Judicial Services Commission interviews

8 October 2015, afternoon session

Kwazulu-Natal High Court

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Interview of Professor K Govender

Mogoeng: Professor Govender, are you ready for the High Court? Why do you consider yourself suited for elevation to the Bench?

Govender: There are two elements in the process of judging: one, the resolution of disputes, and two, building up the jurisprudence. As you ascend the hierarchy of the courts, the pendulum swings toward the second element. Over the last twenty years I've been involved in both processes. I've been an arbitrator since 1996 and served two terms on the South African Human Rights Commission (SAHRC), and been a member of the Durban Bar for a period. I've written judgements, awards and opinions which the Commission can access. This is a solemn responsibility, and if I felt I did not have the capacity, I would not have applied.

Mogoeng: You are a professor but you have also practiced.

Govender: That is correct.

Mogoeng: And you have acted as a Judge.

Govender: Yes.

Mogoeng: Many people believe that it is easy to move from academia to the practical side of the law. What do you think?

Govender: Practice is different from academia. Academics have the advantage of more reflection on the law, and generally do more writing. The disadvantage is that you are not engaged in the day-to-day practice of law. This has to be acquired. But it can be acquired. There is nothing intrinsically difficult about the law. The transition is not easy but it is doable.

Mogoeng: Some people have held up Justices Albie Sachs, Yvonne Mokgoro and Kate O'Regan as examples of Judges who were appoint to the Constitutional Court straight from academia. Some of these judges have pointed out to me that no-one knew much about Constitutional adjudications at that time, so everyone one was sort-of on par. Do you think they are the right example for a case like yours?

Govender: It may have been more difficult for them, because jurisprudence has become relatively more settled over time. But it is also perhaps more difficult to move to the High Court, which focusses on trials, than the Constitutional Court, which focusses on building the jurisprudence, and in which academics' writing skills are of greater benefit.

Jappie: Professor Govender, the luxury of reflection that is afforded to academics is not often afforded to High Court Judges, who work in a pressurised environment where decisions sometimes have to be handed down immediately. How well equipped do you think you are to manage in such an environment?

Govender: You make a valid point. Though it was perhaps not quite at the same intensity, my part-time membership of the SAHRC required a great deal of discipline.

Jappie: How well do you think you will fair in the management of trials? Dealing with witnesses, counsel's arguments, and so on. How well will you cope?

Govender: I've been a senior arbitrator since 2002, and I've handled many trials since then. I've also presided over commissions of enquiry and I've dealt with counsel and attorneys on a regular basis.

Jappie: Why are academics reluctant to make themselves available to act in the High Court?

Govender: I'm not sure. Perhaps they think that the demands of a High Court Judge are too much now.

Mogoeng: In general, the number of academics appearing in court, whether as advocates or attorneys, has dropped. Why?

Govender: Again I'm speculating, but perhaps the workloads of academics have increased.

Mogoeng: Shouldn't academics encourage each other to get some practical experience?

Govender: Yes I agree. Having some practical experience also improves your capacity to teach the law.

Xaba: Chief Justice, I must disclose that Professor Govender taught me at B. Proc and Masters levels. Professor Govender, can you share with us your understanding of what lies at the centre of the perceived tension between the executive and the judiciary? It appears to be a worldwide phenomenon.

Govender: In a constitutional democracy such as ours in which the courts are vested with the testing power, then there is necessarily going to be a measure of tension between the judiciary and the executive. The question becomes how you manage it. As I see it, we have recognised three pillars to the management of this tension: the separation of powers, respect for the rule of law and the supremacy of the Constitution. We have been working out on an ongoing basis the jurisprudence to manage the tension. Also, it is important to note that our judiciary is young, and we need to ensure that respect for the judiciary is entrenched in the hearts and minds of the people. If I am appointed, I will have regard for the separation of powers, and also for the major responsibilities in terms of Section 172 of the Constitution.

Hellens: You've acted on one occasion, in November and December 2011, after which you returned to tidy up some matters. Is that when you heard the matter of State vs Ntuli?

Govender: Yes, it started then.

Hellens: How long did that trial run for?

Govender: Roughly two and a half months.

Hellens: Was a 187-page judgement appropriate?

Govender. There were many issues that I had to deal with in that judgement, I don't think I was merely pontificating on irrelevant matters.

Hellens: I recall you had to deal with a trial within the trial concerning the admissibility of confessions.

Govender: Yes.

Hellens: Did you have assessors?

Govender: I had two assessors.

Hellens: Did you allow them a say on the admissibility of the confessions?

Govender: I think I did.

Judge-President FD Kgomo: A High Court Judge requires forensic skills. Would it be fair to litigants for a court to be presided over by someone with no experience of the hustle and bustle of the court?

Govender: No, it would not be appropriate for a pure academic with no experience to be a Judge.

Kgomo: The Chief Justice recently spoke at the University of South Africa (UNISA) asking why law schools no longer allow legal teachers to practice as well as teach. What is the position at your university?

Govender: When I started, more colleagues used to practice, but only very few do so now. It may be that the responsibilities are greater now and the universities are reluctant to agree to people practicing. There is great pressure to publish these days. I think we are losing the possibility of a symbiotically beneficial relationship.

Mr CP Fourie: You have a truly impressive academic CV. I just want to enquire about your readiness for the Bench. You say you have been working as an advocate since 1994. Can you elaborate on precisely what this means? What have you actually done?

Govender: I have been an associate member of the Durban Bar since 1994. I have not appeared in court frequently, and recently even less frequently because I've been arbitrating more. I've acted in the student disciplinary court at my university. I also litigated on behalf of the SAHRC, until 2009. I'm chairperson of the Film and Publications Board (FPB) Appeals Tribunal. I've appeared in court roughly three times a year since 2009.

Fourie: You acted in 2011 for a month, after which you returned in 2012 and 2013 to finish off outstanding matters. How long were those periods?

Govender: They were also about a month each.

Fourie: What sort of work did you do in those periods?

Govender: There was one big criminal trial, prior to which I did work in some other areas.

Fourie: You most recent acting stint was in 2013. Is there a reason you haven't acted since?

Govender: It is simply because of my commitments as an arbitrator and academic.

Fourie: Do you think that you have enough acting experience to now become a full time judge?

Govender: I think my broader experience as an arbitrator and my work for the SAHRC and the FPB also needs to be taken into account, in addition to my experience as an official acting judge.

Ntlama: Chief Justice, I have known Prof. Govender for many years, we worked together at the SAHRC. Professor, there is a perception in academia that disputes arising from customary law are disputes between customary law and human rights. What does this view mean for the legitimacy of customary law?

Govender: Customary law is a system of law that regulates the lives of a significant proportion of the population. Our challenge is to ensure that its core norms are consistent with the constitution. Importantly, customary law can evolve over time, and one of our problems is that we sometimes treat it as fixed. We have to ensure that it evolves in line with the constitution, and here the houses of traditional leaders have an important role to play. They should ideally be proactive, because where customary law is inconsistent with the constitution, the court is obliged to adhere to the constitution and to replace the relevant article of customary law.

Ntlama: Does this mean that customary law is not an independent system, that can address its own issues within its own context?

Govender: If you have the supremacy of the Constitution, then customary law has to be tested against it. Customary law cannot be evaluated outside the Constitution.

Singh: Chief Justice, I know Prof. Govender as a highly respected academic. Professor, I just want to check, were you invited to act as a judge or did you apply?

Govender: I was invited, by Judge-President Patel.

Semenya: Chief Justice, I must disclose that I was in the same class as Prof. Govender. Professor, judges are not elected by popular vote. How do they acknowledge the will of the people when they interpret statutes?

Govender: Insofar as a statute is passed by a democratically elected parliament, it manifests the will of the people. In practice, there might be dispute about what the people intend by a statute, and in the past we have tried to ascertain the intention from the words of the statute itself. Our methods have changed now, and we do make recourse to external sources. We interpret it in a way that advances the values of the Constitution.

Semenya: If a statute is clear in its intentions and language, how do you as a judge determine whether it survives or not?

Govender: A judge has the power to set it aside only if it is in conflict with the Constitution.

Semenya: You said that an article of customary law that was inconsistent with the Constitution would need to be *replaced* by a judge.

Govender: If you simply set it aside, you could leave an impermissible gap in the law.

Semenya: Can you give an example of a judge replacing a customary practice?

Govender: In the Bhe case, the majority of the Constitutional Court found the primogeniture law to be inconsistent with the Constitution, and said that the intestacy laws should operate in the interim.

Nthlama: In that case, the Constitutional Court imported the common law principle in addressing the vacuum in customary law. Can customary law not develop in its own right and in its own context, in line with the Constitution?

Govender: Yes, absolutely, that sort of proactiveness would be preferable. The difficulty arises when an inconsistency comes before a judge.

Mogoeng: By “replacement,” do you have in mind the development of customary law, as described in Section 39(2) of the Constitution?

Govender: Yes, that is what I have in mind.

Nkosi-Thomas: In which branch of the law was your arbitration practiced?

Govender: Primarily with the South African Local Government Bargaining Council. There have been labour matters.

Mogoeng: Thank you Professor Govender, you are excused.