Judicial Services Commission interviews

5 October 2015, Morning session

Gauteng High Court

DISCLAMER: These detailed unofficial transcripts were compiled to the best of the abilities of the monitor. However due to capacity constraints they have not been fully edited. We have therefore made the audio recordings available that were taken during the interviews available. Those wishing to cite or quote from the transcript are encouraged to check accuracy with reference to the audio file.

Interview of Adv R M Keightley

Justice Moseneke: Past the formalities of nominations and acceptance I often ask the question: why do you want to be a judge?

Adv Keightley: I have done over 20 weeks of acting, in a fairly short period of time. This experience has probably been the most rewarding part of my legal career. One would see from my curriculum vitae that I have been involved with the legal profession for over 30 years, including being in practice, academia and government. What being a judge would mean for me is the opportunity to draw those strands together. Most importantly for me is to have a direct, practical impact on seeing justice is done. As a lawyer you represent your client and you may or may not succeed. As a judge it is your task to administer justice and in that way I see it as an opportunity to serve society by really making the law accessible to those who I sit in judgement over.

Justice Moseneke: Do you accept that judges are accountable for the decisions that they make?

Adv Keightley: I absolutely agree and this accountability would be to a number of players. First and foremost to the Constitution, to the office of the judiciary. It is a responsibility, because even sitting as a lone judge in that case you are the public face of the judiciary, so you have an accountability to the office. Further, an accountability to all those before the judge litigating a matter. That is one of the things which I have really enjoyed about being a judge, through writing judgements and trying to make them clear and thereby opening the door to ordinary litigants in the public. Ultimately, we also have a responsibility to the public and it needs to be legitimate.

Justice Moseneke: I would have thought that you would have mentioned that judges are also accountable to the populace.

Adv Keightley: Absolutely we are and as a judge one must always be acutely aware that what you say and how you decide your matters will affect how ordinary people see the judiciary and ultimately that is a rule of law issue.

Justice Moseneke: We glibly talk about the rule of law, but what is the connection between the rule of law and democracy in your view?

Adv Keightley: It is difficult to talk about the rule of law and democracy, without also talking about the separation of powers. The rule of law entails that we are all as individuals and organs of state subject to the law.

Justice Moseneke: Let me take you into a tighter corner. Laws are made by the representatives of the people, when law is constitutionally valid and made by Parliament, what is the duty of a judge in relation to that law.

Adv Keightley: Judges need to respect the power of Parliament under our Constitution to make laws and in so far as those laws are valid it is the court's job to interpret them. The court does not have powers over and above those of Parliament, they are different powers, guardianship powers. If the will of the people is put into the law, provided that is constitutional, then the judge's job is to interpret that law, understand the issues raised around that law and apply it to the facts. Whether one talks about the rule of law or separation of powers it is guided by our transformative Constitution.

Justice Moseneke: It is also guided by the democratic principle and once laws are made by the duly appointed representatives, judges are bound by it. Would you agree with that?

Adv Keightley: Yes I do.

Justice Moseneke: That is perhaps a starting point for a debate on separation of powers, in a democratic constitutional state. Who is Victoria Mxenge? As your nomination was from someone who practices at Victoria Mxenge Chambers.

Adv Keightley: She was a black woman lawyer, during the apartheid era who did a lot of important anti-apartheid legal work and she was ultimately assassinated for her role. Her husband was Griffiths Mxenge.

Judge President Mlambo: I am impressed that you are able to pronounce Mxenge. Adv Keightley a spreadsheet is in front of you, which I hope captures what you did over your entire acting stint in both Pretoria and Johannesburg. I see that you have done two weeks in the third court at Pretoria and five weeks in the opposed motion court at both seats. As an acting judge which work areas would you categorise as being the most complex and intense?

Adv Keightley: In my experience third court would be the first of the most challenging areas. Third court deals with motions which have been extracted from the ordinary opposed motion court, because they deal with complex issues and often have a large record. For that reason they are assigned to a particular judge who gets the papers well beforehand. For example, I have recently had an administrative review decision regarding the Minister of Justice and Correctional Services that involved his decision to refuse parole for a well-known person who assassinated and attempted to assassinate apartheid activists. What was not a very large record, but raised important and very complex matters. These are the types of matters which typically go to the third court.

Judge President Mlambo: You have also supplied a categorised list of judgements which you have written and you mention four administrative law judgements. These came out of the third court and some from the opposed motion court. I see you have also had an opportunity to sit in full court matters, one of them involving someone who is sitting as a Commissioner here. Did you write that full court judgement? Further, what is your view is on writing a judgement on behalf of someone who is a permanent judge?

Adv Keightley: Yes I did write the judgement in that matter. That was something which was discussed and luckily in both of the cases where I did so, it was not a controversial decision to permit me to be the scribe of the judgements. In the one judgement it was an appeal against the judgement of Judge Willis who is now in the Supreme Court of Appeal, but the appeal turned on an issue which he had not decided upon and therefore it was not a case of overturning the decision of a permanent judge. In the second matter it was not necessary to overrule the initial judgement in its entirety, we were able to vary the judgement to an extent.

Judge President Mlambo: Do you regard it as a vote of confidence that senior judges allowed you to write a judgement that involved another senior judge?

Adv Keightley: I would like to think so and my experience was that they expressed their confidence in me and were very supportive, including meticulously going through the judgement and ensuring that their comments were worked into the judgement. Even though I wrote the judgements, it was overseen.

Judge President Mlambo: You had mentioned earlier that you had acted for 25 weeks in a very short space of time. How were you able to do that, because senior members of the bar find it difficult to find the time for acting stints.

Adv Keightley: I had acted for the first time for a period of four weeks and I found it very challenging, stimulating and really enjoyed it. When the opportunities again arose, I did not turn them down. It did mean was that I had to work extremely hard. One has to work very hard in the period of four weeks that one acts, to ensure that your judgements are dealt with efficiently as far as possible during your acting period. Once you are back in practice at the bar, then it is more difficult in a sense as you have to balance the writing of judgements with your work at the bar. I am extremely hard working and diligent and I do not find it difficult to do work that I enjoy. This has allowed me to exact that balance.

Judge President Mlambo: I see you have also done a week in the tax court. How did you get that right?

Adv Keightley: I was assigned to the tax court, but if I remember correctly there were no cases on the role and therefore I was re-assigned to the civil trial role.

Judge President Mlambo: You have described yourself as a generalist and you feel the spread of exposure you have had is sufficient to give you the nod for permanent appointment.

Adv Keightley: One never stops learning, but I have never felt uncomfortable in any of the cases which I have had. They have been challenging, but in a positive way and I think that this is one of the benefits of my generalist practice at the bar and also having taught a spread of courses at university. I feel completely confident in dealing with any matter. I prepare very well and my philosophy is that if one is well prepared then one can deal with a case fairly to both sides and well. If it is an area of law that I am not too familiar with I will always be very well prepared by the time I go to court.

Justice Moseneke: In paragraph 41 you referred to reserved judgements and you noted four reserved judgements. Have you since disposed of those judgements?

Adv Keightley: They have all been delivered.

Minister Masutha: During the apartheid era there were those judges who said their hands are tied, because their job was not to make the law, but interpret it. Thereby justifying why they would implement a law which they considered unjust. Do you think they were right?

Adv Keightley: Certainly not and there were some very brave judges in the apartheid era who managed to deliver judgements which did not rubber stamp the regime. Historically, the ethos in the country where all the judges were white and male, many of who had been appointed by the apartheid government, is not entirely surprising. We are lucky now, because there is a Constitution which leads us down a completely different path. However, even in the apartheid era there were common law principles, rules of interpretation and civil procedure which all of which were available if the judges wished to avoid rubber stamping what was happening in the country.

Minister Masutha: Is there a higher sense of justice or correctness which lies within all of us, that should always remind us that it is not just a mechanical exercise when we take decisions of any kind. Should we always be conscious of that or would you say that as a judge there is the law in black and white and you do not need anything else as a guide to interpreting it?

Adv Keightley: I would agree with the first part of the suggestion. The importance of the judicial office for me is to be found in the oath of office. What the oath says is that apart from requiring judges to uphold the law and Constitution, is that part of our job is to administer justice. That is not a mechanical process and the emphasis should be on justice which is very closely related to morality and ethics. In my experience as a judge one does think about the justice of the issues before you and that is what makes judging so complex. This is why there is a system of appeals, as it is not simply an issue of punching in the law and the answer coming out. These are all issues which judges have to grapple with in the process of deciding a matter.

Mr Lesufi: When asked who Victoria Mxenge was you said she was a black anti-apartheid lawyer. Why the emphasis on black and do you see things in black and white?

Adv Keightley: I like to think that I do not and I could not really say why I said a black anti-apartheid lawyer. There were white and black anti-apartheid lawyers and race probably should not come into it. However much we try to be transformed citizens of our new society it is those slips which indicate where we come from and how much we still have to move. You are absolutely right and the race of the Mxenges does not add to or subtract from what they did. My reference to race was probably a mark of how we all tend to see things even if unconsciously in racial terms.

Mr Lefusi: I say this, because black students feel you are unsympathetic to their cause when sitting in disciplinary hearings.

Adv Keightley: I have not seen any comments to that effect.

Mr Lefusi: What is your view on the issues tackled in university tribunals? Because there is a strong view that you do not understand or share the frustrations faced by black students.

Adv Keightley: Most of the disciplinary tribunals I have sat on have involved common or garden variety issues, such as cheating in exams. I recently had cause to sit on an appeals panel of the previous president who had full legal representation and on that panel my recollection is that the panel was extremely open to the very complex issues which the student's lawyer raised.

Justice Moseneke: Let me ask Mr Lesufi to ask you to meet very specific allegations, so that you do not meet them here for the first time. I want him to be specific, as I have read your papers quite carefully and have not seen the detail which Mr Lesufi refers to and in fairness you should meet it having seen it before.

Mr Lesufi: I fully concur and perhaps I should have been specific. I am referring to the case which Adv Keightley was responding to and there was a general view that her contribution in that debate did not assist the transformation agenda. That is a view held generally by students.

Justice Moseneke: This was gathered separately from the papers before the Commission?

Mr Lesufi: I suppose so, I am not sure.

Justice Moseneke: What we try to do is to give candidates a fair opportunity to know what was said about them beforehand, so that they are not caught unawares. In all fairness to Adv Keightley, she should be informed of the allegation so that she may prepare to meet it.

Mr Lesufi: I fully concur and as Adv Keightley served in student disciplinary tribunals, which is something which is mentioned in the documents. I just want to have an understanding of whether when serving on those tribunals that she has a clear grasp of the situation of particularly black students, to ensure that their needs are taken care of by institutions of higher learning. The view is that some institutions of higher learning are using the disciplinary process to suppress democracy and debate. As she is part of the institution, I wanted to get an understanding of her position.

Adv Keightley: There were two charges in that matter: one being the student having been convicted of assaulting another student and the other was a conviction on allegations of sending an email which maligned one of the heads of residence at the University of the Witwatersrand. On the latter score, we overruled the conviction, because it is made clear in the judgement that students have the right to express themselves and people who hold office in universities must accept that. Although we upheld the guilty finding on the first count, we reduced the penalty substantially to some hours of community service and a fine of R300. Whereas he had previously been given a suspended exclusion from the university.

Justice Moseneke narrowed the question to whether Adv Keightley is sufficiently sensitive to the concerns of students in a way which would befit someone who aspires to judicial office.

Adv Keightley: Yes, I said earlier no one ever stops learning and we all bring our historical baggage with us. My belief is that you have to be aware of that and once you are aware of that you can deal with that.

Deputy President Maya: I noticed with interest that we at high school at the same time in Umtata. Mine is more of a complement, you were part of the team which successfully argued against a judgement of mine in the Constitutional Court in the matter of Wary Holdings v Stalwo, but I do not bear any grudges.

Dr Motshekga: I want to raise two issues in relation to the doctrine of the separation of powers and I hope that I am not touching on something which is before the courts. There is a rule which states that one must exhaust internal remedies, but there is a tendency in Parliament for parties to opt out of the parliamentary processes before they have run their course and seek judicial intervention. Therefore forcing the courts to play the role of the Committees of Parliament. Do you think courts should entertain such conduct and if so would that not create unnecessary conflict between the judiciary and Parliament? Secondly, there is a tendency or attempt to subject the rulings of Parliament which have nothing to do with constitutionality to the scrutiny of the courts. Would that not distort the doctrine of the separation of powers?

Adv Keightley: The role of the courts is for them to be a referee and they do not take the place of other democratic or executive processes. Under our Constitution it is very important that the legislature, because it is comprised by people who the populace have voted into power should have the scope to function without the courts being called upon unnecessarily. That is not the role of the courts and I think our courts have been quite clear that they are there to entertain disputes, not in place of Parliament, but where there are real questions about the validity of actions. Our courts do need to always be aware of the delicate balance between the three arms of state and to be very careful not to usurp the powers and functions of other arms. It is easy to say that in theory, but in practice it is not so easy and the guide really is what is the role of the courts within the separation of powers. The courts role is to patrol the boundaries, rather than make decisions for other arms of government.

Ms Didiza: There has been a concern around gender representation in the judiciary. I would like to hear your view as to why does it matter and what do numbers add?

Adv Keightley: It is not just numbers, it is also a state of mind. Diversity is always good for decision making. The absence of women means there is an absence of a different world view which without any doubt adds to the quality of judicial consideration and thinking. It is not only in the traditionally women's areas such as

family law or sentencing of persons accused of rape. Women have a different experience of the world and in a country where we have a constitution founded on equality it is very important that that experience is fed through to the court. Even in terms of interactions between colleagues in the tea room, that world view undoubtedly adds to the value and quality of what comes out of the judicial process.

Ms Didiza: I noted in your curriculum vitae a paper which Adv Keightley had given on property law and the bill of rights. I am interested to know whether there will be an opportunity to codify ownership in the way it is understood in the African context. Currently there is a duality, with property rights as understood being held by an individual person, but then there is generic, so called, customary land and no one has found a way to be an understanding and interpretation. When Africans speak about land it is the custodianship of the asset which is emphasised and there is still no way in law to deal with that reality of customary ownership. What do you think a contribution could be by the South African legal system to help deal with that reality?

Adv Keightley: Historically property law dealt with ownership, which was the most protected right by the courts. Already there has been a massive shift through legislation in this regard, if you look at the protection of people living on land illegally and extension of tenure for people living on land in rural areas. That conversation in my view has already begun and particularly because the land issue is very gendered I see no reason why the powers be cannot encroach, not in any negative sense, on the common law principle of ownership. I do not see why similar steps could not be taken to consider other aspects of land ownership which speak to the matters outside of the Roman-Dutch law conception of property.

Justice Moseneke: The cutting edge of the question is whether lawyers should not revisit these disparate notions of ownership, because even their historical trajectories are different.

Adv Keightley: This is absolutely so and my view is that this would add enormously to the transformation debate, because rights go right to the heart of every individual. What your rights are in land and how you understand them is important. The short answer is yes, there is a lot of scope.

Mr Singh: Parliament and the executive are not above the law and the courts have recently made some decisions over turning the decisions of Parliament, not on the basis of the substance but on process. Is there anything inherently wrong if courts have to intervene in such a manner?

Adv Keightley: It is the court's duty to do so, where another branch of government has acted unlawfully or unconstitutionally.

Mr Singh: Given that we are 21 years into democracy and most of our universities are open to all students. We still find students expressing their view through wanton destruction of property, what would your view be?

Adv Keightley: This is a personal view, I fully understand the frustrations of students at formerly white universities. By and large the universities have reacted fairly well, although there is room for improvement. The difficulty is how you balance the right to share those frustrations and express them, with the need to protect not just t property, but also the rights of other students if they are prevented from attending classes. My sense is that in order to deal with it properly one must understand what these frustrations are, because once that is done the university is in the position to determine the proportionality between the level of frustration and impact on other students or university property.

Mr Schmidt: The Johannesburg Bar Council commented on the judgement you delivered in Minnaar v van Rooyen and it is quite a harsh comment. It reads "it is unconceivable that an order be made declaring a director liable on the basis of fraudulent or reckless trading where no evidence is led to support the allegation" Is there anything you wish to say to soften the blow?

Adv Keightley: That was a comment by the Supreme Court of Appeal. I worked very hard on the judgement, I understood the issues and fully reasoned my conclusion. I had shown judgement, as we are encouraged to do, the two senior judges who both said I was on the right track. That is the process of appeal and judges sometimes get things wrong. In my view as long as your decision is supported by reasons that is what is required. Very often there is not one right answer, the Supreme Court of Appeal has spoken and I accept that, because this is why we have courts of appeal.

Ms Magadzi: Reproductive rights are central to women's rights issues. In many instances the abuses which occur are due to people not knowing their rights. Children's rights are also at the centre, along with parental rights. Around issues of surrogacy, do you not think it is important that our women and families are well educated, to avoid many of the abuses we see happening.

Adv Keightley: I would agree with that and one of the areas where our society has not managed to advance is in protecting women from violence. There have been advances on the reproductive front and Ms Magadzi mentioned the surrogacy provisions in the Children's' Act which are being used more and more. I think there is a need for education and for judges to educate when the opportunity arises. One of the advantages of having more women on the bench, is that we are sensitive to women's issues. In two of my judgements these specific issues have been raised. In one of these cases the complainant in the matter was mentally challenged, and in my separate concurring judgement on appeal I set out how the magistrate and prosecutor went wrong in protecting a complainant who had not only been raped, but was mentally challenged. I would like to think my gender had something to do with being able to see the impact of those issues on someone who the court is there to serve and who was disserviced in that situation. There is a role for education and space for the courts to be educated.

Prof Ntlama: I have two questions around children's rights and family law. On the independence of the child following the invalidation of sections 15 (2) and 16 (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act. Which granted children between 12 and 16 the independence to engage in sex. As the Constitution defined a child as anyone below the age of 18, what is your view on parental responsibility vis-à-vis the independence of the child in engaging in sex. Secondly, what is your view on the use of indigenous languages both as communicative languages and as language of record towards ensuring transformation of the judiciary only in numbers.

Justice Moseneke clarified that no judgment has been passed which says authorises sex among children. The core of the judgement was to explain that when children do engage in sex, do not send them to jail. The answer is to send them to Sunday school, life coaching, anywhere except prison. Perhaps Prof Ntlama should therefore rephrase her question to make it clear.

Prof Ntlama: That is the interpretation I have having read the judgement. When you grant that child psychological independence, privacy and such rights above the moral authority of the parents. How would one balance these competing rights? Not necessarily, because the court held as such, but because she was giving meaning and life to the judgement.

Adv Keightley: On issues like this which have an impact on ordinary people in society, it is important to ensure what the judgement actually holds, is made clear to the public. Justice Moseneke is correct, the judgement does not permit children to have sex, rather it states that where they do, the answer is not to send them to jail. I am a parent of children who are long past being minors. The responsibility really should lie with the parents, it is part of how we bring up our children. We cannot give up our responsibility to the criminal courts, which have far more serious things to deal with. Particularly, where families, parents and schools have responsibility and my personal view is that the responsibility really lies with society. On the use of indigenous languages, I cannot even begin to disagree with that. When acting in a case where one of the

parties or witnesses is not English or Afrikaans speaking, it is not ideal for the court, because it does not give the participants the same impetus as someone who speaks the court language. How one does that would have to be carefully looked at and to transform courts towards their being more open and accessible language has to be a part of that. I do not think there is an easy practical solution, but I do agree.

Prof Ntlama: I am glad you agree, because there are number of judgements which disagree with use of indigenous languages. The latest handed down in November 2014 states that English should be elevated above indigenous languages, because it is the language of international commerce.

Justice Moseneke: The Commissioners are done, would you like to making any parting shot before you leave?

Adv Keightley: I want to thank everyone for being present; it is a very auspicious panel. One is terrified before one comes into the room, but thank you for making it a pleasant experience.