

Judicial Services Commission interviews

5 October 2015, Morning session

Gauteng High Court

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Interview of Judge A C Basson

Justice Moseneke: Welcome Judge A Basson before the Judicial Service Commission (JSC) and I urge you to feel relaxed, having been before the JSC previously as a sitting judge. Up front, I want to ask how you have found your experience as a judge up until now.

Judge Basson: When I was appointed eight years ago, upon finding out, I was tremendously honoured. As the years go by I feel more and more honoured for having been appointed, because it is a position of responsibility and requires a lot of commitment from the person serving as a judge. Fortunately after 1994 judges serve within the confines of the Constitution, which makes it easier if you are committed to the values underlying the Constitution. Basically I am constantly aware that this is a position of responsibility towards not only the bench, but also towards the public and the principles underlying our Constitution.

Justice Moseneke: Arguably you are an authority on labour law, because all of all you have written and the judgements which you have passed up until now. Why would you want to move from the Labour Court at all?

Judge Basson: I have served in the Labour Court for nine years and I have served as an acting judge for more than a year on various occasions. I have reached a stage in my judicial career where I of the view that I need to expand my horizons and to develop my intellectual abilities. I am obviously comfortable in the sphere of labour law, given my tenure in that court. During my stint as an acting judge in the High Court I carefully considered whether it would be the way I could develop intellectually and I am comfortable being exposed to the wider variety of cases in the High Court.

Justice Moseneke: Would it not be an obvious loss to the Labour Court that someone of your expertise should move to become a generalist?

Judge Basson: Of course one would like to believe that one is indispensable, but of course we are not. There are individuals quite capable of moving into my position in the Labour Court. Therefore, I do not think it will be a loss and it would be presumptuous of me to think I am not replaceable in the Labour Court.

Dustan Mlambo, Judge President of the Gauteng Division of the High Court: Good Morning Judge Basson, in front of her there is a spread sheet which is for the benefit of the Commissioners to know what you have done in the High Court. He asked her to check if it accurately reflects the work areas which she had served in and the time periods. It indicates that you have acted for a total of 43 weeks.

Judge Basson: I see that it does not reflect that I have presided over a criminal trial in Thohoyandou for a week.

Judge President Mlambo: With that out the way, in your view as a sitting judge and having acted in both divisions of the Gauteng High Court which work areas are the most complex and difficult.

Judge Basson: It is difficult to say, because cases differ and you could get a difficult case dealing with an issue of company law, but you could also get a case dealing with company law issues that is easy to decide. Therefore, I cannot really say that there is a particular area of the law that I find particularly taxing or difficult to deal with.

Judge President Mlambo: Turning to the spreadsheet, you have done eight weeks of opposed motions. In the normal course of work in Pretoria there are no less than 15 opposed matters each week, in Johannesburg it varies and it can be from 10 upwards. You have also had two weeks in the third court and this is where the most complex motions are dealt with and you have acted in the urgent court for two weeks. In my view as the head of a court I would regard these three areas as the most taxing and intense, would you agree?

Judge Basson: Yes I agree. Normally I prefer to sit in the urgent court and it is not a taxing court for me per se. I dealt with one matter in the third court involving a constitutional issue, which was taxing in the sense that it dealt with an area of the law which is probably going to end up in the Constitutional Court. As far as that is concerned perhaps that would be the most difficult case which I have had to deal with.

Judge President Mlambo: To look at the spread of areas which you have worked in it indicates that you have acted in all the areas, except the tax court. The Deputy Chief Justice asked whether your departure, if successful here, will be a loss to the Labour Court. Am I correct that you are following in the footsteps of many other people who started in the Labour Court and then went to the High Court?

Judge Basson: Yes you are correct and we can start with yourself, then there is Justice Zondo who is probably the most preeminent judge to come from the Labour Court. Further, there are also Judge Pillay and Judge Landman who have been elevated to the High Court. It is almost a natural migration for a Labour Court judge to migrate to the High Court.

Judge President Mlambo: Lastly, I have asked you to prepare a document indicating the law areas in which you have written judgements. This is in the possession of Commissioners and gives the Commission an understanding of the areas in which Judge Basson has written. I see you had the benefit of sitting in two full bench appeals. You have also written a judgement dealing with the constitutional issue mentioned earlier: the Surrogacy Advisory Group Matter.

Mr Lesufi: I will follow the same line raised previously, do you think the migration from the Labour Court will benefit the country or you as an individual, bearing in mind the difficulties in the labour sector in the country. Do you not think that we need a very strong candidate in your current position?

Judge Basson: I believe that there are presently very strong candidates in the Labour Court and that there are two very strong candidates contending for positions in the Labour Court. As I have indicated one would like to think that one is indispensable, but we are not. There are eminent candidates who can fill the position I have held. It is not about her personally, rather it is about the enhancement of the judiciary and I am of the view that I can contribute to the enhancement of the judiciary by moving to the High Court given my experience. I have gained a lot of experience as a Labour Court judge which I think could be beneficial to the High Court bench.

Mr Lesufi: We can affirm that you are an expert in the field of labour law. What would you suggest should be taken into consideration regarding the strike which is about to take in the coal sector? Is it that parties cannot persuade each other or is it that the law is not being applied sufficiently?

Judge Basson: Unfortunately labour issues are complex, people often think it is about wages. I am aware that in the mining industry there are a number of factors at play when parties negotiate. Other issues such as benefits, working conditions ... and medical aid benefits are involved. What complicates issues in the mining industry is that it is not just employment or labour issues, it is also about socio-economic and political issues. All of that brings about the tension between labour and management; this is inevitable and happens around the world. Labour issues are particularly complex in South Africa and unfortunately as seen in Marikana these issues can boil over. In the end I hope parties are able to see eye to eye. Strikes are not always inevitable, but strikes play an important role in the tension between labour and management. I hope the strike will be resolved through negotiations.

Mr Masutha: With the kind of experience Judge Basson acquired in the Labour Court, what is it that you believe is unique about that environment that would add value to the experience which you would bring to the High Court?

Judge Basson: Two aspects, firstly, access to justice and secondly dealing with individuals approaching the court and presenting their cases, which is not often seen in the High Court. I believe it requires a particular skill or attitude from a judge to deal with a layperson appearing before them. On access to justice, I have experienced the Labour Court having been very efficient in enabling parties to approach the court as individuals. Hopefully that experience could add value at the High Court, but time will tell.

Mr Masutha: When one is sitting as a judge and is confronted with difficult questions, even those of life and death, which I am sure you have faced in the Labour Court. The situation may be volatile and applying the law may not be the only consideration which will bring stability to the situation. What else does a judge do in such circumstances? Are they bound to follow the letter or perhaps the spirit of the law full stop or are there circumstances where you may have to consider the consequences of any decision taken?

Judge Basson: Obviously the judge will exercise their discretion within the confines of the law, but there is a discretion. In the Labour Court the discretion is fairly wide, because there judges are allowed to take into account considerations of fairness. The concept of fairness is very fluid and you have to take into consideration that a particular decision will have a particular consequence. However, the starting point will always be the law and the discretion will always be exercised within its confines. These confines do however allow one to take into account considerations such as fairness

Mr Fourie: Judge Basson has been provided with the comments of all the law bodies regarding her nomination and application. Under my bundle of documents on behalf of the Johannesburg Bar Council, there is a comment which I found quite surprising and I feel it should not go without giving you an opportunity to respond. It appears to be from the Johannesburg Bar Council and I say 'appears to be', because it does not seem consistent with earlier comments by the Johannesburg Bar Council. Whereas they say on pages 20 and 21: "the candidate's appointment would be seen in the public and legal domain as fitting and appropriate to aid the continued efficiency and effectiveness of the High Court. This way it would preserve and enhance the integrity of the court..." "the candidate's unquestionable experience and ability would also send a clear message that gender transformation and merit are not in tension." That is all very positive, but then on page 68 under the head, "Whether she is a competent person: expression to the values of the Constitution" the surprising comment is made that: "strong sentiments were expressed that she has not proven to be a progressive jurist and someone who promotes the spirit and object of the Constitution, with specific reference to transformation. Her appointment to the High Court will not advance that agenda." I am not putting this to you, because I necessarily share that view. I am emphasising that I was quite surprised given the context of the other comments, but I thought it would be fair to give you the opportunity, seeing as the comments have been put on paper.

Judge Basson: I am not 100% sure what it means to say that I am not progressive. Being a Labour Court judge means per se one is progressive. Particularly in the past eight years, judgements emanating from myself have shown that I am progressively minded and that I am able to progressively apply the law. Had I been given an example of why they say I am not progressive, I would have been able to comment on that. Also, if one looks at my history long before the Constitution came into existence it shows I have been committed to the values enshrined in the Constitution, even before they were so enshrined. I have been actively involved in the enhancement of human rights of especially women in our communities for many years. I have been actively involved in training trade unions, long before workers' rights were enshrined in the Constitution. Therefore, in light of that she did not understand the Comment.

Mr Fourie: And you do not agree?

Judge Basson: No, I do not agree.

Mr Narend Singh, Member of the National Assembly: On the move from the Labour Court to the High Court, Judge Basson had said she wanted to broaden her horizons with a wider variety of cases. From a layman's point of view, I would like to know about the workload in the Labour court vis-à-vis the High Court. Is there not a higher workload in the High Court? What I would like to know is whether it is a more prestigious position to be a judge in the High Court, rather than the Labour Court?

Judge Basson: Labour Court judges and High Court judges are appointed on the same conditions of employment and there is no difference in that respect. As far as the workload is concerned, last year in the last term I acted in the urgent court of the North Gauteng Division and according to her secretary at that court this was one of the worst rolls they had had in the year. The following week I went to the Labour Court and did a week of urgent duty which was much worse. It is very difficult to compare the Divisions according to work load and it all depends on the nature of the cases which one has to deal with. Obviously there is more of a variety in the High Court, but otherwise it is difficult to compare.

Mr Hendrik Schmidt, Member of the National Assembly: According to the spread sheet provided to the Commission, you were appointed on 1 July 2007 and your date of discharge would be 30 June 2017. Is that still correct and how would it impact on your nomination presently?

Judge Basson: Judges of the Labour Court now have tenure, but under the old dispensation judges were appointed on a ten year term. Judges of the Labour Court now have the same tenure as any other judge. It is not the reason why I applied for the position, rather this was for very specific reasons.

Ms Didiza: I have two issues which I would like to raise. With Judge Basson's own experience in the judiciary, what needs to be done to improve the representation of women in the judiciary? Secondly, looking at your work in academia and particularly your contribution to scholarship, what needs to change in the legal framework, if any, needs to be considered by the country. Therefore leading to what those in the academic sphere may need to consider in the training of new legal personnel.

Judge Basson: Obviously it is important that women need to be represented on the bench, not only does it send out a message to the public, but it enhances the judiciary. It is also a constitutional imperative to appoint women to the bench. What I have seen in the past eight years is a gradual improvement in representation of women in the various bars and the side bar. Personally I would have liked to see more women appearing in court and being admitted as advocates, being promoted to senior counsel and to the bench. I remember when I studied in 1983, there was only one women judge being Judge van den Heever, who served at the then Appellate Division. When this was raised in my class I thought I will never get there if there is only one woman on the bench. Fortunately we are in a new constitutional dispensation and women have more opportunities. What is important is that women enhance the bench and it benefits the country as

a whole. I would encourage lecturers to stress the point that women do have opportunity and opportunities which they did not necessarily have when I was a scholar.

Prof Ntlama: My question follows on from the concerns raised by Mr Fourie regarding the concerns raised by Judge Basson's peers. As much as they recognise that there are too few women on the bench, you may be better placed at the Labour Court. Furthermore, with your expertise in labour law what does you think the influence of customary law ought to be on the interpretation of the Constitution to ensure the parallel development of the two systems of law.

Judge Basson: Regarding the first question, I do not believe that I am better placed at the Labour Court. I'm equally suited to the High Court and I have the capacity to sit as a High Court judge.

Prof Ntlama clarified that it was her peers who were saying that she is better placed at the Labour Court.

Judge Basson: Perhaps my peers did not realise that I have served almost five terms acting in the High Court. On customary law, we all know that it is a constitutional imperative to take into account constitutional principles when developing customary law. Customary law is very important and it will remain important in our constitutional dispensation.

Dr Mathole Motshekga, Member of the National Assembly: Judge Basson, I have heard you refer to access to justice. Do you think it is possible to have true access to justice in a society where judges and lawyers are not required to learn any of the indigenous African languages spoken by the majority of the society? And also, where indigenous law (wrongly called customary law) is not compulsory, yet the majority of the population comes from that background?

Judge Basson: I agree and would be the first one to admit that being able to speak an African language is very important and I am ashamed to say that I do not. Access to justice is extremely important and it is not simply physical access to a court to present one's case. It is also to understand and know that you have certain rights, which can be enforced through litigation in court. Customary law or indigenous law is equally important and perhaps practice and academia could play an important role. Academics are always welcome to present lectures to the judiciary to help them understand these issues. I do agree that having the capacity to speak another language is extremely important.

Adv M Hellens SC: What is your understanding of the doctrine of separation of powers?

Judge Basson: There are three arms of government being the executive, judiciary and legislature. In an ideal world it would be nice to see them agree on everything. There is an inherent tension between the different spheres and this is not necessarily an unhealthy one. It is important that the judiciary to remain independent and for it to protect its open-mindedness. In the end it is very important for the judiciary to uphold the rule of law, upon which our Constitution is based. This underpins the importance of having a separation between the three arms of government.

Adv Hellens: What is your judicial philosophy and how do you view your role as a judge?

Judge Basson: I have always been committed to the values underlying the Constitution and I have mentioned earlier that I have been committed to these values since before they were enshrined in the Constitution. For example when I had to pick a topic for my doctorate in the early 1980s I chose second generation human rights. Second generation human rights include labour rights such as the right to strike and the right to fair labour practices. At that time I chose this topic South Africa had not even recognised first generation human rights in respect of all its citizens, most importantly the right to vote. Very early in my legal career I had committed myself to enhancing the enjoyment of human dignity. I always approach my work

with that in mind, conscious of being in constitutional democracy and needing to exercise my discretion within its confines. I would like to emphasise that I have been committed to these values since the early 80s, when I realised that a just society cannot be built unless we give recognition not only to first generation human rights, but also to second generation rights.

Ms A Ndoni: What in your view are the obstacles to justice?

Judge Basson: In my view the major obstacle is access to justice; if you have the funds you can litigate, if you have access to a lawyer you can litigate. In my experience in the late 1980s and early 1990s I had discussions with various women's groups, church groups and ordinary women, I was shocked to come to the realisation that people do not have access to justice. As it is also knowing what one's rights are, I was shocked to find that many women think that they can do nothing when faced with an abusive husband or have been sexually abused for example. That is the first step towards access to justice and this was when I realised that something must be done about this. It was also when we started at the University of South Africa and wrote a book on women and the law, so that they may have improved access to justice. That was a concern then and remains a concern for women today. From her discussion with women's groups there is the perception that the law is not accessible to them and there is also a suspicion that the judicial system is not going to help them, simply because they have experienced the process as very adverse to them.

Ms Ndoni: In your view, if you observe a party in court being poorly or ineffectively represented, is there a role which the judge ought to play?

Judge Basson: There is a fine line between an interventionist approach and an approach where you abstain from interfering in the process. In the end the judge is independent and they are there to see that justice is being done. If the circumstances require it then the judge must play the more interventionist role, but there is a fine line which must be observed between descending into the arena. In my experience, especially in the Labour Court judges often accept a more interventionist role where individuals represent themselves or are represented by someone who is not adequately advancing their case.

Justice Moseneke: There are two issues which stand out from the papers, aside from the glittering curriculum vitae and academic achievements, including tremendous writing even around gender issues. The two questions come from comments which come out from two bodies mentioned. Firstly, where are you going? Why not stay where you are best suited? The other is that not all your judgements have been sufficiently progressive. In wrapping up, it may well be in your interest to make your closing remarks on those two issues. These are the two comments, criticism or questions which may require a dedicated response by yourself.

Judge Basson: As I have indicated, I do not understand the comment on my progressiveness, simply because I have been given no evidence in this regard. I have delivered hundreds of judgements over the past eight years and more than 100 have been reported, while only seven of these have been overturned on appeal. I believe I have been a progressive judge and have contributed to the labour law jurisprudence. I feel I am also suited to being a judge of the High Court. This is not a decision which I took lightly. It is a decision taken after reflection on what I have done during my five terms acting as a judge. As I have indicated, I am not the first judge who is applying to migrate to the High Court. It is almost a natural progression and all Labour Court judges come to a point where they feel they need to develop intellectually and the answer is to migrate to the High Court where they will be able to deal with a wider variety of matters.

Justice Moseneke thanked Judge Basson for her presence.