

Judicial Services Commission interviews

5 October 2015, Morning session

Gauteng High Court

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Interview of Advocate N Davis SC

Justice Moseneke welcomed Adv N Davis SC and said he hoped the interview would not last longer than 45 minutes. He asked why Advocate Davis wanted to be a judge.

Adv Davis: I have been acting from time to time and in my view I can do the job and I have assisted the Judge President, in a role where there is more or less constant shortage. There comes a time in practice where one wants to move away from being the player to wanting to listen to both sides. Further, there comes a time when one feels one should give back and contribute what you have learnt during practice.

Justice Moseneke: What triggers that age or some form of public altruism? Is it a consequence of being tired or is there some bigger purpose?

Adv Davis: I do not think it is age and I have been in practice at the bar for 25 years now and there are ages when a man is a scholar, practitioner or teacher. It is more the altruistic purpose mentioned by Justice Moseneke. When I have acted I always felt that I could give the parties a fair hearing and contribute in that manner.

Justice Moseneke: You are privileged to have had very good university training and risen through the ranks to become senior counsel and practiced as that for a while. Have you developed a judicial philosophy of sorts? Have you by now made up your mind what we as judges should hold as important in doing our work?

Adv Davis: I think it is a simple answer if there were to be a religion for the judiciary it should be the Constitution. Not only are we legally obliged to do so, but if it is infused in how we think then that is what a judicial officer should hold as a guiding light in everything which they do. If that is the starting point and to this humility and respect for parties is added, then weighing evidence becomes simpler.

Justice Moseneke: It is often said that our Constitution is transformative, while some constitutions describe the status quo. What do you think about that? What is its primary purpose?

Adv Davis: I think you are correct in that it does not delineate a status quo. Due to our history it was imposed on a status quo, but that imposition meant that every time something is tested against the Constitution if it does not make muster, then it must be changed and developed. This is why interpretations and striking down of current or previous legislation is seen. In that sense it is moving towards the mountain and the mountain is an ideal which humanity may never get to, but there must be a constant movement.

Justice Moseneke: As a judge should that not always be in one's mind that one should support change towards the ideal.

Adv Davis: I do not think always, one should always measure against the Constitution, but if it is possible to interpret a piece of legislation without striking it down then that is of course the starting point. If an interpretation can save what Parliament intended then that is the starting point, rather than changing every single piece of legislation, because that is not the function of a judge.

Justice Moseneke: Many say that judges are not sensitive enough to the economic plight of many people in our country. What is your response to that?

Adv Davis: I think this is a generalisation and even if that is based on a perception it indicates that there is a perception and red lights. That perception must therefore be addressed and overcome and if there is any fact to it, it must be factually eradicated.

Justice Moseneke: The papers before me suggest that you have done much to support transformation of the bar, could you speak to that.

Adv Davis: Pretoria historically has had a very Afrikaans and “old regime” perception. Partly because of that and Pretoria’s history it was difficult to attract black members and have the bar transform. What we have done and in my time as part of the transformation committee is to start from the bottom up actively changing that. We have actively sourced new young advocates at the universities through bursary programmes and gradually we have changed it from a minority of black pupils to a majority. Just over 60% of our pupils are black pupils and once the transformation starts like that then the bar itself transforms. It is however difficult to get sufficient women to join the bar and I see that there is only one who has applied for silk.

Judge President Mlambo: Before I go to the spreadsheet before you Adv Davis, to continue on the point raised by the Deputy Chief Justice, you have given me time to act in the division and you are among the relatively large number of white male silks who have given me time at the Pretoria division and a smaller number of white female silk. There has only been one black female silk who has given me time, are you aware of this situation?

Adv Davis: There is a shortage of black female silks and that could potentially be the reason. I am aware that Advocate S Hassim had also acted.

Judge President Mlambo: This was not yet a question, rather I want to drive home a point to the Commission. The black male silks who have given him time include Adv A Ncongwane SC who nominated you and also Adv S Lebala SC. Why am I struggling, because there are at least some black male silks in Pretoria.

Adv Davis: It is difficult for me to speak on their behalf and I am unsure whether it was remuneration or a time issue. The same difficulty is experienced in getting participation for training programmes. Perhaps it will increase given that in the past three years we have increased the number of black silks at our bar and therefore the position might change.

Judge President Mlambo: Being accused of not driving transformation, there should be an understanding that the acting slots are there, but there are no takers from the group which ought to be leading transformation. This was not an accusation against Adv Davis. Turning to the spreadsheet I hope to have captured the contents of Adv Davis’ acting stint correctly.

Adv Davis They are generally correct, because in the third court there were special motions and appeals might have been more.

Judge President Mlambo clarified that these third court matters were the matters which had been assigned by the Deputy Judge President. You have acted for a total of 24 weeks and that is probably a reflection of all

the silks who are applying for judicial appointment. I am told senior counsel cannot give me a full term, because of their busy practices.

Adv Davis: I think it is generally difficult giving a full term, unless there were notice sufficiently in advance. If it on a short period of notice, then it is difficult to give an entire term. I understand that you would like longer periods of acting and I am sure if there was sufficient notice this could be accommodated.

Judge President Mlambo: I think the other reason is that silks ply their trade daily in the High Court. Therefore, one cannot use the longer acting stints with people who are appearing daily. What is your take on this?

Adv Davis: That is correct.

Judge President Mlambo: You have dealt with about 13 weeks in the unopposed motion court. People think the unopposed court is an easy matter, what is your view?

Adv Davis: In our division which prides itself on the volume of unopposed motions which we do, there are at least three unopposed courts a day and the judges alternate. Some judges will sit on Monday, Wednesday and Friday and other will sit on a Tuesday and Thursday. The days in between, which are in fact your weekend, are on the roster as reading days which means that you get a pile of documents about a foot and a half or two feet high of up to 60 matters. Although they are unopposed they vary in nature and in the sufficiency of the content. Unfortunately these days they also vary in terms of whether counsel indicates that the papers are in order or if there are mistakes. It is then incumbent upon the judicial officer to check all the papers and where in an opposed motion one would have more time to check all the papers this gets compressed in time if a judicial officer has to go through 60 matters in the space of 24 or 48 hours. The unopposed motion court does not become easier because it is not opposed, it can become more difficult because the judicial officer has to ensure all the requirements are met. There is not an opposing counsel pointing out errors, the judge has to do that.

Judge President Mlambo: Looking at the spread of judgements you have written, it shows that Adv Davis has written on a broad range of areas of practice including constitutional law and consumer credit. Do you think you have had sufficient exposure as a senior advocate and acting judge, to warrant you being given the nod as a permanent judge?

Adv Davis: Apart from the 10 or 12 annexed to my application, I totalled some 60 judgements covering all the sectors. I must admit that I have not sat on a criminal matter, but I have dealt with these in practice and the first reported judgement I was involved in was a criminal matter regarding the reconsideration of the death penalty.

Mr Lesufi: I want to follow up on the transformation agenda issue and the views already expressed on transformation and aiding those who are less fortunate. It is a general view that the state of affairs in Swaziland is not optimal and I am aware of the role Adv Davis is playing in support of the charity of King Mswati III's mother. Do you not believe that you are betraying the democratic cause through such participation?

Adv Davis: Firstly, that participation was almost five years ago and it was a participation with the Harley Davidson Club which wanted to reach throughout the whole Southern Africa. The charity which was supported there was one which did not have anything to do with the political situation. It was for the elderly and the young left in rural areas without breadwinner support and it was felt that if we were to travel through Swaziland that it would be a worthy cause to support. This is how it was decided and the other permutations did not come into the question.

Mr Lesufi: Therefore you have no problem supporting international solidarity networks, even if human rights are not properly respected in that part of the world?

Adv Davis: If we had said no to the charity fund and taken the funds and energy elsewhere, because of the policy in place in Swaziland then in my view people in need would have suffered simply because their politicians do not understand the rule of law. If one had to choose between suffering and not, then I would choose to assist in the alleviation of suffering regardless of what another person's take on the rule of law is.

Mr Lesufi: I assume that you agree that the situation in Swaziland is not optimal? And if so what is the basis of that agreement?

Adv Davis: Yes I agree and it is always unhealthy if the independence of the judiciary is undermined to such an extent that the rule of law is also compromised.

Mr Lesufi: I also see in your application that you have also participated in school governing bodies and what are the changes which need to be implemented to improve these governing bodies?

Adv Davis: It changes between school to school and area to area. Some schools have physical resource concerns and others have governance concerns. For example there is a school in Mpumalanga operating on a private basis, but which had become a rule unto itself and did not even comply with its licencing requirements. School governing bodies all have their own issues, but it appears they need some guidance from time to time.

Minister Masutha: There is a common law expression and to paraphrase it into English it means "justice shall prevail even if the heavens were to fall." We as politicians, both the executive and legislature, would not make a law or adopt a policy which could plunge an entire country into crisis, at least not deliberately. If you are a judge and you are confronted with a situation where a ruling is to be made and according to your interpretation of law the effect of that ruling would be that a deep crisis would be caused, political or otherwise. Does this really matter to a judge or should it matter to a judge? Is the judge confined to strict application of the law, including the Constitution or is there a higher order which says that justice applies in context and that cannot include giving a judgement that would have such an effect. Would you like to comment on that?

Adv Davis: I think you gave the answer in your question itself. Of course the judge must apply the law and the rule of law is supreme under the Constitution. If there is scope for tempering the effect of a judgement and if that is in the legislation or if there a space for a discretion; then the discretion must be exercised judicially. Although that can only be on evidence before it. If the law prescribes a decision which will have dire consequences, then it will have to be given regardless of the consequences. If there are various options and the question is whether the judge is entitled to take those options into consideration, then yes if the law allows it and the evidence forms a basis. The question is decided in context and if the law allows for a discretion or suspension of the order then this is possible. For example in the declaration of the unconstitutionality of a section which may have wide consequences, the courts are alive to the negative effects of an immediate striking out and then Parliament is given the option of one, two or three years to rectify the situation. Then other orders will be granted to ensure that while there is a finding of unconstitutionality that a wrong does not attach to any of the citizens who wish to exercise a constitutional right.

Mr Fourie: You have never been interviewed by this Commission before? Because amongst the papers there is a transcript of an interview with an Adv Davis, which is clearly not attributable to you. The comments by the bar council are generally positive and you have touched on the issue of reported judgements, but there is

one other possibly negative remark which is: “our research indicates that the candidate has appeared in only five reported cases since taking silk”. Is that correct and would you like to comment on the reasons for that?

Adv Davis: No, I have not. That is correct, I think there is another one on the way as I understand the Supreme Court of Appeal to have marked a judgement reportable recently. I took silk in 2006 and I am unsure whether five or six reported judgments in nine years is a good or bad thing. The comment was that this appears to be less than my previous average of reported judgements. This is my 25th year in practice and there have been 26 or 27 reported judgements and on average this is one a year. In that light having only five in ten years of being a silk, it may appear negative. I do not know what the reasons are and perhaps the time spent doing arbitrations and acting may have decreased the opportunities. I know understand from Juta that if there is an appeal pending that they now do not publish the judgement, but often if the appeal does not go ahead the decision is not reverted and the judgement is not published. The same has happened with the judgement which I gave in the Nyathi matter, which Jute only stood to publish after the Constitutional Court matter which they then did. I do not know why it is less, perhaps it could have been the time spent acting or doing arbitration. The other thing is that counsel do not choose their work, they deal with what comes onto their desk.

Mr Fourie: Following on Mr Masutha’s point, once a judge has considered all the issues including those raised in the earlier question, and comes to a finding and makes an order. Can you think of any justifiable ground on which such an order may be ignored?

Adv Davis: Unless a judgement is subject to a pending review, appeal or application for leave to appeal, an order is an order and must be complied with. This is what I have found in my judgement in the Nyathi matter and I found support in various judgements of courts around the country, before the Constitutional Court decision. If there is an order by a High Court which is a final order, then it must be adhered to by all in the country, including organs of state.

Mr Schmidt: In the context of the questions put to him by Judge President Mlambo and your personal commitment to transformation, have you had the opportunity to appear with black counsel or have you requested to appear with black juniors and have had the opportunity of having black pupils allocated to you within the confines of the allocation system?

Adv Davis: Regarding the first question, yes often. I often request that and believe it is part of the mentorship at the bar. Particularly if there is the opportunity to work with a black junior who is new or who stands to gain experience. The state attorney’s office also has a guideline on how senior counsel should work with juniors to assist transformation and ensure skills transfer. Unfortunately the state attorney does not adhere to its own guidelines on briefing patterns, but we at the bar do. It is fantastic to see how, even though we do our best during pupillage training, counsel can gain in experience during the course of preparing for an appeal. Very often that junior will get retained by the firm on briefs when the silks are not necessary. During training skills transfer is also emphasised. There are differences in the backgrounds and experience of pupils before they come to the bar and the inexperienced ones gain even more through the skills transfer. Skills transfer is done across the board, but particularly if it is a black Member who requires more attention. In the past year he had had two or three lady juniors who were not black, so at least there is a gender transformation element.

Dr Motshekga: My experience is that the senior counsel which there are of the highest calibre which the country can produce, but there is a perception that the rise of African lawyers in the bar councils is by way of co-option. Once co-opted they become gatekeepers against the rise of other black counsel and that there is job reservation practiced by white counsel. I am very happy to know that you are for transformation, but there are practical things which need to be addressed. For example at the Western Cape Bar there was a group

which staged a sit in at Parliament, because they feel that there is no space for them in that bar. In Pretoria there are advocates who are in the process of setting up an alternative bar counsel. Are these incidents not indicative of something going wrong with the transformation process at the bar councils and if so, have you yourself experienced challenges which could lead to such instances.

Adv Davis: Let me start at the bar in general, at the annual general meeting of the General Council of the Bar. Adv Semenya was instrumental in the formulation of a statement being made admitting and conceding that in our country and in our profession transformation is not where it should be, is too slow and in some instances the pace is something which we should be ashamed of. I cannot speak for the Western Cape and for some reason it seems that they are moving slower than the rest of the country. In Pretoria, which was traditionally in support of the previous regime, I know how I operate with my colleagues. I am the deputy chair of our bar and the chairperson is a black, female senior counsel and we work well together. Other colleagues, like Adv Lebala SC, mentioned by the Judge President, are very vociferous in supporting the cause of advocacy and transformation, whether it accords with Advocates for Transformation (AFT) or not. I do not perceive the problems as mentioned, but such as they are we want to address them to move to a stage where there should not be a constitutional 50/50 sharing of power. There is no question at our bar of co-option, because there are non-AFT members voted in in any case. I am not aware of any threat to our bar council, if there are disagreements it may be within the AFT itself.

Adv Semenya: My interest is that the separation of powers doctrine restrains the power of the judiciary as well. Yet the Constitution authorises the courts to strike down actions by the executive which it finds incompatible with the duties and obligations they have. How is that irony to be managed by the judiciary?

Adv Davis: I do not think it is an irony, it is the same test as mentioned in earlier responses. If the Constitution is taken as the judicial bible, then anything contrary to the Constitution once it comes before the court then the judge has the constitutional obligation to stop such infringements. As long as they keep within the four corners of their court and do not venture into making law and strikes down everything not in accordance with the Constitution, then it is not only justifiable, but obligatory.

Justice Moseneke gave Adv Davis the opportunity to have the last word.

Adv Davis: It is time which all the Commissioners spend on a very serious issue and is done with a lot of sincerity and integrity. A candidate should be appreciative of that as I am.