

Judicial Service Commission Interviews: Day 3

7 October 2015, morning session

Free State High Court

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Interview of Mr J J Mhlambi

DCJ Moseneke: Mr Mhlambi, you're here before us, the Judicial Service Commission. Our task is to recommend appointment of judges. There are two vacancies in your province and I think you're competing against a good few other colleagues who will like to serve in that province. We're going to ask you questions and the primary purpose of the questions is to give you space to convince us why you should be appointed to serve our people in the Free State. I urge you that we do this in 45 minutes and not more, and that you can help by staying quite tight in your questions. Listen to the questions and try to act to the core of the questions. It's quite in order to be brief. There will be follow-up if she or he feels that your answer is inadequate.

Mr Mhlambi: Thank you Deputy Chief Justice.

Moseneke: Where were you born?

Mhlambi: I was born in Kroonstad in the Free State.

Moseneke: Have you always been a Free State person?

Mhlambi: Yes, Deputy Chief Justice, except when I attended school, because I attended boarding school at the Mariazell Institution at Matatiele, and thereafter I did my matric at St. Francis college near Pinetown in Natal. Thereafter I did a brief stint at the University of Zululand.

Moseneke: Did your family afford to take you to Mariazell and to take you to university?

Mhlambi: The family did afford to take me to boarding school, but could not afford to take me through university. I had to do it on my own, but luckily, my late maternal grandfather contributed towards the funds for my university education.

Moseneke: Your B.Proc reflects that you acquired it at UNISA, and yet you did go to a residential university, however. How do you explain that?.

Mhlambi: In 1976, I was in the university as I have indicated. It was shut down; it was the only university that was shut down. I couldn't make it for the following year due to lack of funds. Then the following year, I started working. I couldn't afford to go full-time because I had married my ex-wife who was also a student and I wonder whether that explains the discrepancy.

Moseneke: And you passed only in 1986, which means you worked in between. Is it?



Mhlambi: Yes, that is correct.

Moseneke: You took your exclusion from university and when you acquired the B. Proc at UNISA...

Mhlambi: Most certainly, Yes. I was doing a part-time course.

Moseneke: You were a taxi driver?

Mhlambi: Indeed, yes.

Moseneke: And then you moved towards the law when you became the court interpreter?

Mhlambi: That is correct. That was in 1990.

Moseneke: And then in 1989, you formed what you called 'own firm'. Were you practicing alone?

Mhlambi: At that stage, yes.

Moseneke: But you have it as 1989 to 1996.

Mhlambi: I ask for pardon there. I didn't realize the discrepancy. Actually, it should have been 1989 when I started on my own, until 1996 when I went into a partnership with someone else.

Moseneke: Then you entered a partnership with somebody called Houston.

Mhlambi: Yes. That is correct.

Moseneke: Currently, you say you're in Mhlambi Attorneys till date. How is the firm constituted, partner-wise and candidate-attorney-wise?

Mhlambi: I've got only one partner and three candidate attorneys at this stage. I think the previous candidate is now a partner.

Moseneke: Are you going to shut down the firm?

Mhlambi: That is a very good question, because I posed the same question to my partner, and I think she has given the answer herself. If fortune favors us, we would at least have to wind up.

Moseneke: Why would you like to become a judge?

Mhlambi: I've been fortunate enough to be allowed to act on a number of occasions, and I found it very interesting and challenging. Without sounding too condescending, I fell in love with the challenges.

Moseneke: And in the law society, what position have you occupied?

Mhlambi: I've been Deputy Chief Justice when if my memory serves me well on two occasions, and I've been president of the Free State law society twice.



Moseneke: President of the Free State law society?

Mhlambi: President of the Free State law society on two occasions.

Moseneke: I must say I like your letterhead; the letterhead of the Free State law society. It starts with the Sotho language right at the top, followed by Afrikaans and followed by English.

Moseneke: Being a judge has a practical side to it, but also has what I call intellectual or jurisprudential sides to it. When you're a judge, you have to understand how your society has arranged its structures and its constitutional affairs, as well as legal affairs. I'll like to ask you one or two questions about the thinking side of the judicial function, which becomes increasingly important as we move higher and higher in the judicial structures. What connection do you see between democracy and the rule of law?

Mhlambi: If there is no rule of law, I'm sure that no one can expect that there should be democracy. Because it's very interesting in a South African context, we who believe in the supremacy of the Constitution or as it is actually cited in one of the sections of the Constitution itself. If the judiciary is not strong enough to actually do its functions as set up in the Constitution, or actually seen to adopt the values in the Constitution, the letter of the law set up in the Constitution is maintained, then there will be no democracy. It is the general role of the Constitution that says let us try and address the injustices of the past.

Moseneke: What is the role of the people in the concept of the rule of law? How does the will of the people intersect with the notion of the rule of law?

Mhlambi: Intersect? I'll ask you to just help me out with 'intersect' in this context.

Moseneke: I think we're going to have an intellectual debate now. How are laws made in our country?

Mhlambi: The laws in our country are made by Parliament.

Moseneke: Who populates Parliament?

Mhlambi: The Members of Parliament who come from society, if I understand the question correctly. Or Parliament consists of the House of Assembly and the NCOP.

Moseneke: Who populates those bodies? Where do the people come from?

Mhlambi: They come from society itself.

Moseneke: Through an electoral process?

Mhlambi: Of course.

Moseneke: And their mandate is to make laws and to debate matters of importance to the nation, isn't it?

Mhlambi: That is correct.

Moseneke: And to hold the executive accountable. It's in the Constitution; those are their three roles.



Mhlambi: Exactly.

Moseneke: Once they have made laws and the laws are valid, what is your duty as a judge?

Mhlambi: To interpret the laws in terms of the Constitution. That is the primary function of the judiciary.

Moseneke: And to uphold the laws.

Mhlambi: And to uphold the laws, naturally.

Moseneke: So ultimately, when we talk about the rule of law, we're basically talking about the product of deliberation of those who represent the people being made law and binds the judiciary. The judges may not depart from that law; they're bound by it.

Mhlambi: They're bound by it. May I say, that they are bound by it as long as it's not contrary to the provisions of the Constitution.

Moseneke: And in that sense the judges are accountable to that outcome of the deliberations of elected representatives.

Mhlambi: Yes.

Moseneke: Can you see that connection now?

Mhlambi: Yes.

Moseneke: The rule of law and democracy?

Mhlambi: I'm with you.

Moseneke: Oh, you're with me. Okay. It took some time but you're there now. And it gives us an understanding of your role as the judge. You are in effect a guardian of democracy, in the sense that you are duty-bound to give effect to laws properly and validly made.

Mhlambi: In fact, it reminds me with the reading of the 'The strange alchemy of life and law' by Sachs, J. I think he was referring to Cameron's statement on same sex marriages and saying that when [inaudible] is that the laws are made or actually the interpretation and the referral to parliament, that they should actually give effect to same sex marriages and not actually occupy the space of Parliament.

Moseneke: Yes. It ultimately comes down to that. It's another way of asking you a number of questions about separation of powers, about the rule of law, about us being a democratic constitutional state. All those things hang together and judges ought to understand that in order to be able to do their work effectively and properly.

Mhlambi: Okay. Thank you Deputy Chief Justice.

Judge President Molemela: You've been actively involved in the law since 1987 when you were admitted as an attorney.



Mhlambi: That is correct.

JP Molemela: Do you still appear frequently in court?

Mhlambi: Whenever the opportunity arises, I do.

JP Molemela: Is your firm involved in High Court litigations at all?

Mhlambi: Yes, it is.

JP Molemela: And do you yourself appear in the High Court?

Mhlambi: I usually send either counsel or either correspondence to do the appearances.

JP Molemela: I see that you've acted in the Free State division on two occasions and you also acted in Gauteng.

Mhlambi: That is correct.

JP Molemela: In the Free State division, you had the opportunity to sit in appeals; I saw some appeal judgments that you wrote.

Mhlambi: Indeed.

JP Molemela: Were you exposed to all branches of the court? Did you do motion court?

Mhlambi: Yes, I did.

JP Molemela: It's a court that is regarded as a bit of the intimidating side, even by our own standard of case load. How did you find it?

Mhlambi: I got some grey hairs but I coped.

JP Molemela: And you recently acted in Gauteng?

Mhlambi: Yes, I did.

JP Molemela: And I see that they kept you quite busy with a number of judgments.

Mhlambi: Yes.

JP Molemela: What was your experience in that court? I see that it's one of the busy divisions in the country.

Mhlambi: It's a very busy court as suggested. You have to have a lot of discipline and a lot of documentation, which is if you like it of course, it's quite a wonderful experience.



JP Molemela: I said to the previous candidate that one way of seeing whether a candidate is coping with the workload is the delivery of judgments. Since you acted in that busy division, were you able to deliver your judgments timeously?

Mhlambi: Yes, I did. But you note that some of my judgments were actually delivered on the same day, which raises some concern. I'm saying this as a background to my confirming that I made a point that I should actually have my judgments delivered on time. What happened is that after my acting stint, all my judgments, because of an administrative glitch as undertaken by that personnel, were not delivered; an aspect that I also brought to the attention of the Judge President of Gauteng, that this is the situation [inaudible]

JP Molemela: You've acted in a busier division; do you think that that would stand you in good state if you are appointed?

Mhlambi: Humbly, [inaudible].

Moseneke: Before I turn you over to the Premier, in 6.2.5 of your questionnaire, you record that your firm does shipping law.

Mhlambi: Shipping? Deputy Chief Justice, isn't it perhaps the question that is on the form itself that you should indicate in which spheres that you practice?

Moseneke: So you say shipping law is what is in the form?

Mhlambi: Of course, that's correct. Deputy Chief Justice.

Moseneke: And then you have 40% of what?

Mhlambi: Is the 40% not referring to personal injury cases?

Moseneke: Well, I don't know. That is why I asked the question.

Mhlambi: Oh, excuse me.

Moseneke: Because when I look at it, it seems to include tax, shipping and intellectual property. And the answer is just 40%.

Mhlambi: Deputy Chief Justice, if you allow me, if there could be an amendment. The 40% actually refers to personal injury cases.

Moseneke: Personal injury, not 40% of everything that has been referred to?

Mhlambi: No. It should be amended. My apologies for the misrepresentation.

Moseneke: When I looked at it, I asked your partner about whether you people do shipping law.

Mhlambi: No. I hope she said No.



Premier Magashule: The question I want to pose is that we are interviewing women also, and I'm sure you've been interviewed once or twice. Why should we recommend you when we still have a challenge with the issue of the number of women at the bench?

Mhlambi: It's quite a valid statement to make that in the climate, there should be transformation. On my part, if I would also disclose, I do not have a problem with the transformation agenda whatsoever. I was just saying that I myself as a candidate within, I want to believe without sounding presumptuous, that one is also entitled to contribute towards the very same transformation through the work that I do.

Moseneke: Just before I turn you over to Mr Fourie, the Bar council in the Free State supports your appointment. Is there anything you want to say about that? They said lots of good things about you; you're a temperate man, humble man; they say you are competent; you're fit and proper. It's quite a glowing report.

Mhlambi: I can only say thanks indeed.

Moseneke: Very well. Mr Fourie?

Commissioner Fourie: Good afternoon Mr Mhlambi. We know each other well.

Mhlambi: Indeed.

Fourie: You've acted in the Free State and Gauteng.

Mhlambi: That is correct.

Fourie: And you give dates. Which of those dates apply to Gauteng?

Mhlambi: 2015. That is March.

Fourie: 2nd March to 27th March 2015?

Mhlambi: Correct.

Fourie: So you were last at the Free State in 2013?

Mhlambi: That is true.

Fourie: Any particular reason for that?

Mhlambi: It's by way of invitation, isn't it commissioner?

Fourie: They don't submit.

Mhlambi: I must admit that during March, I was invited but I was already committed to Gauteng.

Fourie: I also sit on the sifting committee of this commission and I recollect that when we considered your application then, we noted that you applied for all vacancies across the country. Despite the fact that you've only



acted in Free State and Gauteng, you've applied for the other divisions and the other vacancies there as well, even including the Labour Court if I'm not mistaken. Is there any particular reason for that?

Mhlambi: I think it's a question of interpretation here. Once again, I think it is a shock for me; I have never applied to the Labour Court.

Fourie: Well, I can tell you that I can recall, and I can be corrected by the other members, that for all the other vacancies, your name appeared as well. Was it a problem from the side of the secretariat, or did you do so?

Mhlambi: Not in so many ways. That's why I said [inaudible]. I sent an application for vacancy in the High Court.

Fourie: That went to all the divisions.

Mhlambi: I concede.

Fourie: Just the last question. I see you're the director and a member of one close corporation and the director of three companies. One is the Mangaung Sun. What does that company do?

Mhlambi: It's in the gambling, entertainment industry.

Fourie: Is it a hotel group or what?

Mhlambi: It's a subsidiary of Sun International group.

Fourie: Procor?

Mhlambi: It is only the building that we have shares in that housed my previous firm.

Fourie: Archiquant Developments CC?

Mhlambi: Archiquant Developments CC is a property in CC. I'm the sole member of that property in CC.

Fourie: Sorry, I didn't get that.

Mhlambi: It's my property estate.

Fourie: Your residence?

Mhlambi: Not my residence [inaudible].

Fourie: And Misty Sea?

Mhlambi: Yes, it's just a small company that has just started, doing odd jobs, renovations and stuff like that.

Fourie: And lastly on a lighter note, if your partner decides that if one who makes it and the other one does not, how are you going to structure your relationship going forward?



Mhlambi: It's an interesting one. She's a dynamic young lady and she wanted to chase the waters herself, and I wonder [inaudible].

Commissioner M Motshekga, Member of the National Assembly: Mr Mhlambi, have you ever heard of Manguang legal services centre which was established in the mid-80s to provide legal services to victims of apartheid and if so, what relationship did you have with it? Secondly, in the late-80s, there were progressive organisations like the BLA, Nadel, Lawyers for Human Rights which were also defending the victims of apartheid. Did you ever participate in any of them? Lastly, do you believe that participation or the practice of public interest law and participation in progressive organisations sharpens one's self in terms of social justice?

Mhlambi: Indeed, yes. It's quite interesting. In respect of the first question, if my memory serves me well, I was involved in that organization. I also did some things with NADEL. In respect of the second question, actually, participating in these progressive organisations sharpened one's understanding of the social position. At the time, during the mid-80s, I was a member of the Black Lawyers Association before I switched over to NADEL at a later stage in the late-80s, and it indeed made us stronger, and because there was also a duty on most of us who were actually professionals to participate in assisting the conditions and the plight of our populace.

Motshekga: People generally feel that lawyers from rural areas are not good for urban areas. I find it commendable that you were identified to serve in the Gauteng metropolitan context space. How were you identified?

Mhlambi: I actually applied, and some of our colleagues in the Gauteng province actually recommended that I should apply to the Gauteng Province. When I did my stint in 2001, I think, during the aspiring judges' course, we did it at Randburg, and one of the teachers...

Moseneke: I think the answer is, you applied?

Mhlambi: I applied. Thank you DCJ.

Moseneke: The rest of the detail is far-reaching. You applied, you said JP, I'm available if you have a position.

Mhlambi: That is correct, Deputy Chief Justice.

Hon Didiza: On page 9 of your form, in response to the question about your contribution to the law and this legal justice, you indicate that you have produced a considerable number of candidate attorneys who were subsequently admitted. Maybe just to follow up on the question that the Premier asked earlier, in that support and producing of these candidate attorneys, did you or were you also conscious to look at the gender balance; to ensure that you attract more women candidate attorneys and support them?

Mhlambi: Yes, indeed. That is what actually happened, and that is the status quo even now. In fact, most of the candidate attorneys are women.

Prof Ntalama: Considering the high level of domestic violence against women, to an extent that some of them formed coalitions which have put pressure on the judiciary in ensuring that the services that are being carried out



are allegedly of some benefit to curb the state of violence against women, what is your view regarding the influence of public opinion in the judiciary?

Mhlambi: The fact is public opinion may be of assistance but as a judicial officer, you have naturally got your conscience; you've got your idea of what's right and wrong. You've got also to be reasonable and apply equity, and so on. You have to apply justice without fear or favour in what you believe in. If you are swayed by public opinion all the time, it shows that you really are not executing the judicial duties properly. It is good to be reminded but you still have that space of being a judicial officer.

Commissioner Singh: We should note that you had interviewed before.

Mhlambi: Yes.

Singh: On the 9th October 2013 for a similar position. But your acting stint after that was not in the division of the Judge President. That stint was in Johannesburg.

Mhlambi: That is correct.

Commissioner Mabunda: For me, it's that we have worked together with the candidate at the law society of South Africa at a leadership position, and equally at the board of the attorneys' identity fund, and that we're having a relationship with respect to the question that was posed by Adv Motshegka regarding the BLA-Nadel relationship in advancing the cause which he was talking about; just for the record. In other words, the candidate is very active in the particular role.

Mhlambi: I thank the Commissioner.

Moseneke: Commissioner Motshegka can't complain much. Me and him formed Nadel together and we launched it in the same place. We merged a number of progressive organisations to form Nadel.

Mhlambi: I really am shocked to hear that [inaudible] successful and laid the foundation for what they have today.

Moseneke: I was the founding national secretary I'm still a member till now. No, I'm not.

Minister Masutha: Under jurisprudence, I see you included a case I assume which you adjudicated in 2011/2012, Erasmus v Jacobs, relating to the application of section 54 of the Administration of Estates Act in particular, which provides for court's intervention for whatever reason the court may deem fit. And I noticed that you dismissed the application for such intervention in that particular case. Was it on the basis that on the facts, the allegations of the incumbent executive not a being a fit and proper person was not welcomed by the applicants? Was it based on any other grounds? Could it be that you were actually rejecting the provisions of section 54 that allowed judicial intervention? Unfortunately, I haven't seen the full judgment. I just want you to give us a sense as to why you rejected the application for the removal of the executive at that instance, if you can recall.

Mhlambi: If I recall, the dismissal of the action was not based on the principle that is set out in the particular legislation. I think it was more based on the emphasis, because if you read the judgment further, you will realize that the applicants really could not be relied on. The evidence was quite shifty, very shifty to such an extent that it was dismissed on that basis.

Masutha: There is concern that the judiciary at times wittingly or unwittingly indulges in judicial overreach to the other spheres or branches of State, such as the legislative and the executive, and does in fact in some instances for example, substitute the executive decisions for its own. But secondly, sometimes the judiciary is not sensitive to the real challenges, risks or dangers associated with some of the decisions that the judiciary takes; and that it doesn't always act with such caution or diligence when it comes to reversing or overruling the decisions of the executive. What is your view on that?

Mhlambi: I think that is really in the doorstep of each and every judicial officer to guard against that. Indeed, this has been seen in the last few days, or currently, and what has been happening; the comments that you read about in the papers about the judiciary. The Constitution is quite clear that the judiciary is to interpret the law in order to give effect to the duty of giving effect to the values in the Constitution. Naturally, that will take us to the aspect that was referred to earlier on by the Deputy Chief Justice – separation of powers. Even though separation of powers is not that rigid, there is some interplay between the various sectors. There are checks and balances in reviewing. It is imperative, like the old adage, that the judicial officer interprets the law and not makes it because that will be encroaching on the other spheres of government.

Masutha: [provides the Latin quotation of the adage]

Hon Malema: I just want to ask two questions and I will plead with the Chief Justice to give me time. It is with regard to the question of companies. It was not correct to say that it's a small issue. No, it's not. Please go company by company and explain what those companies are doing, because we need to understand the type of person we recommend for the appointment. So, it's a not a small issue; it's a serious issue. Let's go back to it company by company and explain what those companies are doing. Even if you think those are small things, we need to know them. Perhaps you can unpack them, and you will realize they're not small; they're serious things.

Mhlambi: That they are not small things; they're serious things in respect of the content of the assets or....
Deputy Chief Justice, if I, if I may have a copy of the questionnaire containing all his submitted documents

Moseneke: The invitation is to go through each of them and give explanation as would give an indication to the Commissioner's question. And that goes into the pot in assessing whether or not you are fit and proper or alternatively, whether you are so engaged that you may not be able to carry out your judicial function properly.

Mhlambi: I'll start with the one, Commissioner Malema; Sun International; the BEE element consists of four companies of which I'm the director of one. Then, I've been seconded to sit on Mangaung Board of this company. Actually, what is happening here is that the period had lapsed within which to repay the loan that was advanced by Sun International to this BEE partner, and at this stage, what is happening is that the various former shareholders at all four companies, representing the BEE partner, are now awaiting dividends. Hence, my being the director, is actually just to be there representing them. Two, Archiquant Developments CC, as I indicated I'm a sole director, is a property CC. It has properties and these properties have been leased out. In fact, one of my co-tenants in one of the buildings is Legal Aid South Africa, and the other one is actually occupied by my own firm for rental purposes, and two other town houses which are receiving income. Procor, I was a director. We bought a building and this building is still there. So, it's called Procor Building because we bought it from a Procor company. What is happening is when I left the company, they couldn't immediately buy my shares, but, in fact, this morning, I received a letter to say that the sale agreement of my shares has been finalized. So, I will not be involved in this any longer. Then, Mhlambi Incorporated is where I am co-director with my partner. Then Misty Sea Ltd, as I've said, is the company that does various jobs like renovations or renting vehicles out.

Malema: The renovation company, it applies for tenders and gets jobs to do work for the State?

Mhlambi: Work for the State?



Malema: Like renovating government building, things like that?

Mhlambi: No, not government buildings. Renovations are actually in respect of the properties at Archiquant. Other work that can't be done, as the renovations are so many for Archiquant. It's not that big in the sense that it could undertake renovations of government buildings.

Malema: So what happens when we appoint you; what happens to all these, if you become a judge?

Mhlambi: Commissioner Malema, you will notice that in the application, I indicated that it is easy to divest one of the assets.

Malema: No, no. I hear of the divesting of one of the assets but what happens to the rest? We have a long list here of the companies that are there. So, are you prepared to resign your membership and sell your shares to all these companies?

Mhlambi: Yes, of course.

Malema: The last question I want to ask is about your partner. Will you recommend her for the appointment?

Mhlambi: What I can say is that we would appreciate it if she's got a favourable consideration. I wouldn't go so far as to be seen to encroach on the work of the commission, but as I say, personally, I wouldn't have a problem if she is considered.

Senior Counsel Hellens: Two questions: the first is are there any circumstances in which a judge makes laws?

Mhlambi: Yes. In the interpretation of the law, in the stare decisis that we have, in interpreting that law, ultimately it becomes a fact. I think in that manner, the judge makes the law. And I say 'makes the law' in quote.

Hellens: Can you give us an idea of what your judicial philosophy is?

Mhlambi: Deputy Chief Justice, the question is not understood by me. May I ask for some particular instance just to see that I understand it fully?

Moseneke: Commissioner Hellens can put in another way so that you can respond to it.

Hellens: When you look into your judicial soul if I can put that way, what is your guiding principle? How do you see your function?

Mhlambi: My function as a judicial officer?

Hellens: Yes.

Mhlambi: My judicial philosophy I think, I understand you properly, is how would I behave? I think that to give effect to a set of principles which are there to assist the enhancement of the society that I'm in, in various manners like for instance, the betterment or the attraction or to bring about social cohesion in the sense that these principles, such as equality; for lack of a better word, justice between man and man, and so on, should actually be implemented.



Moseneke: This is an occasion where you should be making your closing remarks if any, directed at why we should recommend you to the Presidency.

Mhlambi: Thank you Deputy Chief Justice. I'll be very brief. I request that I should be recommended. That is all.

