, it's a mistake and it's a genuine mistake. But I
5 want to ask him a direct question. With this judgment of the ConCourt, don't you think that your presence has blemished it, that it has contaminated this judgment? A straight and simple as that.

Judge D.N. Unterhalter:

10 Well, my legal answer is that I'm not, I don't think it has for the reasons that I've already given. But if the applicant takes a different view, it will make its application to the Constitutional Court.

Commissioner Dodovu:

15 No, leave the application aside. The applicant aside. The applicant has brought the matter before the ConCourt. The ConCourt has issued a judgment where you were involved in the way that it has been explained here. Now my question is and let me say my respective view is this judgment of the ConCourt, the highest court in the land, has been blemished by the fact that you participated in these particular
20 proceedings. That's all that I'm saying, and I want to hear your response on that.

Judge D.N. Unterhalter:

Ja. My response is that I don't think it has been. I think that the application was carefully considered by all the judges, other my, including myself, but let's deal with
25 the other judges. Each one of the justices gave careful consideration to the matter and arrived at the, a unanimous conclusion as to how the matter should be dealt with. And so, the fact that I should not have added my concurrence to the position taken by the other judges, I don't think in any way means that this is a problematic decision. It is a proper decision rendered after proper consideration by all the
30 judges on the court who should have sat, and the applicant therefore got the hearing and result that the applicant deserved.

Commissioner Dodovu:

Okay. Thank you, CJ. During the deliberations I will definitely deal with this particular matter. If I may analogize, it's like Chiefs playing against Barcelona and Barcelona has got 10 players and you say, in any way Chiefs was going to lose. That's not how it works in my view. Thanks.

Chief Justice Zondo:

Thank you, Commissioner Dodovu. Commissioner Malema.

10

Commissioner Malema:

No, CJ, I wanted to correct a small mistake that the judge committed. He said it's another mistake which he's committing right in front of us here. He says he recused himself on a matter involving Department of Education, no MEC of Department of Education from Orange Free State. There's no such a province called Orange Free State. These names are changed for a reason and if a judge just sits there and call a name of a province wrongly like that, it's an exception that we, it's an issue that we take serious exception from it, some of us, because we value these names. That's why we replaced these colonial names. Thank you, CJ.

20

Chief Justice Zondo:

Thank you. Commissioner Magwanishe.

Commissioner Magwanishe:

No, I'm covered.

Chief Justice Zondo:

You are covered. Okay, all right. Commissioner Pillay?

Commissioner Pillay:

Thank you, Chief Justice. Good evening, Justice Unterhalter.

5 **Judge D.N. Unterhalter:**

Good evening.

Commissioner Pillay:

10 Justice Unterhalter, I did a rough calculation of the matters that you list in your application, and it roughly amounts to about 350 judgments listed [intervenes]...

Judge D.N. Unterhalter:

Yes.

15 **Commissioner Pillay:**

...in your application. Now I'd like you to juxtapose that for a second with the list that you've provided us which sets out the number of black and women counsel that you've led. And if one had to distill from that list the black women specifically that you've led, it totals to no more than 7 women.

20

Judge D.N. Unterhalter:

I have 8, but you may well be right. I [intervenes]...

Commissioner Pillay:

25 Well let's give you the benefit of the doubt and say it's 8 women. I really want to hear you on this, Justice Unterhalter. Are you saying that you're looking at the amount of work that you've managed to get under your belt in the time that you

were at the Bar, your opportunity for passing on skills to black women practitioners, the power that you wield in doing so, so given your reputation, given your demand in the market, you were in one of those very rare situations where you could dictate who you wanted on your matters. I mean your reputation speaks for itself.

5 And in that context and with that kind of power that you wield, you literally put up a list of 7 or 8 black women. Most of them, and those of us that know the names, the one thing that jumps out at you is that most of the women listed, the black women listed were very junior at the time that you left the Bar. So, certainly it hints to me that at least one or two, or maybe three of them were pupils at the
10 time that you involved them in your work. But it [intervenes]...

Judge D.N. Unterhalter:

I don't think so.

15 **Commissioner Pillay:**

...is a cause for concern that there are no senior black women that you've worked with, firstly, despite, and this is the real nub of the issue I want to raise with you, despite the power that you wield.

20 **Judge D.N. Unterhalter:**

Yes. I can take the point that you make, which is that looking at this list, the black women on the list are more junior. I'm not sure that I accept the criticism though that that somehow is a problem. It seems to me that it much, much more important to give opportunities to those who are starting out and are junior to
25 participate in cases. More senior black women, important as their provisional rise is, have more opportunities just by dint of their seniority and the fact that they are established. So, I'm not certain at all that the criticism is a fair one in that one would've thought that some credit would be given for the fact that bringing more junior black women into cases of some importance would actually give people
30 opportunities that they could benefit from, and I think did benefit from.

I accept that everybody could be better than they have been, but I am not certain that you've generated lists of people that, from other practitioners of very long

standing who've appeared here that rival this list. And I think frankly that I took it upon myself at the Bar to involve myself with black practitioners and women to a not inconsiderable degree and I was privileged and happy to do so and I think if you speak to some of the people on this list, you would learn that they did derive some benefit from their involvement in these cases.

Commissioner Pillay:

Justice Unterhalter, I have absolutely no doubt that they did derive benefit, but can I just follow up on your answer? So, what you've just said now is where you have worked with black women, it was on the basis of you extending an opportunity to those women?

Judge D.N. Unterhalter:

I think that was certainly the result.

Commissioner Pillay:

Can I then, the logical consequence of that is that you haven't worked with a black woman junior where you depend, and you trust that junior to work with you on a matter. In other words, you rely on the skill and the contribution that the black woman junior brings.

Judge D.N. Unterhalter:

I don't accept that proposition at all. The manner in which I worked and had I had the pleasure to do so with you, is in an extraordinarily non-hierarchical way in which I participate and was happy to participate very fully and enjoy the benefit of the skills that practitioners at different levels had to offer. So, this wasn't a question of some grace and favor that I was conferring on very junior black practitioners. I enjoyed working with them and enjoyed the skills and benefit of the thoughts that they had to offer and the involvements that they had on the cases that we did together.

Commissioner Pillay:

Justice Unterhalter, I represent Advocates for Transformation. So, you will appreciate why this is a burning issue for us. I've already put to you what my concerns are about your list and how the names jump out at you and the inferences
5 which those of us who are familiar with the names will draw. Is there anything else you want to add in terms of your selection of black women specifically to work with?

Judge D.N. Unterhalter:

10 No. All that I have to say is that I, this was part of what I did in my practice, and I believe that I derived benefits from those that I worked with, and I believe they did too.

Commissioner Pillay:

15 Thank you, Chief Justice.

Chief Justice Zondo:

Thank you, Commissioner Pillay.

20 **Commissioner Cane:**

[Indistinct 02:04:25].

Chief Justice Zondo:

Okay. Commissioner Cane.

25

Commissioner Cane:

Thank you, Chief Justice. Just to follow up on that, Judge. You are aware of the advocacy training program that the Bar runs, and I would like you just to describe your role in that regard, whilst at the Bar and whilst on the bench.

5

Judge D.N. Unterhalter:

Yes. It was an important part of what I endeavor to contribute to the life of the Bar, both when I was at the Bar and thereafter. There are training [intervenes]...

10 **Chief Justice Zondo:**

Please just bring your, the mic closer [intervenes]...

Judge D.N. Unterhalter:

I'm sorry.

15

Chief Justice Zondo:

...to you.

Judge D.N. Unterhalter:

20 I'm sorry.

Chief Justice Zondo:

Yes.

Judge D.N. Unterhalter:

The training is a very, very important part of what the Bar offers to both pupils who come to qualify as advocates as well as practitioners who have some standing within the profession. I've always thought training to be a matter of fundamental importance and way in which practitioners who have some experience can endeavor to assist those who are coming to the Bar and those who are at the Bar. And so, I have over a very long period of time worked with pupils in their training, practitioners in their training and the annual training that takes place in, at Wallenberg, is something of particular important to me. And it's an intensive period of engagement with junior members of the Bar to work with them to augment their skills.

And I think that is a fundamental part of what the Bar and practitioners can do, and judges can do to contribute to the excellence of the profession and secure its future. Particularly for those who are in respect disadvantaged and it's often through those contacts and through the training that it provides that they are placed in a position to better their profession and better their performance in the profession. And to the extent that I could do so through work that I did, I did so, and to the extent that training is another channel by which this can be achieved, I worked extensively in that way.

20

Commissioner Cane:

Chief Justice, may I have one more question?

Chief Justice Zondo:

25 Okay.

Commissioner Cane:

Judge, many people listening to you won't understand what Wallenberg is or means. Could you just give some description of your involvement in that particular program?

30

Judge D.N. Unterhalter:

Yes. So, the Wallenberg program is an intensive period of three or four, sometimes five days where practitioners of a certain number of years of experience come down to Stellenbosch where trainers, some of them members of the Bar, some of them drawn from all over the world and judges work in a very, very intensive way over this period of time with practitioners to hone their skills. And there are particular methods that are done. It's a combination of lectures that are given, talks that are offered and intensive practical training in respect of concrete problems where practitioners are required to work up problems as they would in real-life court situations.

And under those simulated conditions, we hone their skills and seek to make sure that they emerge as better practitioners. And one of the gratifying features of that process, which is then replicated in slightly different forms throughout the year, is just to see what enormous benefit practitioners derive from it and how their skills improve, and they are able to deploy them very effectively within the courts that they then go into as practitioners after the training. So, it's been a source of both commitment on my part and also a source of considerable happiness that such progress can be made through these concrete efforts.

Commissioner Cane:

Thank you, Judge. Thank you, Chief Justice.

Chief Justice Zondo:

Thank you. Commissioner Schlemmer and then it will be Commissioner Baloyi.

Commissioner Schlemmer:

Thank you, Chief Justice. Justice Unterhalter, would you just mind to tell the commission and the public also the role that you have played at the universities where you were involved in, with moot courts, lecturing etcetera?

Judge D.N. Unterhalter:

Yes. Thank you, Commissioner Schlemmer. I have throughout my time at the Bar had an extensive involvement with academic institutions, your own institution, Wits and thereafter with the University of Cape Town. And it's always been a particular
5 pleasure to be involved in the academic world and be involved in the teaching that that has afforded me, both at undergraduate level, but more regularly at masters level. And I have in that capacity taught courses and had the pleasure of seeing whole generations of students proceed through the university.

The academic world and the academy is a very, very important institution in this
10 country where not only train people, but they come to form fundamental understandings about law and it's, and the significance of law and the contributions they can make. Part of that is through teaching, part of it is through research and supervising doctoral students which I've done. And part of it is through, as you've indicated, moot courts which are done by way of the training that students receive
15 and the exposure that they've done. That's been part of my life for many, many decades and it's a particular source of pleasure that I have had over the years through that academic contribution.

Commissioner Schlemmer:

20 Thank you. And you have not always been paid for that work, have you?

Judge D.N. Unterhalter:

That is correct.

25 **Commissioner Schlemmer:**

Thank you, CJ.

Chief Justice Zondo:

Thank you. Commissioner Baloyi?

30

Commissioner Baloyi:

Thank you, Chair. Good evening [intervenes]...

Judge D.N. Unterhalter:

5 Good evening.

Commissioner Baloyi:

10 ...Justice Unterhalter. It's really just to, mine is just to clarify something arising from what Commissioner Pillay said to you and specifically she said that, you know, looking at the list of the black females [intervenes]...

Judge D.N. Unterhalter:

Yes.

15 **Commissioner Baloyi:**

...we, some of us know who they are and so we know they are quite, they're junior. I just want to put it to you so that you could confirm. When, you've been appointed on the bench fulltime 2018.

20 **Judge D.N. Unterhalter:**

That's correct.

Commissioner Baloyi:

Okay. So, you've been there for three years, pretty much three years, four years.

25

Judge D.N. Unterhalter:

Well four, a bit more than four years. Four years and a term.

Commissioner Baloyi:

5 Okay. Now the, looking at this list, the average age of these, of these black females that you've worked with is about five years. I don't know if you know that, but if you start at the bottom the fourth person would've been in her fifth year, she's left. And then there's [Indistinct 02:12:00] who's in year five and there's a [Indistinct 02:12:04] Ayanda, she's year six and then Sita Batta as you go up that list, she's year
10 five and then Muvango[?] is year 8. So, sticking with the year fives, that on, generally what it means is that that would've been their second year of practice by the time you left the Bar.

Judge D.N. Unterhalter:

15 You are [intervenes]...

Commissioner Baloyi:

Roughly.

20 **Judge D.N. Unterhalter:**

I can't [intervenes]...

Commissioner Baloyi:

25 I know you don't know them so much in terms of how many years they've been there [intervenes]...

Judge D.N. Unterhalter:

No, I [intervenes]...

Commissioner Baloyi:

...I'm just putting this to you.

5 **Judge D.N. Unterhalter:**

I fully accept that these were people who were starting to their careers as juniors, I completely accept that.

Commissioner Baloyi:

10 Okay.

Judge D.N. Unterhalter:

15 I can't confirm exactly how many years call they would now have. I mean my recollection is that some of them have rather more years, but I, you would know that better than I.

Commissioner Baloyi:

Yes.

20 **Judge D.N. Unterhalter:**

Because a number of these people were in my group and they had been there for some time before I went to the bench, but I, you may have the figures more accurately than I.

25 **Commissioner Baloyi:**

Yes, what – sorry. I'm just making a simple point that if we work on the basis that the number of years that I'm giving are correct [intervenes]...

Judge D.N. Unterhalter:

Yes.

5 **Commissioner Baloyi:**

You would have worked with them at the tail-end of your career at the Bar. So, in the last two years of your career at the Bar, because we've established that you are now about year 4 on the bench.

10 **Judge D.N. Unterhalter:**

Yes.

Commissioner Baloyi:

That's all I'm trying to establish with you.

15

Judge D.N. Unterhalter:

I can go back, I mean this list has been, it may not even be complete, but I've generated it from the Law Reports where they appear as my juniors in reported cases. Obviously, there are a great many cases beyond this and if it was a matter of importance to you, I could at this rather advanced stage try and go back and look to see exactly when I was briefed, when I was briefed with various people and at what stage. But I accept that these were junior people, and they may well have bene towards the end of my period at the Bar. But I could go through and look. I mean for example some of the cases that they were involved in were certainly
20 considerably before the last couple of years at the Bar and I, you know, because I derived it from the reported cases. I can give you the cases, the reported cases and you can satisfy yourself as to when those cases were decided and when they're reflected in the Law Reports.
25

Commissioner Baloyi:

Yes, no, I'm not asking you to. I was just checking the numbers, if you work off the numbers, their ages as I've given them, am I correct to reflect that if someone is year five today, you worked, you would've worked with them towards the end of your career at the Bar.

Judge D.N. Unterhalter:

That would be true, it's a matter of arithmetic and logic.

10 **Commissioner Baloyi:**

Yes. Thank you. Thank you, Chief Justice.

Chief Justice Zondo:

Thank you. I think there are no further hands. So, at this stage I want to thank you, Justice Unterhalter, for once again availing yourself. I think I did, had already given you a chance to say something I think earlier on.

Judge D.N. Unterhalter:

I [intervenes]...

20

Chief Justice Zondo:

Or not?

Judge D.N. Unterhalter:

25 I don't think so, but [intervenes]...

Chief Justice Zondo:

Ja. If there are two or three points that you would like the commissioners to, that you would like to emphasize to the commissioners to take into account as they consider your candidacy, I'll just give you about three minutes to [intervenues]...

5

Judge D.N. Unterhalter:

Certainly.

Chief Justice Zondo:

10 ...emphasize those points.

Judge D.N. Unterhalter:

15 Yes. Thank you for the opportunity. I think I would only make two or three points. The first of them is that over the period of my career, I have engaged with law in a variety of ways. Mine was never just the narrow path of professional endeavor at the Bar. I have, as I sought to indicate through answering numbers of the, numbers of questions, sought to engage law through the prism of academia, through practice at the Bar, through engagements with NGOs, both as a matter of pro bono work, but also through involvements in their work directly such as CALS.

20 I've also seen work in a whole variety of dimensions which was done through pro bono work that I committed myself to and they're not just those that are reported in the Law Reports, although those I have listed in my CV. I was involved in endeavors to reformulate the National Water Act with then Minister Asmal. I was involved with some of the very early work in respect of what became class actions in respect of the asbestosis claims against Gencore.

25 So, I have sought in a whole variety of ways to engage law, both from the perspective of the way in which civil society uses law to pursue the many, many ways in which law can benefit people generally in the country. I've seen it institutionally through acting for various ministers. And so I understand how law is engaged by the executive and the interests that the executive has. I've been involved in institutions and their work such as the Competition Commission and

5 ICASA and the regulatory roles that they've played and how those are reflected in law. And I have of course, as I've indicated, had a lengthy period of time of involvements in constitutional law and the Constitutional Court is a place where I would very much wish to serve and very much wish to offer some of the experience that I've had. So, that's the first thing I wanted to say.

10 The second thing I just wanted to mention, and this is around innovation within the court system, I was one of the people very much involved in the resuscitation of the commercial court in Gauteng. It's very important, at least as far as I'm concerned, that the court system institutionally develops that it is responsive to the needs of the country in its different dimensions. One of the things that has happened in this country is that a great deal of commercial litigation has effectively become privatized through private arbitration. There are many virtues that attach to that, but it's equally important that the courts remain places where important commercial decisions go, cases come and where precedence are set which will be
15 valuable to a country that is seeking to attract investment and where commercial law, amongst many other areas of the law, count significantly.

20 And I think therefore that I would endeavor were I to ultimately be appointed to keep that sense that the institutions of law are fundamental to the constitution and the constitutional values that we all savor and consider so fundamental. And I would want to make my contribution to the Constitutional Court which stands at the apex of a system that ensures that our constitutional values have life and dynamism and that is part of a court system that is responsive to the needs of a changing society where there's much to be done, many challenges to meet and in which the law and its institutions [intervenes]...

25

Chief Justice Zondo:

You have one minute left.

Judge D.N. Unterhalter:

30 ...can play a fundamental role.

Chief Justice Zondo:

You have one minute left.

Judge D.N. Unterhalter:

5 I've said my peace. Thank you, Chief Justice.

Chief Justice Zondo:

Yes. Thank you very much. Once again, thank you for availing yourself, but you are now excused.

10

Judge D.N. Unterhalter:

Thank you so much.

Chief Justice Zondo:

15 Thank you.