

### Judicial Service Commission Interviews: Day 3

7 October 2015, morning session

Free State High Court

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#### Interview of Ms N M Mbhele:

Moseneke: Thanks for agreeing to be available for the interview this morning. We're going to pose questions to you. The purpose of the questions is not to hear our voices but to allow you to express yourself because you are the candidate who wants to be appointed a judge, and is being given an opportunity to demonstrate to us that you think you are worthy of the appointment.

Mbhele: Thank you Deputy Chief Justice.

Moseneke: You accept that we have read the documentation that you have filed, and we have it very much in our mind as we talk to you. I'll ask you to listen to the question and try to be succinct. Don't try to compete or outdo the person who posed the question. Your answer should be short. Let's go back to where it all started. Where is Lindley?

Mbhele: Lindley is a small town between Kroonstad and Bethlehem.

Moseneke: And has it always been your home?

Mbhele: It has always been my home until I was about to complete my university studies, that is 1993.

Moseneke: And as you grew up, your father is still alive, and your mother is still alive?

Mbhele: My mother is still alive. My father passed on in 2012. They moved from Lindley to stay at a farm in the eastern Free State.

Moseneke: So your life has been in the Free State?

Mbhele: Correct so, Deputy Chief Justice.

Moseneke: Now, what do you think about your primary schooling? Was it the quality you needed, was it pleasant?

Mbhele: I did my primary schooling at a farm that was about five kilometres from the farm where I was born. I was there since 1981.

Moseneke: Who owned the farm where you were born?

Mbhele: It's Mr Dell.

Moseneke: And your parents, were they working for Mr Dell?

Mbhele: My parents worked for Mr Dell up until my father moved to [inaudible] where he worked for an agricultural institution owned by government at that stage. He proceeded to benefit from the processes of government where he eventually became a farm owner himself.

Moseneke: Wonderful. Now, how did you find your way to the university?

Mbhele: At the time when I started university, two of my brothers were already working as police officers. Part of my payment for the university was borne by one of my brothers, and the farm owner contributed to my initial registration for university at the time.

Moseneke: That is very helpful. And you went to university after our democratic government in 1995?

Mbhele: No. I went to university in 1992. I completed my degree in 1995.

Moseneke: I see. You completed in 1995, but you went there in 1992.

Mbhele: Correct so, Deputy Chief Justice.

Mbhele: Where were you during the youth uprising of the mid-80s to early-90s?

Mbhele: At that time, when I was at the university, I was a little bit involved. When I grew up at the farm where we were, there wasn't enough political activity actually, but when I started at the university, I got a little bit involved with Pan African Students Movement (PASM), and I was part of the students' Christian movement as well. I never really took active membership in PASM at that time. But the role I played as a student at that time was to reach out to the community around Mankweng, near to University of the North, where as a member of the law students council, we would go into the communities, do the street law programme and interact with communities, and advise communities on basic legal issues that may confront them in their day-to-day business. I was involved with the communities around Mankweng.

Moseneke: As you left university, you went to Articles immediately to be a candidate attorney?

Mbhele: Correct so, Deputy Chief Justice.

Moseneke: Why did you choose that profession?

Mbhele: I have always wanted to become a lawyer, an attorney. In fact, before I took up a position as a candidate attorney with the now Judge Kubushi and the JP Molemela, I was offered a position at the National Prosecuting Authority, but I had to weigh my options at the time. I discovered that I could do more contribution as an attorney at the time than as a prosecutor. So, I chose to go do articles because I felt I could play a better role there as an attorney at the time.

Moseneke: So Kubushi, Molemela refers to the Judge President?

Mbhele: Correct Deputy Chief Justice.

Moseneke: And you continued along that path and that has become your life up till now, an attorney?

Mbhele: Correct so, Deputy Chief Justice.

Moseneke: How many years now have you been an attorney, including your time as a candidate attorney that was from 1995?

Mbhele: It's almost 19 years.

Moseneke: In your papers, you disclosed that you are a member of Black Lawyers Association (BLA) also for about 19 years.

Mbhele: Correct so, Deputy Chief Justice.

Moseneke: And you also tell us that you are a member of the African National Congress.

Mbhele: Correct so, Deputy Chief Justice.

Moseneke: Is it a position you still hold, because you say 'till date'?

Mbhele: Yes, I am a member of the BLA and with the African National Congress, I don't know if I've renewed my membership for this year, because I've been very busy.

Moseneke: The form tells us you say so, and there's nothing wrong about that. It's not something that is unlawful, it's nothing that the law prohibits. I'm looking at just your disclosures that are before us, and you say 'to date'.

Mbhele: I consider myself a member, though.

Moseneke: And what are your legal obligations once you are appointed?

Mbhele: I will have to de-register my memberships from the said organisations.

Moseneke: Your practice has reflected... you say about 40% of it constitutes personal injury, tax, shipping and intellectual property. Would there be any practice like that in the Free State? Shipping? 6.2.5 of the questionnaire... It's not a big issue; it may be a typing error. When you see shipping law in the Free State, it makes you think...

Mbhele: There should have been an error there.

Moseneke: Yes, it may well be an error. I just saw it, it jumped out. It's like having shipping law in Tshwane. I'm going to turn over to Judge President Molemela who may have questions for you.

**Judge President Molemela:** Thank you, DCJ. And to all the Commissioners before I start asking the candidate questions, I intended to place it on record that the candidate served articles of clerkship at a firm in which I was a part of. It is already on record now. The DCJ has covered quite a number of aspects that I wanted to cover. But let's start here, at your acting appointments. You have acted in the Free State division for about three terms, is that correct?

Mbhele: Correct so, JP.

JP Molemela: During these terms, what kind of court work were you exposed to? Did you sit in any appeals?

Mbhele: I sat in appeals, I did civil trials, I did both opposed and unopposed motion, I did criminal trials, I did reviews and petitions.

JP Molemela: Did you have an occasion to do what is normally referred to as urgent courts?

Mbhele: I did urgent courts three times, when I was acting the first, second and third time.

JP Molemela: It can be quite intimidating. How did you find it?

Mbhele: I found it very easy to do, once I was well acquainted with the papers that were before me and I that I needed to deal with at the time when I went into court. The minute I settled in, I found it easy to go through the whole process up until at the end of the motion court. I didn't find it difficult to adjust with.

JP Molemela: Considering the type of work that we do in the divisions, you say that you have done all branches of the law.

Mbhele: I've done all branches of the law. There's been commercial litigation matters brought before me; there's been tax matters; criminal matters. I've done all branches of the law.

JP Molemela: I'm sure you have read the comments that were submitted by the Free State society of advocates. They do not support your appointment. You do know that, don't you?

Mbhele: I do know that.

JP Molemela: And you will have noted that one of the reasons that they advance is that they say that you have only four years court experience. In response to the DCJ's question, you stated that you have 19 years' experience.

Mbhele: Correct so, JP.

JP Molemela: And yet here's the Bar saying here that you have only four years court experience. And I've had a look at your CV and I've noted that you spent quite a lot of time at the Legal Aid South Africa in various capacities.

Mbhele: That's correct.

JP Molemela: Did you do any court appearances?

Mbhele: I did a lot of court appearances. When I started at legal aid, I was an ordinary professional assistant who was at court every day.

JP Molemela: When you say at court every day, appearing in court every day for the parties?

Mbhele: Correct so, JP. And when I advanced to become a supervisory professional assistant, I had to do 50% court work and 50% supervision of other staff members who were doing court work as well. So, me being a supervisor had to do court observation, and check quality of the files. That on its own demanded of me to understand what is happening in our courts and be at court every day. When I ascended to the position of the center executive, I still had to do court work as well, because as part of my contract, I still had to do part of the court work and still supervise other staff members' court work. So, the whole time, I've been involved in court work all the time, up until I left legal aid and went back into private practice.

JP Molemela: When you were doing your articles of clerkship, I think that kind of experience was not taken into account when they talked about your court experience. Did you appear in court?

Mbhele: I appeared in court. At that time the Bar practitioners were doing a lot of legal aid work. So, that time I was doing most of the criminal matters at court, and some civil matters, because at the time, my principal was doing conveyancing mainly. So all the litigation work in that firm was done by me, because we were only two in that firm: the principal, the professional assistant and myself. We were doing court work almost every day of the week.

JP Molemela: The firm was doing mainly criminal practice, isn't it?

Mbhele: Correct so, JP.

JP Molemela: You appeared in court quite a lot?

Mbhele: I appeared in court quite a lot.

JP Molemela: One way in which it becomes discernible that a candidate or person is struggling in terms of coping with the work is late delivery of judgments. Now, during these stints you were acting as a judge, did you deliver your judgments timeously?

Mbhele: I did, JP.

JP Molemela: Did you find that there were areas that you were struggling in recollection, say you were not coping?

Mbhele: Not at all. I could cope at all times.

JP Molemela: I note that you were a counsellor at the Free State Law Society.

Mbhele: I'm still a counsellor at the law society of the Free State.

JP Molemela: Did that position enhance your legal experience in any way?

Mbhele: It helped a great deal. It gave me an opportunity to preside over disciplinary hearings of practitioners who at all times had to appear before the council, and at some stage, I had to take decisions that would lead to striking them off in that area to one that will apply their minds extensively in dealing with practitioners that appeared before the council. It has given me an opportunity to preside over various disciplinary matters relating to practitioners.

JP Molemela: Now that you have applied for a position as a judge, do you think that congeniality is important, for judges to mingle, go into the tea room, attending judges' function? Is that important?

Mbhele: It is important. The discussions that come out at the tea room and the discussions that come out as people mingle, are always helpful to advance or broaden one's horizon in terms of understanding most of the issues.

JP Molemela: I see that you are a partner in the firm Mhlambi.

Mbhele: Yes, I am a partner.

JP Molemela: It looks like there are only two partners. It's only you and Mr Mhlambi.

Mbhele: Correct so, JP.

JP Molemela: Both of you have been shortlisted, right?

Mbhele: Correct so, JP.

JP Molemela: Have you ever considered what the position will be if the two of you were to be recommended for appointment?

Mbhele: We have discussed that. Currently, I have three candidates that will start under me. Two of them have just passed their board exam, and one of them would be admitted very soon while one is awaiting her term of articles to expire. That discussion was advanced with them. At the time when I was appointing candidates, my focus was mainly on appointing women. It's three women that I've got as my candidates currently, and there was a suggestion to one of them about if both of us should get appointed to the position in the Free State, if they would be willing to take over the firm. That discussion has been there, but if any of them are not willing, according to the rules of the law society, we would time to wind up the practice properly and the process of winding up would not be much of a problem.

JP Molemela: I see that at some stage you were involved as a legal adviser at Thusanang Advice Centre, but in bracket it says human rights sector. What did that entail?

Mbhele: Thusanang Advice Centre was a branch office of the national institute for public interest law and research. What was happening at the Thusanang Advice Centre was mainly doing advocacy training, human rights, and gender. At the time when the Constitution came into being, we realized that there's a need to educate the community on the Constitution itself and make aware of what is expected of them. We started interacting with the traditional leaders, the chiefs around Kwakwa, the whole rural area there, trying to sensitize them of the provision of the Constitution itself. At the same time, we were taking the community as well on the conventional eliminating of all forms of discrimination against women, wherein the best subjects that we had was gender sensitivity and the girl child; dealing with children at high school, trying to take decisions about gender roles and respect for human rights. I identified that at some stage, at the time when I was at Thusanang Advice Centre, I linked up with the firm [inaudible]. When there were matters that needed litigation, I always had a relationship with my former principal to take those matters on pro bono, which he had dealt with at the time, if those matters could not be covered by legal aid in any way.

Moseneke: We have an arrangement that the answers will be precise. Just listen to the core questions and give us the core answer. There will be a follow-up if more is required of you.

Mbhele: Thank you DCJ.

**Premier Magashule:** I just want to pose one question. We are interviewing some of the people who may have more experience than you. My question is, why should we consider you? Is it because you are a woman?

Mbhele: I believe that I am capable and competent. I have the necessary skills to do the job. I understand what the job entails more than anything. Being a woman is just an added advantage. What comes first is that I am in the position to do the job and I can do it, and I confident that I am competent enough to handle this.

**Commissioner Fourie:** I wanted to question you about the fact that you and your partner, are technically coming up against each other. I just want to make the remark that we've often seen good friends coming up

against each other for vacancies, but never two partners. Didn't you agree that one should go first and the other one should wait a bit?

Mbhele: There was a discussion and we both felt that there are two positions. If both of us make ourselves available, that all the best for the judiciary.

Fourie: Two questions. The one is, let's just hope that your experience as a practicing attorney that has been referred to, the Bar council says four years, and in the question that you cleared with the DCJ, you said 19 years. But if I look at your certificate of good standing from the law society of the Free State, it says that you were admitted on the 8<sup>th</sup> of March 2001, which gives you 14 years as a practicing attorney.

Mbhele: Correct so.

Fourie: Let's settle that. Which is it? 14 years?

Mbhele: The Deputy Chief Justice had covered the period of practice since 1995 when I finished my degree. That was to his question. That's why I said it's 19 years according to my understanding.

Fourie: Just a last question. The Bar council says that 'because of the fact that Ms Mbhele is literally unknown to the Free State society of advocates, appointment to the Free State bench will not be recommended'. However, they say that they do not have any objections. I find that quite an interesting remark and it puzzles because, despite the fact that they say that they don't know you literally, they are prepared to say that you are always friendly, well-mannered, and secondly, you've acted quite continuously from April 2014 until August this year. Would you like to make an opinion on how the society of advocates can say that they you are literally unknown to them?

Mbhele: I wouldn't understand because I do not know what they mean when they said they literally did not know me, and yet at the same time, they find me friendly and always ready to listen. But I have interacted with some members of the Bar, some, I have briefed in a number of matters. I wouldn't know why they say they don't know me.

**Commissioner N Singh, Member of the National Assembly:** You're relatively young, I see you're 42. I don't know if you're aware of how many young judges have been appointed. Now, there are many judges who sit on the bench up till age 75 which is 33 years from now. What is your view on the appointment of younger people to the bench and where do you see yourself 20 years from now if you are appointed?

Mbhele: If I am appointed, 20 years from now, I would see myself still being part of the judiciary, still at the bench. I know that it will not be the first time that a person of my age gets appointed to the bench. A few of the judges, like Judge Poyo-Dlwati is a few years younger than me. She's already at the bench and they are doing a good job. When I took up this commitment, I'm prepared to stay and to make an advancement within the judiciary itself; that's where I want to see myself – at the apex of the judiciary in 20 years from now.

Singh: I see you've answered this question from the Honorable Premier about experience. I just need to be convinced very briefly that three acting stints gives you enough experience for us to consider you to be appointed to the bench.

Mbhele: I have written a few judgments that would show that with time, I've got quite the necessary experience. It would be ideal to even have more experience but I am convinced that I am ready to take up the position, with the experience that I have acquired. I'm convinced that I am ready to take up this position.

**Deputy President Maya:** The question I wanted to ask has been asked by the Commissioner. I just want to make a comment relating to the concerns about your tender age. I don't think anyone in this room should be worried about that because I was appointed at 35 and I'm still here today. There's a lot of leg-room in this field and a long ladder to climb. I just want to say to you that I'm very proud of you and your achievements. You did not let your background define you. I think that you're just a shining example of a person who has used her willpower to rise above circumstances.

Mbhele: Thank you, Deputy President.

**Commissioner Mabunda:** Commissioner Singh, it's four acting stints and not three. She acted four times.

Moseneke: Where did you find the four times from? Paragraph 9.2 shows three stints of acting.

Mabunda: Four.

Moseneke: Oh, she's currently acting now? Why is it four? That's what I'm asking.

JP Molemela: DCJ, it's four stints which make up three terms. Thank you.

Moseneke: That helps. We now have the facts. Thank you.

Mabunda: My disclosure is that I know the candidate very well, because she's a member of the legal education center board of the BLA, and obviously, as a leader, you're always in charge of the legal education center. I wanted to put that on record. Secondly, that she has served under my leadership as a member of the national executive committee of the BLA. And lastly, because of the qualities in her leadership, as a leader in terms of the Act, I was able to cause her to be recommended to the national forum which is grappling with the issues of the Legal Practice Act.

Moseneke: That is helpful, Commissioner Mabunda. Thank you.

**Commissioner Malema:** You said were at the Turfloop campus in which year?

Mbhele: 1992 to 1995.

Malema: And you were a member of PASMA?

Mbhele: I was a member of the student Christian movement which had a relationship with PASMA. In 1994, when we had a joint venture, we won the elections together with PASMA.

Malema: So in this Christian organization, were you in leadership?

Mbhele: I was the chairperson of the women's committee of the student Christian movement. That was the committee that was dealing with gender.

Malema: And the committee took a decision to go into partnership with PASMA?

Mbhele: Correct so, Commissioner Malema.

Malema: Why did you take such a decision?

Mbhele: At the time, we aligned ourselves with what PASMA believed in at that time. Some of us believed in what PAC's policies were at that time.

Malema: You believed in the PAC ideology and what PASMA represented; going into alliance with them and all that. Then all of a sudden in 2007, you changed completely to the ANC. What informed that?

Mbhele: In the area where I was, PAC did not have a footprint, but I also found the ideology espoused by ANC appealing at the time. That's why I decided to join the ANC.

Malema: Did you assume any leadership responsibility?

Mbhele: Not at all. Soon after I joined ANC, I got too committed with a number of things. I was just an ordinary member who attended meetings as a member. But between 2009 and 2012, I was completely outside Welkom itself, because I had to work at Polokwane and travel home every Friday. So, I didn't have much time to participate in most of those things.

Malema: Have you been to any forum of the ANC which was a high profile forum?

Mbhele: Not at all.

Malema: Have you met the Premier?

Mbhele: Yes.

Malema: Do you have a special relationship with the Premier?

Mbhele: No. The Premier has only appointed me to the board of operating licensing in the Free State where I served. That's how far I know him. I only know him at the times when he calls meetings; that's the only time I interact with the Premier.

Malema: You've never had one-on-one interaction with the Premier?

Mbhele: Never.

Moseneke: I see on your form you reflect three reserved judgments. Are they still there or have they been cleared up?

Mbhele: It's two reserved judgments. The De Bruyn case and the other one was long delivered. The other one is supposed to be delivered tomorrow when I get to Bloemfontein. The judgments are only delivered on Thursdays.

Moseneke: The core function of a judges is to write judgments. On the account of their judgments, it explains how they've reached the decisions by writing it out for the whole public to see. It's a core function of a judge; it's to tell those before her and the world at large how the decision has been arrived at. It's an active accountability. You agree with that?

Mbhele: I agree with that, Deputy Chief Justice.

Moseneke: And while you are there, I could take the liberty to tell you that once a military junta took over in Nigeria, they stopped writing judgments, so that there were no reported judgments. And when we went out to try and collate judgments from African countries, even their highest court in the land did not deliver recent

judgments. So, the Supreme Court says you have lost the case, and you've lost the case. There was no accountability; there was no act where you were obliged to tell the nation why and how you arrived at the outcome you arrived at. You can see that that invites incredible misuse of public power. So, it's time to write judgments when we confess to the world how we have come to decisions that we have so that everybody can say [inaudible]. That's my duty to tell you every time. It's a big act of accountability of judges. You don't need the lecture because you have delivered your judgment and the one remaining, you're going to do quickly. But that is a very vital part of what you're going to do as judges. The final word is yours. Why should we recommend you to the President to be appointed?

Mbhele: I believe that I'm a fit and proper person; I believe that I will make a contribution into the development of the jurisprudence of this country. Above all I believe that I represent that face that most litigators will be able to relate with at the time that they come to my court. And I believe that I do meet the necessary qualities that call for my appointment as a judge.

Moseneke: Thank you Ms Mbhele. We do release you and good luck. You've achieved a lot, and you will hear in due course what the Commission thinks on whether you should be appointed this time around.

Mbhele: Thank you DCJ.

