SUMMARY OF THE JSC INTERVIEWS OF CANDIDATES FOR CONSTITUTIONAL COURT VACANCIES: 20 – 22 SEPTEMBER 2009

This is a summary based on notes taken at the JSC hearings. It does not purport to be a comprehensive or verbatim record of the hearings, although every effort has been made to record the discussions accurately. In the interests of brevity, commissioners and judges are referred to by their surnames throughout the summary.

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Day 1:

A request for a live radio broadcast of the proceedings to be made was granted, notwithstanding concerns about selective quotation of what was recorded.

Judge Ngcobo:

Langa CJ began by indicating that the President had indicated that he proposed Ngcobo as the next Chief Justice, and wanted a process of consultation by the JSC, and for the JSC to come up with any alternative proposal. The JSC had issued a media notice inviting other nominations, but none had been received. However, the JSC still had to give the President its views regarding the nomination.

N was asked how he saw the role of the Chief Justice ('CJ'). He responded that there were two broad responsibilities: firstly judicial, constituting the deciding of cases as a judge of the Constitutional Court ('CC') and the important function of presiding over conference; and secondly administrative, constituting administering the CC itself and ensuring that it functions effectively, and as the head of the judiciary, having an important responsibility to defend the institution of the judiciary, making sure its integrity is preserved. Criticism of the judiciary is good, but only within reasonable bounds.

Ngcobo was asked against who or what the judiciary needed to be defended. He responded that as the highest court, the CC wielded enormous power, one unique compared to other former commonwealth countries. In exercising that function, a tension with other branches of government may result. This tension is not unnecessary – it arises from their different roles. The challenge is how it is managed. Ngcobo described the process as one of "quiet diplomacy" and "constitutional dialogue". Legislation could be sent back to Parliament to fix – it was for the Legislature to fix legislation, not the court. This was shown at the beginning of constitutional democracy, when the constitutional assembly ('CA') drafted and presented the constitution for certification, the CC found certain defects and referred the matter back to the CA, who complied with the court order and the CC then certified. This was the kind of "constitutional dialogue" Ngcobo had in mind. Ngcobo also emphasised the importance of the language used by the court to communicate.

Langa commented that the CJ also interacted with the JSC, the heads of court, and other external bodies such as the Southern African Chief Justice's forum, and asked how Ngcobo was equipped to deal with these functions. Ngcobo remarked that it was an enormous task, and that he had reflected on whether his passion for adjudicating, writing, teaching etc would get in the way. Ngcobo had concluded that he would be able to cope, but might need to cut down on some activities such as teaching.

Ngcobo was asked whether he wanted to elaborate on any aspects of his CV, particularly regarding his background and involvement in judicial education. Ngcobo recounted that he had worked as a clerk of the court in the magistrates court; as an interpreter, prosecutor and attorney. He had recently given seminars to Magistrates on judgement writing, and understood how the lower courts work. He had worked as an attorney, an advocate and then as a judge of the high court and has a sense of how the system functions. He had given seminars on judgement writing for newly appointed judges. Had a passion for teaching law, especially on the role of the judiciary in socio-economic rights. Continuing judicial education is critical.

Radebe noted that Ngcobo had been elected by judges at the recent judge's conference to execute the resolutions of the conference, and that this suggested a vote of confidence by the judiciary. He then asked Ngcobo to explain his judicial philosophy, noting that Ngcobo had a reputation as a dissenting judge.

Ngcobo commented that he had been a judge for 30 years, taking in time on the industrial court, high court, labour appeal court, amnesty committee and the CC. A discernable pattern may begin to develop, but Ngcobo never thought of it as a pattern – he tried to decide cases as they appeared before him, based on the record. Tries to discern the meaning of the constitution. He had written unanimous decisions, but dissents where his judicial conscience requires. His approach to adjudication was informed by fundamental principles, particularly the supremacy of the constitution. A judge must respect the Separation of Powers demanded by the constitution –a number of judgements recognise that in interpreting the Constitution, an abstract separation of powers does not help. What helps is what the Constitution says. In a 1997 judgement the CC had identified the challenge – the issue of separation of powers had to be looked at in terms of our history and constitutional structure. The separation is not such that other arms of government are made dysfunctional. There is a need for judicial restraint. The court must observe the limits on its powers.

Radebe raised the statement that the primary role of a judge was to interpret, not make, law, and asked for Ngcobo's view in light of the *Van Straaten* case. Ngcobo noted that the CC had the power to review the Constitutional validity of legislation. The saying was true, but the judiciary in our constitutional democracy is required to uphold the constitution and to say what the constitution means. If in the process of interpretation it appears to intrude, that is mandated by the Constitution.

Burgess asked whether judges had the right to strike, and how judges should raise any grievances they might have. He also commented that the SANDF has a separate justice system, and asked whether in terms of s166 of the constitution military courts formed part of the judiciary. Ngcobo responded that it was not consistent with judicial office to strike. As to grievances, High Courts are headed by judge presidents, and grievances could be lodged with them. If the grievance cannot be resolved, it could then be referred to the Heads of court. Ngcobo avoided commenting on the Military courts as it was an issue that might come before the CC. He noted that the constitution sets out what constitutes the judicial branch and that the responsibility of the CJ extends to those courts it mentions.

Van der Merwe noted that the country has 11 official languages, but that the use of English in the courts was growing, and asked about the position of other languages. He also asked for Ngcobo's views on what could be done about the problem of reserved judgements. Ngcobo commented that once parties had been heard, they were entitled to a speedy judgement. Long outstanding judgements were undesirable. He understood that some cases were complex, and that High Court judges were under pressure. This still did not justify long delays. Generally, judgements should not be outstanding for longer than the subsequent long recess. On language, the practical question was, if parties could come to court and draft papers etc in e.g. Zulu, it would raise practical difficulties. But having only one language of record undermined the others, which have equal status under the constitution. Ngcobo remarked that he would prefer to defer the question to the legislature.

Moerane asked what the most pressing challenge was for the judiciary at present. Ngcobo spoke of the need to maintain public confidence. He remarked on the irony of judicial power, in that judges wield enormous power, but do not have the means to enforce their judgements. Their real power is their independence. If judges are independent, and perceived to be so, this will instil confidence in the people they are meant to serve. With this confidence, people may not agree with decisions, but will ensure that a court's orders are obeyed. But this will only be done if they have confidence.

Another challenge is access to justice. The old commissioner's courts have now been subsumed into the Magistrates courts, with the Magistrate's Court's limits on jurisdiction, with the result that certain cases may only be heard in the High court, which results in problems of access. There is a need to make justice more accessible. Another obstacle was the rules of court, which were old, and contributed to delays in getting to court caused by legal culture, such as by litigants giving each other extensions. Thus delays were caused because the pace of litigation was determined by the litigants, when it should be determined by the court. Ngcobo spoke of the need for a single code of rules applicable in both the High court and the Magistrates Court, and of the need to improve and rethink the civil justice system. The efficiency of the administration of justice provided a challenge, especially regarding delays in the handing down of judgements, and Ngcobo saw it as his primary responsibility to ensure that the judicial system works efficiently.

A further challenge lay in managing the relationship between different branches of government, so that they are not adversaries. Regarding the transformative nature of the Constitution, the preamble of the constitution showed that transformation was central to the constitutional project. One of the JSC's most important tasks was to determine who sat on the bench, hopefully guided by judicial temperament.

Moerane noted that the JSC decision on the Hlope counter-complaint against the CC was now finalised, and that Ngcobo was 'no longer in jeopardy.' Moerane asked if he had any comments. Ngcobo stated that he had considered it his duty to disclose the complaint to the JSC.

Mpati noted that the last superior courts bill had envisaged that the powers of the CJ would extend to allocating cases to judges in other courts, and asked whether the CJ should have that power, and what the impact would be on the independence of judges. Ngcobo joked that whilst he had nothing against more power, he had concerns about a 'super chief justice', commenting that the CJ had sufficient responsibilities not to be required to deal with those further matters. On principle, the CC did not allocate cases since it sits *en banc*, and judges were free to write judgements if they wished. Allocating cases to panels may not be desirable, as it might not be perceived as objective. Such perceptions were important and could be dangerous. Radebe intervened to note that he did not have such a bill to put forward.

Ntsebeza noted that transformation was an imperative, and commented that, in the interests of consistency, he wished to ask for Ngcobo's views on the transformative objective of s 174(2). Ntsebeza commented that 'we are told that, because the word transformation does not appear in the constitution, it does not exist as an objective.' Regarding reserved judgements, Ntsebeza asked if it would help if all judges had clerks, as in the CC. He also asked Ngcobo's attitude regarding acting judges, especially in relation to recesses, which were useful times in which to write judgements, but acting judges were not appointed during recesses. Finally, he asked whether Ngcobo had 'anything

in the cupboard' which the JSC should know about - Ngcobo responded that he was not aware of anything.

Regarding reserved judgements and acting judges, Ngcobo remarked that the question was one of diligence. If an Acting Judge felt that he could not discharge his duties, he must disclose that. Acting Judge's were needed and the system could not function without them. Law clerks were of great value and played a critical role in assisting with research. Especially in High courts, where judges were frequently 'putting out fires' in motion court, time to research was limited. The law clerk system also provided good training for upcoming lawyers. Regarding transformation, Ngcobo commented that one cannot ignore our history, and that those who do not learn from history are condemned to repeat it. The constitution was adopted against the background of that history and with the aim of transforming society. Transformation was therefore at the heart of the constitution, and institutions must transform to reflect the society they represent. Progress was being made, but more needs to be done. This was how Ngcobo understood the JSC's task in determining who was "appropriately qualified" in terms of race and gender.

De Lille raised a concern regarding government's failure to implement court decisions such as Grootboom, and questioned whether, in the context of enforcing judgements against government, the statement that 'all are equal before the law' was a contradiction of the separation of powers. She further noted that Ngcobo's term expired in 2 years – Ngcobo confirmed this, as he would have served 15 years on the CC. She also asked how Ngcobo would deal with attacks on the judiciary such as it being accused of being 'counter-revolutionary.' Ngcobo commented that he hoped that would not happen.

Regarding the question of implementing judgements, Ngcobo commented that *Grootboom* was not a perfect example, since the order had been a consent order to which the parties had agreed. The Human Rights Commission had undertaken to monitor the implementation, with the understanding being that if there were problems, the matter would be brought back to the court. There have been cases involving a lack of implementation, for example *Nyathi*. The court was told that there were many other such cases, and issued a structural injunction requesting information concerning what other judgements had not been implemented. The Director General had furnished a report, and substantial progress had been made. The background was that there were no mechanisms for execution. Regarding separation of powers, Ngcobo did not see it as an infringement, but a failure to comply with the constitution. Section 165 was clear – decisions and orders of the court are binding, and if they were not implemented, the constitution would be violated. Ngcobo commented that he had not come across any case of a deliberate refusal to comply. Most cases were ones of bureaucratic indifference or inefficiency. In the *Van Straaten* case, no response had been received from government, and the court had noted that this must be drawn to the government's attention. The Minister had subsequently written an explanatory letter to the court.

Regarding attacks on the judiciary, Ngcobo accepted that the judiciary was not above criticism, and that if criticism was responsible, it was beneficial in that it makes judges accountable. It begins to deteriorate when it becomes personal attacks. This does not relate only to the judiciary but to any institution created by the constitution – criticism may be a pretext to undermine public confidence. It was necessary to understand why criticism was made in order to respond effectively. Ngcobo

would seek to ensure that such criticism of the judiciary did not happen, but if it did, he would find a way to address it.

Mabe sought an assurance regarding the independence of the judiciary, asking "are you independent?" Ngcobo confirmed that he was, commenting that he had a judicial record of 30 years, and had set out all his cases, which reflected his record. He did not give judgements because he did not like an individual, but based on the record and the constitution.

Soni asked how the Ngcobo court would differ from the Chaskhalson or Langa courts. Ngcobo commented that the court would be faithful to the constitution, would not see itself as pro-any office, and would be dedicated to upholding the constitution.

Soni then mentioned an article by Ngoepe JP which had suggested that the Constitution restricted the term of office of CC judges in order for new people to come on board, and that the duty of new appointees was to review previous decisions of the court. Soni asked Ngcobo whether he agreed with this view. Ngcobo remarked that he had never conceived of the duty of incumbent judges as reviewing previous decisions, and had not understood the article to suggest that. There was a delicate process of establishing the foundations of Constitutional jurisprudence, and that the court continued to do so incrementally. Everyone had judgements they did not agree with, but the judgements were written by those trying to interpret the constitution – unless they were shown to be clearly wrong, they should not lightly be departed from. Regarding pre-constitutional precedent, the courts have full authority to depart where it was not consistent with the constitution.

Smuts raised the question of possible constitutional realignment in terms of the establishment of an Apex court with expanded jurisdiction, and asked Ngcobo for his views on such an expansion of jurisdiction, and how this should inform the JSC's approach to other candidates. Ngcobo remarked that transformation and experience were not mutually exclusive. The JSC should look not for broad experience in a specific area of law, but for the capacity to grow. Judicial temperament was key. Other criterion were scholarship, experience, dignity, rationality, courage, forensic skills, capacities for articulation, diligence, intellectual integrity, energy and wisdom. All candidates had a 'paper trail' which would give some clues. Cannot ignore the injunction of the constitution, bearing in mind the need for representivity. Experience alone is not decisive – the question is how to balance.

Mashamaite asked about the dignity and social behaviour of judges, referring by implication to Judge Motata, and asked whether such conduct dented the dignity and integrity of the courts. Ngcobo declined to express an opinion on Motata, as the matter might come before the JSC. To be a judge was a high calling, and a standard was expected. It was undesirable for conduct unbecoming to take place, as it may undermine confidence.

A degree of humility was required of a judge, to know that they might be wrong. This enabled them to listen to others.

Judge Bertelsmann:

Had lectured at UNISA; was interrogated by the Security Police for attending a non-racial meeting, which had begun his interest in human rights. Had been a prosecutor in 1972, and then gone to the bar. At the time the Pretoria bar had been racially exclusive, and he had been involved in removing that clause. Involved in political cases, appeared before the Harms commission on behalf of victims

of hit squads, appeared for Vrye Weekblad, was a founder of Lawyers for Human Rights. Involved in the organisation for the abolition of the death penalty. Chairman of the Pretoria Bar 1993. Interest in restorative justice – need for a new approach to law based on ubuntu principles.

*Bramley's Children's Home a*nd *Mokena* cases show deep concern that the victims of sexual violence, especially children, were not being protected against secondary trauma.

Neethling asked Bertelsmann how he would justify his own appointment in terms of race and gender. Bertelsmann quoted former Chief Justice Mahomed – transformation is also about attitude. The court was a collective, composed of a group – whether another white male was justified was a decision the JSC had to take. Bertlesmann felt he had a contribution to make regarding fundamental rights, but whether that was what the composition of the CC required was for the JSC to decide.

Moerane asked about candidates being persuaded not to withdraw – Bertlesmann denied that he was one.

Van der Merwe commented that the right to a fair trial required experience and competence on the bench.

Ntsebeza spoke about Ss 171(1) and (2) and the importance of transformation, and commented on how transformation does matter. Langa commented that, regarding transformation, good people should not stand back – it did not matter where you came from, the JSC would always engage in a balancing exercise.

Advocate Budlender SC:

Applying because the Constitution espouses values and principles for which he had fought for 35 years. The CC was a critical institution which plays an important role in making these real for everyone.

Langa asked Budlender where his lack of a permanent appointment as a judge was a disadvantage. Budlender responded that the CC was comprised of a large bench of 11 judges, which gives an opportunity for diversity, in a group with a range of experience, backgrounds and skills. The constitution provides that only 4 CC judges need to be sitting judges when they are appointed. This reflects the need for diversity. Others have judicial experience, Budlender would bring other experience from practising as an attorney, advocate and working for an NGO. He had also headed a government department. Previously made himself available for appointment, not appointed – partly because of angering some people because of his work on the TAC case. Now believed there was a more open attitude.

Langa asked whether socio-economic rights were Budlender's speciality. Budlender described himself as an all-rounder, having litigated cases on many constitutional aspects and administrative law. He had done a significant amount of work on socio-economic rights, especially the right to housing. Courts have a "self-interest" in promoting socio-economic rights – these are fundamental rights.

Radebe cited the SCA's comment on 'fullness and lucidity' of one of Budlender's judgements as an acting judge. The Minister commented that he felt previous judicial experience was not a pre-

requisite. He asked Budlender to elaborate on his view that discrimination on the grounds of wealth can also constitute discrimination on the grounds of race. Budlender noted that he had argued that where wealth and privilege were racially distributed, this could constitute indirect discrimination on the grounds of race. This had also been an issue in the *Rates Action Group* case.

De Lille asked about legal aid in criminal matters, and whether more time and resources should not be devoted to civil litigation. Budlender cited s 34 of the constitution and the right to have disputes decided. Budlender commented that there could only be a fair public hearing if there was an equality of arms. He believed that there was a constitutional right to a fair civil trial, and that this placed an obligation on the state. Budlender had argued this in the *Nkusi Development Corporation* case, and the Land Claims Court had upheld the argument.

Moerane queried Budlender's statement about why he had not previously been appointed. Budlender commented that when he had first appeared before the JSC, it had been indicated to him that, once he had acted on the Cape High Court, he could reasonably expect to be appointed. He understood that he had not been appointed because of the demographics on the Cape High Court, which he understood, and because of a feeling that he had gone too far with his challenges to government in litigation. Ministers had warned him that he would get into trouble. Moerane remarked that the implications of that were that the approximately 25 members of the JSC who interviewed Budlender had been acting under instructions from the previous administration. Budlender stated that that was not what he had said. Some people had been angry, and had not wanted hi m to be a judge. Moerane stated that there had never been a time when Budlender's appointment had not been recommended because he had angered people in the Mbeki administration. Moerane asked whether Budlender had been one of the candidates who had considered withdrawing. Budlender stated that he had never discussed withdrawing.

Burgess commented that there had never been a question regarding his involvement in the TAC case re: Budlender's appointment. He noted that Budlender had been at UCT during the 1960s and 70s, and asked whether Budlender had been affiliated to NUSAS. Budlender denied this, stating that he had been involved in the SRC, which had been affiliated to NUSAS. Burgess asked why Budlender had not disclosed this, and Budlender remarked that he had not considered it to be relevant.

Burgess then asked why Budlender's house had been bombed, and whether he had been a member of the Progressive Party ('PP') youth. Budlender replied that his home had been petrol bombed twice, but that he had no longer been involved with the PP by that time. At the time, he had been involved in student opposition to apartheid, but had no PP involvement.

Ngoepe followed up on Moerane's question and asked how the administration could have affected Budlender's prospective appointment. Budlender remarked that he was sorry the issue was playing such a prominent role, and that he should not have mentioned it.

Smuts observed that in Budlender's previous writing, he had suggested that the "access approach" was of limited use in providing justice to the poor, and asked whether Budlender still held this view. Budlender characterised the argument as being that the poor needed to be in the same position as the wealthy, and that whilst access was a start, it was not enough. The CC had been receptive to various processes, and had been receptive to *amici*.

Schmidt remarked that Budlender was seen as pro-poor, and a human rights activist, and questioned whether he lacked balance. Budlender responded that he was committed to the values of the constitution, which included full citizenship for all. In the *Kyalami* case, the flood victims had been supporting of what government had done – therefore human rights litigation did not always work against government.

Van Der Merwe returned to the question of government interference with the JSC, stating that the issue needed to be put to rest in order to protect the integrity of the JSC, and commented that there had been no discussion concerning government interference. He then asked whether Budlender needed 'a few years' on the High court bench. Budlender responded that he was 60 years old, and could make a major contribution in constitutional and administrative law. Most High court work did not cover these areas, but the work in the CC did. Demographic and transformation issues were also important, and whilst the constitutional court was a black led and majority court, the Cape high court was not. Now was the time for him to get onto the CC.

Ngubane commented that he was impressed with Budlender's CV and work, but queried whether the statement about his previous non-appointment was 'a gossip', and had an impact on his fitness and propriety as a judge. Budlender denied this and stated that he was 'not a gossip'.

Ntsebeza commented on the interpretation of Section 174, commenting that at Budlender's previous appearances, Justice Allie had been appointed, followed by a black woman and then an Indian woman. The application of s 174 may have informed those appointments. The point of departure was that if there were 2 candidates, these could be recommended for one position. (1) kicks in to establish that the candidates are appointable, then (2) kicks in. Ntsebeza noted the problem of the inability to train as many advocates from the black community to form part of the pool for judges. Less than 10% of the Cape Bar was black, out of 400 advocates.

Budlender responded that he had never complained about his non-appointment. Regarding transformation of the bar, he noted that he had become a member of the transformation committee. There were obstacles of access, including a lack of suitable mentors, money and perception. Too many were allowed to 'sink' during training. There was also a problem in briefing patterns.

Judge Cachalia:

Spoke of his committed to non-racialism and a demonstrable record of fearlessness, independence, and commitment to public service and to the law. His interest in constitutionalism was born from experience of the abuse of state power during apartheid – Cachalia had been detained 4 times, and banned twice. During the 1986 state of emergency, he had told his interrogator that the struggle was one for constitutional democracy with an entrenched Bill of Rights. Cachalia had championed this vision throughout the 1980s, even though both the UDF and the ANC had strong strands of opinion which were sceptical about a bill of rights and were concerned that constitutional democracy would be an impediment to social transformation. He saw the common vision that emerged as a vindication of his own views. He had a track record of independence, having taken different positions in relation to his own organisations, for example in submissions to the TRC regarding Mandela United Football Club. In 1993, amidst fears the right wingers would sabotage the

election, there were debates about introducing detention without trial until the election - Cachalia had argued against this.

He had acted as a human rights lawyer during the 1980's and 90's, focusing on Constitutional and Tax law. He had been involved in drafting the provisions of the new Police Act, and had drafted the provision excluding any defence of superior orders. He was involved in the drafting of security provisions at the constitutional assembly.

Cachalia's judicial philosophy was influenced by the promotion of non-racialism and non-sexism. It deepens democracy when judges interact with the constitution. But judges ought not to be a law unto themselves – must respect the separation of powers and the constitution itself. Need to protect the judiciary as an institution. Would be the ultimate honour to be appointed and the culmination of his life's work.

Radebe asked about the balance between freedom of speech and dignity. Cachalia responded that the courts had laid down authoritatively that newspapers must take reasonable steps to check their stories. The law makes it clear where the balance falls.

Mahlangu asked about Cachalia's writing on international terrorism, and the lack of a definition for terrorism. Cachalia commented that there is a lack of a definition – the concept is capable of being defined, but the problem is one of politics. The main issue is what happens where the state commits terrorism. This was a difficult area. The South African definition of terrorism is vague and open to constitutional challenge.

Moerane raised the issue of the withdrawal of candidates who lacked trust in the JSC. Cachalia commented that Judge Nugent had said that he was uncomfortable with proceeding in the present climate, but had not said anything about not trusting the JSC. Cachalia stated that he was not comfortable with the line of questioning – the proceedings were not an inquisition regarding Kriegler, and further litigation could be pending on the matter. He had consulted with many people, including Kriegler, and came to an independent conclusion to be at the hearings. Cachalia told Moerane that he was "not getting at Judge Kriegler through me".

Langa halted further questioning on the subject. Cachalia stated further that he had not considered withdrawing, and that he had spoken with Kriegler, for example on whether he should remain on the SCA for longer.

Neethling asked about the prospect of an Apex court. Cachalia commented that it was a natural and inevitable consequence. The question of what constitutes a constitutional question can become strained. This view was subject to provisos in that it would be necessary to re-look at the system as to whether the court could sit *en banc*. It would not be enough for judges simply to be constitutional experts – they would need a broad knowledge of the legal system. Having been an appellate court judge was an advantage – there was a need someone with general appellate experience on the CC.

Ntesebeza queried Cachalia about a statement attributed to him about the ability of black judges to write judgements. Cachalia stated that he had not said that. He had been questioned about systemic failure in the courts, and during the course of his answers had said that some judges were struggling with the job. No reference was made to race.

De Lille asked about non-racialism and what constitutes 'black.' Cachalia commented on the tendency to get 'caught up in numbers', but that the Constitution wants a competent and non-racial, non-sexist judiciary. In form and content, it must be non-racial. Ministerial prerogative from the National Party days was gone, when most judges were white, and most of them were Afrikaners. The JSC was a good institution. Cachalia commented that 'we can't play the numbers game'. Need a judiciary that is broadly representative, but that does not mean in proportion to every population group – would not work that way. Used the analogy of not expecting a proportionate number of Indians in the Springbok rugby team.

Semenya commented that he had a different experience appearing before the Supreme Court of Appeal ('SCA') to the CC, and found the SCA less engaging. Even if a judgement was correct, it felt as if the matter was being dealt with quickly. Cachalia asked whether he was saying that as a practitioner, the SCA did not give a fair hearing. Semenya commented that in dealing with cases it was important not just to give a correct judgement, but also to give a fair hearing. Cachalia responded that the CC has around 30 cases per year, whereas the SCA has a heavy roll. It was the first time he had heard that criticism, and would bear it in mind.

Ramathlodi referred to Cachalia's comments about representivity and the 'numbers game', and asked whether Cachalia was suggesting that Africans were not competent to be judges. Cachalia responded that it showed the depth of the country's racial divisions that Ramathlodi could think that.

Van De Merwe commented that the Nats had not played a 'numbers game'. Cachalia responded that there had been a strong sense in the legal community that this is what they did.

Schmidt asked whether current appointments to the bench were the ones struggling to write judgements. Cachalia commented that he felt the JSC should be more circumspect, and that some appointments were 'not cutting it', which was unfair to both the judges and litigants.

Judge Theron:

Holds an LLM from Georgetown university. Enjoyed the collegiality at the SCA. Attributes – hard work, perseverance. Informed by poor background, worked hard to get to where she is.

Moerane suggested that a judge must have the courage of their convictions; Theron agreed. Moerane then referred to Theron's dissenting judgement in *S v Nkomo*. Theron discussed the facts and the scheme of minimum sentence legislation, which had to be enforced if no substantial or compelling circumstances were found. Theron had found the case to be one of the most brutal rape cases she had seen – having seen many in her 10 years on the bench – and posed the question that, if minimum sentencing had not been applicable in this case, when would it be? She had believed in her convictions and dissented. Moerane then asked how many coloured judges were on the SCA. Theron responded that she was not sure whether Navsa or Mpati would be classified as such. Moerane asked whether Theron would fulfil transformation requirements on race and gender, and T confirmed this. T denied having discussed withdrawing her application with anybody.

Radebe asked about the *Rhe v Webb* judgement. Theron stated that a South African family would have had to go through the children's court to adopt, but the US couple in question had gone to the

High Court. Theron had found this to be a circumvention of the Children's Court, and anomalous in light of the requirements placed on South African couples.

Mpati asked how many female judges were on the KZN Provincial Division – Theron thought around 6. He then asked whether Theron felt that litigants were not given appropriate attention in the SCA. Theron responded that it was sometimes necessary to be robust and direct counsel in a particular direction.

Van Der Merwe asked about the court *a quo*'s judgement in *Nkomo*. Theron stated that the court had not found any compelling circumstances, and Nkomo had appealed, whereupon the majority in the SCA had imposed a sentence of 16 years.

Theron responded to Ntsebeza that she was passionate about training and teaching.

Semenya referred to Section 176 and commented that Theron would still be fairly young at the end of her 15 year term, and asked whether she had considered what she would do afterwards. Theron commented that she had not really considered it, but would have lots of options – possibly involving the judicial education institute.

Burgess asked how her Judge President felt about her leaving, and Theron replied that he had given her his blessing.

Judge Froneman:

Asked about his publishing record on Human Rights and Constitutional issues, he commented that in 2002 he had served as an extraordinary professor at and had written about the interpretation of the constitution and the meaning of the African renaissance. Discussed the move from 'formal to substantive reasoning'. Identified himself as one of the early judges who 'got the vibe of the constitution'- tried to give effect to the substance and spirit of the constitution, rather than 'formal reasoning'. Regarding social grants cases, the merging of eastern cape administrations made him aware of how the courts can help poor people to get access to grants more effectively.

His judgement in the *Nkosileni* (spelling?) case was refereed to with approval by Kentridge AJ in the *Zuma* case. Anticipated the question about making self available as a white Afrikaans male – he had decided that he could, for three reasons: - each south African believing in the values of the constitution ought to be prepared to put themselves before the Commission; - he grew up being taught to respect people equally; - he had his 'eyes opened' at university – inspired by the bravery of the likes of Budlender. Froneman commented that he would like the JSC to accept an approach whereby different influences are given due recognition.

Radebe asked about Froneman's 'revolutionary' approach in interpreting the constitution in *Kate*. Froneman commented that he did not see it as revolutionary, but in accordance with what the CC has said. The constitution requires that the common law must be developed. Courts must develop new remedies if they not found in common law. It was the duty of judges to innovate regarding remedies.

Ntsebeza asked whether the CC had gone as far as it can regarding socio-economic rights, and whether there was a need for judges to 'push the envelope'. Froneman commented that it was

unfair to ask if it 'should be pushed.' He commented that he had observed Oxford University students criticising the CC for being too cautious, in contrast to the Indian Supreme Court. The thrust on socio-economic rights should first come from the democratically elected government. It would not be proper for him to say that he thought the court should go further, but there was a perception that the court had been too cautious.

De Lille asked about the horizontal application of rights. Froneman commented that the traditional view was that rights operated only between state and subject, and not between private entities. Froneman understood the constitution as not being aimed only at public, but also at private, power. Transformation there is the extent to which the common law is developed, and transformation was about unequal power relationships.

Smuts referred to the *Kate* judgement, at paragraph 23 where Froneman had discussed the SCA judgement in *Jayiya* and found it not to be binding if it was not interpreted as he had suggested. Smuts asked whether he was overturning precedent. Froneman denied that it was, but commented that precedent had not received the proper attention of the courts in terms of the values of the constitution, and queried whether it still operates as strictly. The constitution no longer allows judges to say they are 'just applying the law'- they must take the moral precepts of the constitution into account.

Soni asked whether Froneman had considered whether to come before the Commission. Froneman acknowledged that he had done so prior to entering the race, when he had been approached to stand for nomination [in context of his considering whether he should put himself forward as a white Afrikaner male].

Advocate Gauntlett SC:

Perspective on the role of the CC – is the highest court on constitutional matters – the 'ultimate tiebreaker'. Plays a fundamental role regarding legislation, and deals with a wide range of cases – wider than might originally have been expected. Has become the 'Supreme Court' of South Africa. People underestimate the effect of the court. Gauntlett had litigated more constitutional cases than others, and was permanent judge of appeal in Lesotho. He played a role in bar leadership, and acknowledged the need for transformation.

Ntsebeza asked why, when Gauntlett was chairman of the General Council of the Bar, there had not been sufficient representation of black practitioners at the bar. Gauntlett commented that the reality was that much legal work was done in Johannesburg and Pretoria, which made it harder to keep practitioners in other centres. Bars outside Johannesburg do not have the group system, which can lead to better transformation because of the availability of work. In the Cape, there is a lack of territorial integration through the group system. Black practitioners tend to be drawn to Johannesburg.

In response to a question by Schmidt, Gauntlett commented that acting on the Lesotho court of appeal had been a 'learning experience'. As to whether the Constitution could be seen as 'pro-poor', there was an extent to which all public law is aimed at protecting the vulnerable. Social policy is a difference issue to separation of powers. It is not for the courts to second guess government policy, but to police the boundaries of legality. Sometimes this may lead to upholding the position of a rich

litigant, because that is what the law demands. Subject to that, accepts that the constitution is transformative, pro-poor document.

In response to a question by De Lille, Gauntlett described the Freedom under Law institute ('FUL') as a 'mutual space to act advantageously', as *amicus* to raise principled issues about human rights and constitutional issues. For example it was, acting for a legal manager in the North West who had no money. It had also acted as *amicus* in the *Nyathi* matter.

Mahlangu raised the question of Gauntlett not have served permanently on the High court. Gauntlett commented that the concern was misdirected, since he brings experience from an intense constitutional law practise, and in other areas of the law. Regarding the suggestion that only serving judges be considered, the JSC would have to decide what constitutes the rounded experience of an individual. Gauntlett commented that his track record may be peculiar, but that it 'is what my life is on paper'.

Ngoepe commented regarding previous judicial experience that experience as a trial judge and of first instance work was important. Gauntlett responded that there was no one perfect form of experience.

Moerane asked whether there had been 3 resignations from FUL and Gauntlett confirmed this. Regarding the withdrawals by nominees for the CC positions, G's response was that those candidates 'should stay'.

Neethling raised the Hlophe racism report on the cape legal profession, where 2 allegations were made about Gauntlett, one relating to a story he was alleged to have told about Hlope, and the other relating to the *New Clicks* matter. Gauntlett commented that the first was hearsay and the SCA had sustained his actions in appealing New Clicks. The JSC had found that the former allegations had been refuted.

Ramathlodi asked whether Gauntlett shared the view that the JSC was a threat to democracy. Gauntlett declined to answer. Langa suggested that Gauntlett's appearance before the JSC reflected his attitude towards it. Gaunlett stated that he had the highest regard for the JSC and did not impugn it.

Radebe asked whether Kriegler had been presumptuous in deciding that the affected members of FUL had to recuse themselves. Gauntlett commented that Kriegler held strong views and had consulted 'to an extent'. He declined to be drawn into using the word 'presumptuous'. Radebe then asked about a Lesotho judgement Gauntlett had written, where street traders had been moved and thereby lost their livelihood, and had argued that this constituted an infringement of the right to life. Gauntlett had examined Indian and South African cases and determined that the right to livelihood was not the same as the right to life.

Burgess noted that Gauntlett had dual citizenship, and asked whether he would be able to swear the oath. Gauntlett confirmed that he would, and that the question would be whether he would be held to the oath, and he would be.

Judge President Hlophe:

In response to a question as to why he was putting himself forward for the CC, Hlophe commented that he had good experience, especially in Constitutional law, and an interest in constitutional law. When asked how he perceived his contribution to CC, Hlophe commented that he would be part of a team of judges, and would make a contribution along with other judges.

Mpati noted that, by contrast with the SCA panels, the CC sits *en banc*, and commented that there could be some tension, but that the members of CC need to be collegial and work together, and asked whether Hlophe was in a position to do so. Hlophe responded that he would be, just as he was in the Cape Division. The tension should not be taken in isolation. The dispute with the CC was principled, not personalised. He knew and respected members of the CC.

Mpati then referred to paragraph 14 of Hlophe's application form, which referred to writings cited in judicial decisions and described 'numerous SCA and CC decisions' – Mpati enquired whether this meant judgements or writings. Hlophe responded that it encompassed both – the former Appellate division had referred to a 1987 article; and judgements had been referred to e.g. *S v Collier* on the test for bias. Mpati asked what the title of Hlophe's dissertation had been – Hlophe responded that it was on restorative justice in South Africa, comparing it with other common law jurisdictions. It dealt with *inter alia* the doctrine of legitimate expectations.

Burgess commented that an issue that was plaguing him and his constituents was that one read in the newspapers that Hlophe did not like white people. Hlophe commented that he was a judge under the constitution, and that the constitution abhorred racism, hence the equality clause. The constitution was the supreme law. Furthermore, Hlophe had taken an oath of office to decide cases fairly, irrespective of *inter alia* race. Hlophe commented that one just had to look at his work in his judgements and see if racism comes through, e.g. *Collier* (where he rejected argument that fair trial required trial by judicial officer of the same race) and *S v Moliswa* (where he convicted a black man as the killer of Marijke de Klerk).

Burgess asked about the transformation of the judiciary and of society, commenting that the judiciary was 'indifferent' about the transformation of society, and asking what role Hlophe saw himself playing. Hlophe commented that he had made a contribution as Judge President in respect of both race and gender transformation. Transformation was however more than that, and Hlophe would continue to make a contribution. The judiciary must be transformed in order to play a meaningful role.

Burgess then asked how judicial independence and transformation could coexist. Hlophe commented that independence may mean different things – it did not mean that the judiciary must compete with lawmakers. The role of the judiciary is a supporting one – does not mean they agree with everything. Independence is relative in the context of the constitution.

Burgess asked for Hlope's view on 'what will really happen' regarding language in the courts. Hlophe commented that the starting point was section 6(2), which places a duty on state organs to promote languages. It was wrong for courts to deny the right to express oneself in court in an official language.

Burgess asked Hlophe to give his view on the CC as an institution, the JSC as an institution, and the people serving on them. Hlophe commented that the institutions were products of the Constitution, and must be respected. He respected the judgements of the CC, the rulings of the JSC, and the individuals on them. The fight with the CC judges was never personal. Hlophe commented that 'I am South African', and he was entitled to rights because first and foremost he was a citizen. He had put the matters behind him and regarded the dispute with the CC as finished.

Radebe cited the *De Lille* judgement and asked where one drew the line between tentative views and pre-judgement. Hlophe responded that it was human nature to form tentative views, but that one should be open to persuasion. It becomes pre-judgement where you are not prepared to be persuaded. A good judge is left open to persuasion.

Radebe then referred to the *Mabuza* case, and asked about the role of judges in developing customary law. Hlophe commented that it was the role of the judges to develop the law, as one "can't expect legislation each time". Hlophe commented that he had a keen interest in customary law, and noted that the issue was of historical importance as under the repugnancy clause of the Black Administration Act, customary law was prevented from developing. Now under the constitution, it was the role of judges to develop customary law, and ensure that it was incorporated into South African law so that it was no longer an "illegitimate child". But judges are doing little to ensure that this takes its rightful place.

Ngoepe drew attention to an adverse comment by Advocate Mitchell regarding the campaign on Hlophe's behalf, raising the concern that Hlophe had not distanced himself from it or attempted to moderate the tone of the campaign. Hlophe remarked that he had not seen the comment and had no involvement in the campaign and did not know who Professor Gumbi was.

Schmidt raised the issue of Oasis, commenting that Hlophe had given them leave to sue when he had an interest, and asked why Hlophe had not declared the interest and why he had not considered appointing his Deputy Judge President. Schmidt also noted that, if it was accepted that permission for the Oasis payments had been given by Dullah Omar, there remained a small amount that was not authorised.

Hlophe responded that Desai knew about the interest, as he had introduced the Ebrahim's to Hlophe, and therefore he saw no reason to declare the interest. He had discussed the matter with the Deputy Judge President, and they had differed on the interpretation of the regulation, as to whether a formal application was needed – Traverso thought yes, Hlophe no.

Schmidt asked whether he should not have withdrawn anyway. Hlophe responded in the negative – Desai was aware, and the matter was a purely administrative one, to enable Desai to go to court. Desai and the Ebrahim's were friends. Schmidt remarked that the fact of them being friends gave all the more reason for Hlophe to withdraw. Hlophe reiterated that Desai was aware. Regarding the 'missing' amount for which permission had not been obtained, Hlophe stated that if he should have, but didn't, he could only apologise.

Schmidt asked about Hlophe's application for a tax amnesty for a late declaration. Hlophe responded that this related to payments to a trust, which was a legally separate person. Schmidt questioned why Hlophe had then used the word 'my' application for tax amnesty. Hlophe

responded that the choice of words was unfortunate, and as far as his personal tax was concerned, he did not owe anything.

Schmidt then proceeded to ask about the alleged slurs against the attorney Greef, which were confirmed on affidavit by a Senior Counsel who was subsequently made an Acting Judge.

At this point Ngoepe intervened to state that the room should be cleared to deal with procedural issues. Ramathlodi remarked that the proceedings were becoming like a court. However proceedings continued.

Hlophe answered that he did not appoint acting judges – the profession recommends them, and the bar council was aware of the issue and made the recommendation. The decision was made jointly with the Deputy Judge President. The recommendation had been made by the SC's own bar, and Hlophe had put the matter behind him.

Smuts raised the issue of Hlophe's racism report and the incidents illustrating the problem. Smuts asked about the number of women judges on the bench at the time of the appointment of Judge Redlas [spelling?]. Hlophe thought there had been around 5. Smuts asked how Redlas had then not been a transformation candidate. Hlophe responded that gender was only one of the issues, there was also the question of race. There were also other considerations, such as that she had not done motion court.

Regarding the Gauntlett allegation, Smuts asked whether Hlophe had given Gaybtlett notice that he intended to publish the allegation. Hlophe responded that he had not. Smuts asked whether this was fair, in light of Hlophe's allegations against the CC. Hlophe responded that he could ask Gauntlett the same thing regarding Gauntlett's allegation that Hlophe had borrowed money from his secretary. Hlophe stated that he had made up with Gauntlett.

Smuts then questioned why Hlophe had cited the *New Clicks* case as having been unsuccessfully appealed against. Hlophe responded that "the SCA judgement was reversed".

Smuts quoted from Harms' judgement in the SCA, finding that the delay in giving judgement had been unreasonable and had to be interpreted as a refusal. Smuts asked what the grounds had been for the delay and why they had not been spelt out. Hlophe replied that the grounds were that there was a split decision, and the delay had to be contextualised. There was 'no perfect judgement', and he had not considered it prudent to spell out the reasons for delay.

Smuts then asked about the dispute with the CC judges, noting that the majority of the JSC subcommittee had found that Hlophe's allegations about the court's ulterior motives were "unfortunate" and "incapable of establishment"

Ramadthlodi again intervened at this point to request that the room be cleared. Van Der Merwe objected and argued that proceedings should remain open. The questioning was allowed to continue.

Smuts asked if these were the allegations that were "not personal". Hlophe responded that those were the allegations made, and that he respected the JSC's findings. Smuts asked whether, in light of those findings, he would retract the allegations against the CC judges. Hlophe responded that he

would not do so at this interview, and commented that he felt strongly about the referral to the JSC, and how he had been treated by the court.

Smuts referred to paragraph 18 of Hlophe's application form, which asked if there were any circumstances which might preclude a candidate from serving, to which Hlophe had responded 'no.' Smuts asked if Hlophe had been serious in saying so, and H replied that he must have been serious.

De Lille asked about section 16.4 of the form, which dealt with judgements successfully appealed, and had said 'details to be furnished'. De Lille further asked about the terms of the Oasis retainer – was Hlophe to make appointments on their behalf? Was he to speak to universities on behalf of Oasis? De Lille asked further whether, to take the judiciary forwards, Hlophe should consider an apology to Langa and Moseneke. She questioned whether the judiciary should not be more united, and remarked that Hlophe should 'not believe you are above the judiciary'.

An intervention was made at this point regarding the Oasis aspect of the question – it had previously been found that there was no need for oral evidence, and that to ask questions relating to that would be a 'back road' to oral evidence.

De Lille responded that it gave the opportunity to clear matters up, and that MPs were not involved in the small groups of the JSC – they were elected representatives and were being kept in the dark.

The response was given that they could ask the JSC, but that the JSC could not override its own decision.

Smuts argued that the ruling had related to the need for investigation, not to the agreement, and did not apply to this interview.

Ngoepe again urged that the room should be cleared in order for the procedure to be ironed out.

After a delay of around half an hour, during which the public was requested to leave the building entirely, the hearings resumed.

On resumption, Hlophe responded to the question about judgements having been overturned by citing the cases of *Gysman [spelling?], SABC* and 'a few others.' The reason they had not been included was that he had not been in his office until the last two weeks. As to the terms of reference with Oasis, Hlophe stated that he had given evidence on it before, and would not be giving evidence further. As to an apology, he would certainly consider it, but noted that there was also a finding against the CC judges.

Semenya noted that Hlophe had been nominated by the Justice for Hlope Alliance, and asked what the organisation's goals were. Hlophe replied that he had been nominated by them and had accepted, and that was as far as it went. Semenya asked what the organisation stood for. Hlophe responded that he did not know much, but from what he read, it stands against injustice against any judge. Semenya noted that it bore Hlophe's face and name. Hlophe stated that he was not involved in the organisation. Semenya noted that under the Constitution, section 34 provided for a fair public hearing, and questioned whether the alliance thought this would not cover him. Hlophe responded that he could not speak for the alliance. Semenya then asked whether it was fitting for a sitting

judge to be campaigned for. Hlophe responded that it was not, nor for any judge to be campaigned against.

Moerane commented that the saga between Hlophe and the CC, as far as the JSC was concerned, had ended on 28 August 2009, having lasted around 15 months. It had done great damage to the image of the judiciary and involved bitter exchanges. Moerane asked if Hlophe now regarded the matter as finalised. Hlophe replied that he respected the institutions, and regarded the matter as finalised. Moerane asked if there was any wisdom in reviving and prolonging the matter. Hlophe agreed that there was not, hence he had returned to his duties as Judge President.

Moerane referred to the Justice for Hlope Alliance, and noted that according to the papers, Gumbi was a member of the executive committee, and had signed the nomination. Hlophe responded that he could not recall if it had been signed, and that he did not know Gumbi. Moerane then referred to the consent questionnaire attached to the nomination, which was also in the name of Gumbi, and asked Hlophe if he had seen the nomination form. Hlophe responded that he must have seen it before signing, but reiterated that he did not know Gumbi. He had been given the form when he was at home on long leave. Moerane noted that the alliance had made allegations against the JSC, accusing it of being a kangaroo court. Hlophe disassociated himself from the allegations, and emphasised that he respected the JSC. Moerane asked whether Hlophe would do anything about the allegations made in his name by the alliance, and Hlophe responded that he would never endorse them.

Van Der Merwe stated that he had concerns with the events of the past 15 months and how to rectify the damage done to the judiciary and the JSC. Hlophe was the main actor, and Van Der Merwe asked him what he could do in terms of 'damage control' to protect the institutions. Van Der Merwe stated that Hlophe should 'go into hiding' and appealed to him to withdraw. Hlophe stated that he would not consider withdrawing, and that it was for the JSC decide.

Neethling observed that, after the first JSC complaint, certain actions of Hlophe were found to be unacceptable, and three delegates were sent to talk to him. Neethling queried whether Hlophe should have mentioned this to the JSC. Hlophe responded that the issue was 'common cause', and that he had understood the questionnaire to deal with matters within his knowledge, not to disclose what was common cause. Neethling responded that it was a new JSC, and not everybody knew. He then asked Hlophe about his alleged statement that he would 'not shake hands with a white man', regarding Langa CJ. Hlophe denied having said that, and stated that he had shaken hands with the Chief Justice, and shakes hands with white people. Finally, Neethling noted Hlophe's statements that he would not endorse statements by the Alliance, but asked whether he would speak out against them. Hlophe responded that as soon as he knew who the members were, he would make every effort to disassociate himself.

Day 2

Judge Jafta

Found working at the CC to have been intellectually challenging. Constitutional law had long been an area of interest, and he had taught it at the University of the Transkei. Asked what his special attributes were, he responded that he was an all-rounder, stating that he was in a better position to

participate in the development of customary law, an area where development was lacking most, and he also had a background in labour law. His track record in terms of judgements on constitutional matters spoke for itself.

Ntsebeza referred to Jafta's answer regarding whether anything should be drawn to the attention of the commission, and noted that Ngcobo had mentioned the Hlope complaint, whereas Jafta had not. Jafta responded that he had understood that to have been directed at matters of which the JSC was not aware. He had withdrawn the previous year because of it, and therefore thought the commission was aware.

Moerane noted that he had written some judgements in the CC, including a dissent in *Kruger*. Regarding the Hlophe matter, Moerane noted that it has occupied the commission for some 15 months, and had been characterised by exchanges of harsh language, which must have been painful for Jafta. The JSC had decided, in a "comprehensive, well-reasoned" decision, that the matter had been finalised. Jafta confirmed that he had read the decision. Moerane asked if Jafta considered the matter to be finalised, and Jafta confirmed that he did. Moerane asked if it would be wise for anyone to re-open the matter, and Jafta commented that the matter had done so much damage to the institutions affected, which was unfortunate. Jafta denied he ever considered withdrawing.

A complaint by an anonymous litigant was put to Jafta. He responded that the issue involved an argument that the common law be developed to bring a delictual claim, but that there had already been a claim under common law, which had been compromised in that case.

Neethling noted that Jafta had given evidence under oath that Hlophe had tried to influence him. A newspaper report subsequently suggested that he had changed his view.

Burgess raised a point of order that the merits had already been dealt with, and the findings accepted, and therefore that Jafta could not be asked whether he agreed. Langa suggested that Jafta could be asked whether he had changed his evidence. De Lille commented that there was no point of order, and the question was allowed.

Jafta stated that he had been asked whether he stood by his earlier version, and said yes. His view that an attempt to influence him had been made was based on inference. Neethling then asked about a prospective Apex court. Jafta commented that it was a good thing to have the CC at the apex, as the Constitution was supposed to cover all fields. The practicalities of implementing it were "another thing".

Van Der Merwe commented that he understood the Hlophe complaint to have been that Hlophe had tried to influence Jafta, and asked Jafta whether he still stood by that, or had softened his original complaint. Jafta responded that he had not softened. His view was that one could make the inference that there had been an attempt to influence him. At no stage had he formed a different view.

Radebe asked whether it was correct that he had no judgements appealed against. Jafta responded that that related to the SCA, and that there had been some from the High Court. Radebe then noted the judgement in *Nyati*, which had cited Jafta's judgement in *Mjeni* (spelling?) with approval. Jafta commented that he had been pleased, as he was not convinced that the SCA was correct to overrule *Mjeni*.

De Lille asked what Jafta's judicial philosophy was regarding the CC, and commented that the Constitution was pro-poor, and included socio-economic rights, but asked, if the poor were not able to bring claims, how the CC could be made more accessible. Jafta responded that litigation was expensive, and that something needed to be done to bring down legal costs, and that the state must do something to finance litigation on behalf of the poor. Whilst there are public law firms, at this rate, customary law will not be developed. The state must look at financing cases.

Smuts noted that the CC sat *en banc*, and was characterised by a spirit of collegiality, and asked whether Jafta had felt undue pressure from the other CC judges regarding the Hlope allegations. Jafta replied that he had not. Smuts remarked that Jafta's minority judgement in *Kruger* showed admirable independence. Jafta remarked that he had been unable to persuade the other judges.

Judge Jajbhay:

Described the judiciary as a "most noble profession", especially in light of the country's history, and would consider it an honour to be associated with the work of the CC. Commented that there was "lots of work to be done" at the CC and in all branches of government.

Langa asked for Jajbhay's view of socio-economic righst and how the court had dealt with them, noting that the court had been criticised for being weak in realising socio-economic rights. Jajbhay disagreed that the court had been weak, and characterised it as having been pragmatic. The jurisprudence was commendable and thoughtful. It was important to achieve the confidence of the people. Jajbhay had heard the *Innercity Johannesburg* matter, and had done an inspection during which he had seen and been moved by the conditions in which people lived, describing the sight of school books floating in water. He had asked himself how he could send people away into such conditions, and that such conditions did not constitute 'alternative accommodation'. Jajabhay acknowledged that there is good work done by government, and that it was important to come up with South African solutions to the problems.

Langa noted that another criticism was that the court strayed too far from the executive. Jajbhay responded that he started from the premise that the constitution was the supreme law, and the judiciary must uphold it. Courts should be slow to interfere in legitimate policy choices, but must be principled. He was not sure the courts have strayed – they would sometimes request the Legislature to look in to legislation; sometimes read in to Legislation, sometimes refer back.

Schmidt raised the *Tshabalala-Msimang* judgement, where Jajbhay had found that the public interest right outweighed other principles. Jajbhay commented that constitutional interpretation involved the balancing of competing rights, and no one right trumps. The matter had been urgent, and he had not had the benefit of joint deliberations. He was conscious of his limitations, and would make mistakes. He was sorry the matter had not been appealed, as it would have been good to "receive some assistance."

Moerane (who has acted for the then-minister) commented that he agreed with the first part of the *Tshabalala* judgement, where Jajbhay had applied the clear statutory language. None of the circumstances in the statute envisaged a public interest defence. The Act deals comprehensively with medical records and provides no public interest exception.

Langa asked whether Moerane was re-arguing the case, and whether he wanted Jajbhay to admit that he was wrong. Moerane responded that he was debating constitutional issues and how they are interpreted by judges – he was interrogating aspects of a judge making law.

Jajbhay responded that Moerane should have appealed, and that it would have been better to do so then the newspaper advertisement the department had taken out. Jajbhay had not had the benefit of collegial discussion on the matter – it had not been easy sitting alone.

Moerane then asked if Jajbhay had been persuaded not to withdraw. Jajbhay replied that 'nobody dared do that', and that he respected the institution of the JSC as part of the constitutional apparatus. Jajabhay commented that for a judge to be told that he was coming onto the bench in perpetuation of transformation serves to continue the hurt of apartheid.

Ntsebeza asked about the role of the judiciary and improving the civil justice system, with reference to mediation and conciliation. Jajbhay stated that the CC had given guidelines, in cases such as the Joe Slovo matter – it was imperative to make use of mediation and conciliation as tools in the adjudication process. Not all cases could be dealt with in this way, but most can. 80 % of Johannesburg and Pretoria High Court matters were RAF cases – this was an abuse of the system, as the Deputy Judge President has to mediate and keep the roll unclogged. But the question was why parties should come to court and settle at the doors of court. This wasted millions in fees, which could be saved if a mediation process were followed. Mediation processes should be developed. There should be compulsory mediation in respect of Transnet and other such institutions.

Radebe asked Jajbhay to allay fears he had that his answers about the *Tshabalala* case had given the impression that he was not sure in making a decision, and required assistance and wished the matter had gone further. Radebe noted that Ngcobo had cited judicial temperament, independence and courage of convictions as positive attributes for a judge, and asked Jajbhay to allay fears that he was not an independent judge. Jajbhay stated that he did have the courage of his convictions, and had no problem in standing up to his colleagues when he disagreed with them.

Neethling commented that regarding the right to privacy, three important decisions supported Jajbhay's finding in *Tshabalala* that there was a compelling public interest to publish illegally obtained material.

Semenya commented that in terms of Section 41(3) and the constitutional principles on co-operative government, the mediation of disputes could be seen as a constitutional principle. Jajbhay commented that intergovernmental disputes had to be sent to mediation under s 41(3), but this required a panel of professional mediators. Semenya commented that the South Gauteng High court was a difficult court to work on, and it was easier for judge's careers to progress when they worked on a court such as the Eastern Cape Court, where they had opportunity to reflect on cases which judges in South Gauteng did not have. Jajbhay acknowledged that it was a difficult court but commented that there was good leadership, and time was made for judges. Jajbhay commented that he wrote judgements for the parties, not for the law reports or the media.

Ngoepe acknowledged that pressure of work did not allow enough time to do research. Jajbhay agreed, commenting that he would be going straight from his interview to the motion court, where he had 110 matters to allocate. Ngoepe commented that the Mayor of Johannesburg had made a

statement complaining about judgements which made it difficult to remove people from dangerous buildings. Jajbhay responded that these were the difficult decisions judges had to make. When the case in question arose, there had been no action plan as to how to deal with tenants. Now there is a plan, and the courts did not wish to impair it, but to help – efforts must be co-ordinated.

Judge Khampepe:

Judge in the Gauteng High Court, appointed in November 2000. Was a fellow at the Legal Resources Centre, interrupted to study for an LLM at Harvard. Practised as an attorney with a focus on labour law. TRC Commissioner. Labour Appeal Court judge since 2007. In 2008, chaired the commission mandated to investigate the mandate and location of the Scorpions. Served on observer missions of overseas elections.

The constitution promises South Africans a democratic society based on human dignity, equality and social justice. Khampepe had practised in the field of human rights, and saw the CC as the ultimate custodian of all human rights. Her involvement in human rights as an attorney had given her skills which would stand her in good stead.

Langa asked her about her attitude to the role of the courts regarding socio-economic rights. Khampepe commented that the court had made impressive decisions in promoting socio-economic rights. In *Soobramoney*, the court had grappled with the issue of the right to health, and the decision indicated a serious development to enable many South Africans not having access to basic primary healthcare to be considered. To an extent, the government had done what it can, within its means, and the outcome may be lamentable, if healthcare is not provided to all, government is compelled to provide to all, but socio-economic rights do not find application to the majority of people. Langa asked if Khampepe saw this as an indictment of the level of resources or how the court had interpreted the constitution. Khampepe responded that it might be a combination – the court was confronted with a situation where resources were not unlimited, and the court had appreciated the limitation – it was not an indictment of the court, but there was room for more creative ideas to put pressure on government to find resources. Everyone had to be provided with proper health care where they could not afford a private doctor. Whilst one could appreciate government's efforts, more needed to be done.

Radebe commented on how "well calibrated" the words in Khampepe's CV were. He asked her what challenges she faced in the 'transformation project' as a woman judge. Khampepe commented that an advantage of women judges was that they brought legitimacy to the bench. Women constituted a majority of the population, and if the judiciary was to enjoy the confidence of that majority, it should have women judges. Women bring their own perspectives in adjudication – they bring their own reasoning, and take into account issues such as motherhood, people with sisters, and women heading households, which men might "not take seriously".

Burgess commented that the report of the DSO had not been made public. Khampepe commented that this was incorrect. Burgess asked if the proceedings had been open. Khampepe responded that at the commencement, an application had been brought for them to be held in camera. She had refused this and consequently the hearings had been open to the public. Burgess asked further about dealing with information classified by the intelligence agencies. The debate about the operations of the DSO had been sensitive. Burgess asked for Khampepe's view on the problem of

protecting sensitive issues from the public in court cases, and the problem of people 'hiding behind public interest.' Khampepe responded that she had not had to deal with classified information – she had ruled that it would remain classified, and any any classified information was not open to the public. Not many issues relating to classified information had arisen. The main issue was one of mandate, so the question never arose for consideration. Burgess responded that he had been asking a more general question. Khampepe stated that she did not purport to be an expert, and issues regarding intelligence capabilities did not arise because of the intelligence community, but because of investigations into the DSO's legislative mandate. She was not qualified to express an expert opinion, and would not pronounce on issues she had not properly researched.

In response to a question from De Lille, Khampepe clarified that she had served in a dual capacity at the Prosecuting authority and the TRC. When asked if she was disappointed that her DSO report had not been implemented, she responded that how the recommendations were taken were beyond her control and the role of judges.

Moerane asked how she had found her stint on the DSO commission. Khampepe described the proceedings as 'electrifying' and challenging, a challenge she had met through the assistance of Moerane and others. Khampepe had shown courage, especially in mediating professional rivalries, and had had to use her conciliation capabilities. Moerane then asked if she had considered withdrawing. Khampepe confirmed that she had been approached to withdraw, because of "other interests", not because of her suitability, and because of a possible position as Deputy Judge President on the Labour Appeal Court. She had not been persuaded, and commented that she was a difficult person to dissuade.

Semenya commented that she had made a finding about the DSO which was contrary to what was "agitated" in the public domain, and asked how she had "got it right". Khampepe responded that it was not about "getting it right", but about a question of principle – a judge must adjudicate based on evidence, and be persuaded by argument. Public opinion was irrelevant. She had made a decision based on what she had concluded, and found that to be defensible. Semenya asked about her role in the labour movement as a woman. Khampepe commented that she had been involved with organisations to fight against oppression and assert fundamental rights, informed by her desire that people should be assisted. Her own state of mind was to pursue what was just.

Semenya then asked about her experience on the TRC. Khampepe commented that she had been involved in hearings chaired by Ngoepe, and recalled amnesty applications by members of the security services. During one of these, it had been disclosed that a judicial officer, investigating officer and prosecutor had met behind closed doors and discussed the case. It was important to know that judicial officers are custodians of people's fundamental rights, and must act in a manner that advances and protects rights. The incident showed the need for the judiciary to be vigilant and understand that it was the custodian of all people's rights, and could not be influenced in adjudication by outside forces. It was a telling example of the need for the judiciary to take account of the legitimacy the constitution seeks to give.

Smuts referred to an observation the previous day that judges should be someone capable of doing justice, not just someone who "looks like me", and asked what Khampepe saw as the real motivation driving the transformation imperative, and why it was needed in respect of race and gender. Khampepe responded that she assumed the overall objective to be giving legitimacy to the judiciary,

for obvious reasons when one had regard to how the judiciary had been perceived in the past. If appointments are made in terms of race and gender, this is creating an enabling environment of legitimacy. Psychological transformation goes beyond race and gender because of the overall objective – must transform the attitudes of judges, positively. Have to be able to appreciate each other, in order to be sensitive about differences.

Smuts commented that Khampepe's work on the DSO commission had been a shining example of independence, but noted recent allegations of political interference in prosecutions, and asked whether any attempt had been made to place political pressure on the commission. Khampepe commented that whilst the perception had been that there was political pressure, there never was any, and if there had been, it would 'not mean anything'. But at no stage was there any political pressure.

Mpati asked about the view that judges should not chair such commissions. Khampepe responded that judges were there to serve the people, and that her expertise had been important in investigating the mandate – so why shouldn't it be used? It would be different if all judges were conducting commissions, as this could lead to a perception that the 'hand of government' was used in the ultimate decision making process. This was not the case here, and there was no reason why she should not serve – the issue impacts on people.

Mpati asked how such a perception could be removed. Khampepe responded that it came from "certain quarters", and was usually not founded. It was important to take into account, but not where it was unfounded. Mpati then asked about Khampepe's membership of the ILLJ – which had been listed on Khampepe's forms, but there was then a letter stating that she was not and never had been a member. Mpati asked how it was possible to make such a mistake about membership of an organisation that held meetings. Khampepe responded that she was a member of the BLA, but did not attend meetings. When the organisation was established in 2004, she had attended the inauguration, and then been involved in the Commission. She assumed she had never been informed about meetings or what duties she had been required to fulfil.

Ramathlodi asked her view on minimum sentencing legislation, particularly life sentences for rape. Khampepe responded that this was always troubling for judges, since it involved balancing the need to protect the community with the right to life of individuals. The penalty is justified, and the Legislature seeks to lay the basis, and provide the circumstances where it may be imposed. Regarding offences such as rape, sentences should not be imposed 'at the altar of deterrence', but need to send a message that it impugns the constitutional right to dignity of women. It must be imposed with circumspection, but is defensible.

Ramathlodi commented that the impact on the victims remains, and that the legal system makes no provision for compensation. Trauma is suffered by the victims, particularly women. Khampepe commented that before sentencing in rape matters, a victim impact report would normally be required, which would give an indication of the extent to which the offence had affected the victim. Often judges would insist on some assistance being provided to the victim by the state. It would be hard for a judge to order what measures should be adopted by the state in terms of rendering further assistance to the victims, but this needed to be considered. Khampepe would not be inclined towards reparation due to practical considerations, since offenders usually lack financial capabilities, and hence it would probably lead to making an order that would not be capable of being satisfied.

Judge Kroon:

Withdrew his candidacy last year due to an unresolved complaint. Would bring attributes of diligence and dedication. Industry and legal acumen were not the only criterion for the constitutional court – candidates should also have am all-round comprehensive constitutional mindset. Regarding transformative constitutionalism, time will bring fresh challenges regarding constitutional issues. A CC judge should be able to work with, interact with colleagues.

Moerane suggested that Kroon's career (having been a judge during the apartheid era) had been a case of being 'in the wrong place at the wrong time', and Kroon agreed. Regarding the Hlophe matter, Kroon acknowledged that he had been a party to the complaint. Moerane asked if he regarded the matter as having been finalised following the JSC decision. Kroon commented that he had been a party to the statement by the CC judges, and would not second guess the JSC's decision. In the interests of the judiciary, the CC and Hlophe, the matter must be regarded as closed. Kroon confirmed that he was 68 years old and would have to retire at 70, and thus would spend slightly under 2 years on the CC.

Ntsebeza asked for Kroon's view on judges chairing commissions of inquiry. Kroon commented that care should be taken in making such appointments, and it should not be done where it would serve a political purpose. But there was some virtue in it, since judges brought experience in disposing of matters expeditiously.

Radebe asked how a judge should ensure that advocates guilty of unprofessional conduct complied with their duties. Kroon responded that duties to a client were subservient to the duty to the court. Mention was made of his judgement in *Council of the Bar v Matthys*, where the advocate had been struck off the roll.

Schmidt referred to the DGRUreport and noted that it contained only 2 of K's judgements, commenting that it was 'hard to believe' that there were not more. Kroon referred to the *Mathuli* judgement in the CC, and to *Twane v Transkei Agricultural Corporation*, which had involved administrative and constitutional law issues. He commented that other judgements on constitutional issues may not find their way into the law reports.

Smuts asked for Kroon's view on an Apex court, in light of his experience as an acting judge on both the CC and the SCA. Kroon commented that he had one apprehension, relating to full bench appeals. Some thought the objectivity of such appeals was open to question because of the judges being from the same bench, but practise had proved otherwise. It was an attractive proposition to have an apex court so as not to have to deal with the question of whether there was a constitutional issue; but Kroon was aware of points raised by Presidents of the SCA concerning logistical and other considerations against abolishing full bench appeals. Judges would prefer that full bench appeals would remain in order to give them assistance and to gain experience equivalent to being on an appeal court.

Judge Legodi:

Commented that he saw himself more as a "servant of the people" than a judge. He had come to the bench with lots of "disabilities", which had made it incumbent on him to put more effort into his

work; now he could claim to have succeeded in facing those challenges. It was challenging to assess the consistency of legislation with the constitution.

Langa asked for Legodi's perspective on socio-economic rights, in relation to his motivation for wanting to be on the court. Legodi commented that on a number of occasions he had had the opportunity to interpret the common law and customary law principles, in relation to actions which infringe rights. He believed he could bring this experience to his role as a member of the CC. Legodi commented that he would like to see constitutional open days being brought to rural areas, to explain people's constitutional rights to them. Legodi had delivered papers on the constitutional rights of children with disabilities; democracy; and in the lower courts on ethics. This was challenging, but if appointed, he hoped to continue with it.

Radebe noted Legodi's membership of the Mpumalanga Parks Board, and commented that there had been allegations of corruption concerning this body. Legodi responded that he had initiated investigations and a senior official had been accused of corrupt activities. Legodi had left before the disciplinary enquiry had been completed.

Burgess commented on Legodi having acted as the "interceptions judge", and then asked him whether the military courts formed part of the judiciary. Legodi commented that they did, and that he had been approached by his Judge President to sit on the military court, and had made himself available.

Mahlangu mentioned a submission that Legodi lacked the minimum qualifications needed to be an advocate, and had limited constitutional law experience. Legodi responded that they were entitled to that view, but that those he dealt with on a regular basis were positive about him. He affirmed that he was convinced he was suitably qualified.

Judge Maya:

Found the SCA a 'tough court', and the work intellectually stimulating. The CC was a 'special court', to which all judicial officers aspire. It is the bedrock of our democracy. This was a 'special opportunity' of being one of the guardians of the court.

Langa asked how the court was doing on socio-economic rights. Maya responded that it was doing "very well", as the court was giving judgements on issues that would better people's lives, and had been positively received. If not, the constitution would not be as widely lauded as it is. There was also a strong jurisprudence from the labour courts, which impacted on the rights of employees. Some people had not been happy with the outcome of the demarcation case, but on balance, the court was "on track".

De Lille noted the GCB's submission that she was the most senior African woman judge, and the third most senior woman judge, and questioned whether the SCA would be deprived by losing her.

At this point the electricity cut off

Maya responded that this was part of the transition process, and noted that the JSC had not been afraid to fill CC posts from the bar, side-bar, academia and the High Courts.

Radebe referred to the *Zanner* case and Section 35 (3) of the constitution, asking whether she might come to a different conclusion regarding the issue of staying prosecution. Maya responded that the court had considered an array of remedies, and whilst she could not recall the details of the case, she understood the importance of section 35(3).

Maya was asked about the role of women under the constitution. She responded that the constitution recognised the need for gender equality, which 'says a lot'. There was a need for gender balance in the judiciary, and mentioned CEDAW and the African Women's Charter.

Soni returned to the *Zanner* decision. Maya commented that the main reason for the decision had been that the appellant had not made any claims satisfying the court that prejudice would be suffered if a permanent stay were not ordered. Radebe questioned whether she would reconsider in light of s35 (3) if similar circumstances arose.

Soni asked the withdrawal question. Maya said that she had got 'cold feet' after a busy term at the SCA, but her husband had persuaded her not to withdraw.

The electricity came back on immediately after the interview finished.

Judge Mlambo:

Commented that the CC will lose massive experience, and that he was well placed to replace that. Had been the chairperson of the legal aid board since 2002.

Radebe quoted from the judgement of Mahomed in *Tshabalala* (spelling?) that the public service must be broadly representative, and that this was not possible without progressive affirmative action. In light of Mlambo's citation in the *Gordon* case, Radebe asked for his views on affirmative action. Mlambo responded that affirmative action was a constitutional imperative. He told how, when he had been a judge on the North Gauteng High Court, court orderlies had been surprised because they 'did not think their own people could be judges'. It was imperative to transform in terms of race, not just mindsets. Radebe then asked for his reaction to the statement that transformation should not just be a numbers game. Mlambo remarked that it shouldn't be a numbers game, since if numbers were blindly pursued, 'we may get it wrong'. It was necessary to have a transformative mindset.

Mabe asked about the *Unlawful Occupiers v City of Johannesburg* case. Mlambo identified a need to balance interests between providing alternative, proper housing and the right of schoolchildren to an education.

Moerane referred to Mlambo's position as head of the Legal Aid Board, and asked how it was faring in achieving its legislative mandate. Mlambo replied that it was doing 'very well', and that an increasing number of clients were being served on an annual basis. The number of clients assisted was roughly the same as the U.K. legal aid board manages to assist on a much larger budget. An issue was that criminal legal aid consumed the lion's share of the budget, and stringent measures were needed to ensure access to civil legal aid. Expectations on the board were too high, and hence discussion with the professions regarding pro bono work were being undertaken. A major problem was access to primary legal aid. Secondary legal aid (i.e. representation in court) was consuming the lion's share of the budget.

Moerane asked whether aid was equitably distributed, or whether it was skewed towards high profile cases. Mlambo denied that it was skewed, commenting that the board had resisted judicial interventions which had tried to force it to provide funds, noting that the *Boeremag* case had been contested up to the SCA.

Mlambo denied having discussed his candidature with 'the retired judge'. Schmidt commented positively on the number of cases Mlambo had heard on the SCA.

De Lille referred to Mlambo's judgement in *Tandwa* (spelling?), holding that the right to legal representation was a right to competent legal representation, and asked about the quality of legal aid. Mlambo responded that work was done in house, and he was confident that the justice centre lawyers gave good service. In the historical context, one would expect priority to be given to cases where individuals stood to lose their freedom.

The criticism was put to Mlambo that the side-bar experienced the legal aid board as being transigent. Mlambo responded that this had been his experience when he took over, but that the justice centres had improved. Poor people should not have substandard legal aid. Experience was needed, and the use of candidate attorneys had been cut down. A further complaint was put that legal aid attorneys did not consult properly and twisted clients' arms to plead guilty. Mlambo confirmed that attorneys had a target number of cases, but stated that efforts were made to ensure that this did not interfere with consulting. Statistics show that there were not an excessive number of guilty pleas.

Further questions were asked relating to legal aid.

Ntsebeza asked about the use of mediation. Mlambo commented that he had used it in the labour court, where there was active case management by judges in getting parties together. Mediation could be used to ease congested court rolls.

Judge President Moegoeng:

Regarding his motivation to be on the CC, Judges Farlam and Brand had made a presentation to new judges regarding constitutional law, which had generated his interest. He was a judge in a "corner of a corner", but had done what he could to share that interest. Made every contribution he could in his province, and the CC would be the next step. Stated that appoint to the CC would give him a better chance to "pour out my passion".

De Lille noted the submission by the National Forum of Advocates, that Moegeng was enthusiastic but had not published, and that his LLM thesis title was not disclosed. She asked Moegeng about his judgement in the BMW case. Moegeng commented that credit providers were too quick to repossess, and must provide genuine notice.

Ngoepe observed that if Moegeng remained as Judge President, by retirement he would have been on that court for 26 years, and asked if that would be good for the court. Moegeng commented that it would not be, and observed that if he was appointed to the CC, a woman Judge President would probably replace him.

Regarding language, he commented that it was the 'wrong time' and 'too complicated' to confront translation issues. Extreme costs would be incurred by 'running ahead of ourselves.'

Moerane asked what the most pressing challenge to the judiciary was. Moegeng identified transformation, going beyond race and gender – it was necessary to transform the courts to ensure access. Moegeng referred to a conference on restorative justice with traditional leaders, and argued for the need to revamp and restore traditional courts. He interacted regularly with traditional leaders, and argued for the need to establish genuine traditional courts. He had seconded a judge to the faculty board of the local university, and helped with training at the legal aid clinic.

Regarding judicial case management, Moegeng commented that there were many postponements, and that preparation which ought to proceed hearings was non-existent, with pre-trial minutes often an exercise in going through the motions. Judicial officers ought to take over case management.

The judiciary needed internal mechanisms and structures to deal with internal problems. The Chief Justice should be "legally clothed" with authority over all judicial officers, and similarly Judge Presidents within their jurisdiction. The judiciary was the only arm of government which was not properly co-ordinated, and there was a need for a single judiciary.

Moerane asked about the purpose of the National Judges' Conference, and remarked that he had been told that the last one had not been well attended. Moegeng confirmed that this was true, and spoke of the need to 'beef up leadership capacities', and train the heads of court on leadership. In response to a question by Langa, Moegeng remarked that the meeting was well attended, but that it could have been better. One Judge President had remarked on some of his judges' absence, and the white judges in one division had all been on holiday.

Neethling asked about his experience in constitutional matters. Moegeng commented that he had prepared orientation courses, and that exposure to constitutional law depends on the cases that arise. He would not push a constitutional issue into a matter not relating to the constitution, but had done the best he could when he had the chance. Moegeng commented that his decision in the *Lesapo* case on access to justice showed that he 'has what it takes'.

Judge Davis:

Felt that it was now the right time to apply – would not subvert transformation. Acknowledged that he had differences with Hlophe, but that these had been ideological, and not racial. In response to Burgess questioning him about the Hlophe saga, he commented that he thought he "had come to talk about my candidature, not the JSC decision."

Mahlangu asked about the GCB's concern at Davis' high number of reversals. Davis stated that he had had 27 judgements appealed against, 12 of which had gone against him, out of a total of 140 reported judgements. He also commented that some CC judgements (e.g. *Carmichele*) would negate certain SCA reversals. Davis commented that he had tried to be transformative in his judgements, and that he often had a different jurisprudential philosophy to the SCA.

Ntsebeza asked about Davis' jurisprudential philosophy in relation to socio-economic rights, and whether he still held that view expressed in his 'battle' with Forsyth in the South African Law Journal. Ntsebeza also commented on Davis' membership of the Competition Court and the Labour Appeals Court, commenting that this showed a dearth of talent and suggested that it would leave a gap if Davis were appointed to the CC. Finally Ntsebeza asked about white judges not attending the judges' conference – Davis responded that he had been climbing Kilamanjaro, and commented that it was a shame about the absence of white judges, as transformation of the bench was important.

Regarding his philosophy, Davis commented that he saw race and class as inextricably linked, and had not abandoned his belief in class analysis. His philosophy was informed by the need to transform society. The constitution was a social-democratic document – some clauses make no sense otherwise, for example substantive equality and labour rights. A libertarian view of our law was not sustainable. A balance was needed between understanding the role of the state and the rights of individuals. It was necessary to have a realistic view of the state's obligations so as not to impose too much of a burden. The CC had done this via the reasonableness standard, to ensure that the poorest of the poor come first. But there was a need to strike a balance by showing some deference to the state. Davis predicted that if the constitution was to be made to work, its aspirations needed to be implemented, and the gap between aspirations and reality must be closed. Davis described his philosophy as holding power accountable. Regarding his involvement on other courts, he commented that he had turned down an invitation to serve on the SCA for that reason. He was confident that the other competition court judges could do the job.

Smuts referred to the Forsyth debate, and commented that it was not all class analysis, and referred Davis to his argument that it was futile to argue that human rights were law. Davis responded that the law had subsequently become more complex, and human rights had become important as a significant instrument that the poor can use. On their own, however, they could not deliver social democracy. Therefore he had adopted more nuanced positions.

Smuts referred Davis to his dispute with Judge Wallis, and asked whether the language Davis had employed in dealing with a judgement by Wallis was appropriate. Davis characterised it as a robust statement in response to a robust judgement, and a response to the role of private power in apartheid. Davis commented that his language had been modest compared to the language of US judges and Lord Denning.

De Lille asked whether the courts have developed jurisprudence around the rights of the child. Davis replied that a fairly nuanced jurisprudence was developing, and commented that judges can only deal with the cases that come before them. The challenge was one of balancing, and he remarked that he had 'got into trouble' in Grootboom by finding an unqualified housing right for children

Radebe noted the 'flattering terms' of the recommendation by Kader Asmal, and commented that he was impressed that, as an activist judge, Davis had not abandoned the struggle and was still activist. Radebe commented that he had found the *Rail Commuters Action Group* judgement refreshing, and commented that government was ensuring the judgement was implemented. He asked for Davis' comments on his role as an activist judge. Davis commented that he did not encroach without careful thought. It was difficult because of the implications of a judgement in other areas. He tried to make the constitution work as best he can, bearing in mind limits.

Semenya commented that there has to be a point where one recognises the difficult of using law for social engineering, and the reason that human rights and constitutionalism are not in favour in the third world is because they do not address underlying problems. Davis commented that if they do not address private power, human rights are not important. There is a tension between stability and transformation, but this needs to be interrogated. Davis agreed that the power of the media could not be contained by defamation law.

Semenya asked about the principle of representivity and representation by peers on the bench. Davis commented that the starting point was competence, which encompassed a range of issues, including jurisprudential philosophy and empathy. It was a mistake not to tease these out. Identity was important, but that was not everything and there was a need to be nuanced. Litigants look beyond colour and at a judge's value system. Non-racialism was a 'difficult journey'.

Davis suggested that a social democrat understood that the state was important, and sought not to weaken it, but to try to balance. Ntsebeza suggested that where judicial activism was most needed was in relation to the property clause. Davis commented that the *Modderklip* case showed a move away from an absolutist vision of property.

Day 3

Langa began by announcing that because candidates were being interviewed for only one court, commissioners sat through all the interviews. Fatima Chohan would therefore not take part in the deliberations, having not attended the first day's hearings.

***Judge Poswa*:**

Had overlooked that he would be turning 70 on October 24th, and therefore understood that he was disqualified. Langa commented that there was no point in proceeding, and thanked Poswa for attending. Poswa asked the JSC not to discard his submission, as it did not just deal with him, but raised issues of transformation and delivery of justice. Van Der Merwe tried to ask a question about reserved judgements, but the question was not allowed and Poswa was excused.

Judge Satchwell:

Previously turned down an acting appointment on the old Appellate Division because she felt she was too junior. Had been asked to act on the CC, but the RAF commission had lasted too long. Her approach to judicial education and its importance was predicated on the need to re-structure society post-apartheid. Agreed that judicial education was an instrument in facilitating transformation.

Commitment to human rights was shown by 'deeds not words' – she had worked in the black sash, as an attorney, appeared before the TRC, and her judgements showed an appreciation that judges always need to learn – much cannot be taken for granted, and judges need to show humility. In *Holtzhausen v Roodt*, regarding the admission of expert evidence, she had accepted that judicial officers lack certain expertise. Her submission to the TRC had dealt with how the law had maintained and encouraged apartheid. She would offer the CC a proven track record with practising and judicial experience. Where her judgements had been overturned, she had not been criticised for carelessness. She was able to work with colleagues and had sat on appeals.

Radebe put forward the submission by Zahir Omar that she should not be appointed because most South Africans would not be able to identify with her. Satchwell responded that her private life was her private life, and had only once come into the public sphere, when she went to the CC to vindicate a right. Otherwise, there had been no recusal application, leave to appeal application or appeal argued on the basis that her private life reflected on her work as a judge. She was not here to propagate her lifestyle, but as a hardworking, committed judge. Langa commented that he felt that her lifestyle [by which in the context of the discussion was meant her sexuality] was irrelevant to her fitness for the bench. Satchwell remarked that regarding the point about identifying with judges, one did not expect a judge to represent all of their kind – the courts should reflect everyone and every concern. Once all people are committed to constitutional values, we then know that a commitment to constitutional values overrides differences and has triumphed over apartheid.

Radebe remarked that he agreed with those sentiments. He commented that he had found Satchwell's RAF report to be profound and significant, and commented that government had taken steps to implement it. He then asked for Satchwell's views on how best to protect children in divorce proceedings, with specific reference to the *Sawyer* (spelling?) case. Satchwell commented that it had been a long running case, and she had brought in outside assistance for the child, to fulfil a different function to the family advocate. The boy had held strong views about which parent he stayed with, and she had appointed someone to give him a voice in court.

Ntsebeza asked what the greatest problem was in realising the equality right in connection with sexual orientation. Satchwell remarked that the concern in South Africa was over constitutional values, and the CC had made a contribution to moving society towards restructuring. If the values are seen as out of touch, it had to be remembered that these are not the values of the CC, but values that emerged from a difficult debate and discussion. The CC has been careful not to intrude into the legislative and executive realm (e.g *Doctors for Life*, *Fourie*). It is for government to initiate a debate about policy. She did not believe this government was inimical to the constitution. Satchwell had put the fate of herself and her partner in the hands of judges – she did not ask for their recusal because they she thought they did not understand the issues.

Moerane asked about withdrawal. Satchwell responded that she had not spoken to Kriegler, but was grateful for the assistance he provided to junior judges. She put on record that the constitution ordained the existence of the JSC, which was a remarkable step in any country, and if one questioned those appointed, one questioned the basis of the constitutional democracy – "if I do, I should not be a judge". Regarding the work of the commission, there were flaws in every process. One might disagree with a judge, but one does not then boycott them or their entire division. Those on the JSC with minority views continued to serve on it.

Semenya questioned whether it was 'romantic' to look at constitutionalism as the solution to problems of the poor, in relation to socio-economic rights. Satchwell commented that some were elected to spend tax money and make policy. The judiciary feared to intrude into legislative and administrative action, for good reason. There may be some CC decisions where she would have aligned with the minority. Regarding socio-economic rights, as the country becomes more nuanced in its progression towards democracy, the courts will be confronted increasingly by these issues, and government should be proactive. She shared Semenya's concern with seeing socio-economic rights as the key to a better life.

Judge Seriti:

Is involved in judicial legal training. Committed to human rights - had early involvement through promoting human rights through the activities of organisations he was involved in. BLA activities were aimed at providing human rights for all, and proper access to justice.

Neethling asked whether Seriti had had any judicial experience in applying the Bill of Rights. Seriti responded that he had, especially through PAJA. Neethling asked if he had had any opportunity to develop the common law. Seriti responded affirmatively, noting that he had given decisions relating to human rights such as *Peens*, where he had drawn a distinction between the Defence Act and the Police Act. Neethling asked how he had applied the bill of rights to develop the common law. Seriti commented that he had relied on the constitution, but that part of the constitution had not been contravened because the action was not extinguished.

Burgess noted that Seriti had not listed that he had been the designated 'interceptions judge.' Burgess referred to the concerns in the intelligence community about the manner in which courts deal with intelligence matters. If Seriti was appointed to the CC, he would be the only judge with such experience, and Burgess asked whether his work in that area would be useful. Seriti confirmed that it would, and commented that he had consciously not disclosed his work as interceptions judge as he understood the Act not to permit him to do so.

Ndoni asked for Seriti's views on the criminal justice system. Seriti remarked that the lack of participation in the justice system led to a lack of credibility. A jury system would allow participation and improve the legitimacy crisis. The sentencing disparity based on who you were and where you came from should be addressed by a system involving the people. He still held that view. Need to find a way of involving the majority of the people, which will alleviate the 'crisis of legitimacy'.

De Lille commented on the constitution being pro-poor and containing socio-economic rights, and asked how this could be realised if the courts were not accessible. Seriti suggested that one remedy could be to extend the powers of the legal aid board, and to extend their training. Something was being done, but it was not sufficient. There needs to be legal aid for criminal and civil matters.

Judge Willis:

Developed his interest in law, especially defence work, from having contact with Bizos and others – his wife had been a defence witness in a NUSAS trial. Human rights were a 'visceral belief', not abstractly intellectual. Had worked as a mediator in labour disputes – could see both sides, knew what workers' struggle is about and 'what is practically possible'.

The contribution he could make was based on a vast, deep experience in labour matters – this was his field, and he could make an important contribution in that regard. Held strong views on human rights. Background in theology would be useful – gave a methodology of reasoning regarding moral issues. Brings a commercial background that not many other candidates have. Keen environmentalist – involved in conservation issues. Environmental issues more complicated than people think – could make an important contribution.

Semenya asked how labour and capital could be reconciled. Willis commented that both had an interest in 'keeping the show on the road.' It was not a straightforward conflict of interest.

Semenya asked what place constitutional jurisprudence had in harmonising a divided country. Willis commented on the need to encourage negotiations and deal making, which had been overlooked recently. Semenya asked whether the court had done enough regarding socio-economic rights. Willis responded that the CC had acted with the best of intentions, but that it had made errors of judgement. The Constitution envisages rule under law – socio-economic issues were more complex than just issuing orders that cannot be practically implemented. The *Grootboom* decision had been a disaster because Grootboom had died without a house.

Smuts asked about the need for the population to identify with judges, and asked what Willis thought they needed to identify with. Willis responded that transformation was aimed at reconciliation. Repentance involved living a transformed life, and Willis thought this was happening. People would have confidence in judges because of the lives they lead – this helps make a difference to the new South Africa.

Moerane asked about the challenges facing the judiciary. Willis identified that biggest as access to justice. The system was outdated, and effective case management would assist access. Willis stated that he was a believer in alternative dispute resolution, which would expedite and facilitate access to justice by allowing poor people to appear in person.

Ngoepe asked, regarding *Grootboom*, what the difference was between ordering that the application be dismissed because the state has not money; and ordering that a house is built provided there is land etc. Willis commented that the one makes it clear what the necessary preconditions are, the other does not. Making unenforceable orders undermines the credibility of the court.

Soni asked, regarding using alternative dispute resolution ('ADR') for constitutional disputes, whether this would not hinder the development of Constitutional Law, especially regarding the substance of rights. Willis agreed, and suggested that ADR would not be available once a matter got to the CC, but that the CC must encourage it "down the line".

Langa asked what order Willis would have made in *Grootboom*. Willis suggested that before he made an order dismissing the claim, he would ask government what they could do, and if they could do something 'within parameters', then that would become the order.

Judge Yekiso:

Regarding his contribution to the CC, Yekiso commented that for the new arrivals on the court, a contribution had already been made to the development of constitutional jurisprudence by the CC. There were still lots of challenges – many were denied the benefits of that jurisprudence, and it was the responsibility of the CC to ensure that communities were aware of how to vindicate their socio-economic rights. Communities were not aware of how to enforce their socio-economic rights.

Radebe asked about the recommendation of Yekiso, which described him as taking a 'legal engineering' and 'naturalist approach'. Regarding the naturalist approach, Yekiso commented that he had studied law at the time of Parliamentary sovereignty, when the courts had acted as guardians of the law whatever the consequences. The naturalist approach sought to deal with legislation in a manner that would lead to less harsh consequences for the victim – it was thus a purposive approach. Radebe then asked Yekiso about his decision regarding the detention of *Goliath*. Yekiso

commented that it had been for the benefit of Goliath, who suffered from serious TB, and in the interests of the community as a whole, since Goliath was refusing to accept treatment.

Ntsebeza noted that Yekiso had been an interpreter, and asked for his view on language in the courts. Yekiso stated that he presided over circuit court proceedings entirely in Afrikaans, due to his background and experience earlier in his career.

Yekiso had acted as the inspecting judge of prisons when no retired judge was available to do the job.

Judge President Zondo

Had studied while working in a law practice. Regarding his contribution to CC, Zondo noted that the CC has held that the interpretation and application of labour legislation is a constitutional matter. He had studied constitutional interpretation at Masters level – it was important, because interpretation of the constitution is a core function of the CC. If the move to an apex court happens while he was appointed, he would be able to make a contribution in other branches of law – for example, he has a masters in competition law.

Regarding his personal experiences, Zondo commented that he grew up in rural areas, and knows what rural life is like. His experience of rural customs gives him an understanding of the life experiences of different sections of the population.

Regarding the *Whitehead* case, Zondo commented that he had found that the reason Whitehead had not got the job was not because she was pregnant, but because the other candidate was better, so there had been no proper basis to argue that the dismissal had been due to pregnancy.

Ntsebeza asked about the possible role of mediation in all courts, especially in light of access to justice issues. Ntsebeza also asked whether it was necessary to continue to have an overlap between appeals to the Labour Appeal Court, the SCA and the CC. Ntsebeza also asked about a succession plan on the Labour Appeal Court, since there was no deputy judge president.

Zondo responded that there was definitely a role for mediation, and that Labour Law was an example of where it had been successful and it should be seriously considered for other courts. Zondo did not think that it was necessary to have a further level of appeal. He suggested that it had been an oversight in drafting the constitution which had enabled the relevant provisions to be interpreted as allowing an appeal to the SCA. There was no need to continue this practice, which only served to delay finalising disputes. There were no reasons why cases should not go straight from the Labour Appeal Court to the CC. Regarding succession, this would be a problem in any event as his term as Judge President ends in April 2010. The acting Deputy Judge President was to be appointed as deputy.

Ndoni asked what the status of the judges' conference recommendations on language was. Zondo responded that he was not sure – it might be coincidence, unrelated to the report, but the majority view in the report had been recommended. It was unacceptable that people speaking indigenous languages did not have the benefit of interpreters, at all times, whereas English and Afrikaans speakers do. Where all litigants speak the same indigenous language, there was no reason why

these cases should be conducted in that indigenous language. The Department appears to have a project along similar lines.

Moerane asked whether it was correct that Zondo had never taken leave, and Zondo confirmed it was. Zondo did not have a deputy in the Labour Appeal Court, which contained 4 or 5 judges, and Zondo was the only one acting full-time – the others acted part-time from the High Courts. Zondo would not be able to take long leave until a deputy was appointed, and there were not many candidates with labour law experience who could stand in.