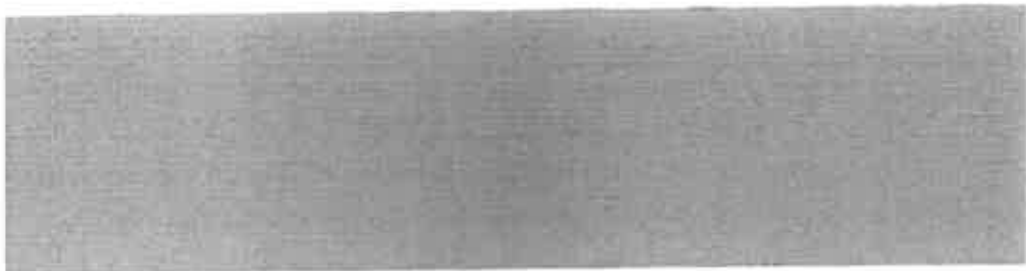


So I think that some commissioners very lightly dismissive of that concern, and I do want to say that, at least for as my own part in the contribution to this debate, that we should take seriously the fact that we are destroying the judicial system because we are allowing experienced judges to leave and we are not replacing them with equally capable judges which we know, we can see. it is not as if this is a secret.

The fourth thing I want to say in general is that I do not agree with you Commissioner Singh. We do not appoint
10 people based on interviews. Interviews are part of it but we look at the collective experience of candidates. That is why they submit CV's, otherwise they will just show up here and we speak to them. We look at the collective experiences which is demonstrated in their CV's. We also look at what the bodies are saying. We also use our own encounters with them. And, obviously, we take into account the interview. But one cannot single out the two hours of the interview and judge a career of 30 years. That is an irrational way of doing appointments and judge a career of 30 years in one interview.
20 So an interview is important but it is part and parcel of the experience.



[Handwritten signature]



Now why do I say all of these preliminary remarks. I want to speak specifically about Judge Unterhalter because he has been singled out in this discussion because he is the
10 only judge that has been singled out for criticism except for Judge Kgoele. I will talk about Judge Kgoele now in a second, but let me talk about Judge Unterhalter. The first criticism is that he is not a team player. There is just no basis, in fact, for that at all. There is zero basis. The people that work with him actually praise him for collegiality and praise him for being a team player. When I was an advocate, I did not do many cases with him but he actually worked well with juniors. What he did not do, he did not introduce new people into teams but if you are in those, to be on a team
20 with him, he was actually a pleasant gentleman. Now, of course, I have appeared before him as a judge but he is a very pleasant judge to appear before. So this idea that he is not a team player is factually unfounded. That was not even put to him. So I do not understand on what basis it can be said that he is not a team player. The second criticism that

has been laid against him is the offence of entitlement and importance. Again, there is no basis for that at all. There is not a single commissioner that put to him that you have a sense of entitlement and importance. There is one question that has been raised over and over again over Judge Unterhalter, is that you said one thing in his interview last year. You have changed it now. What is your position? And his position is that he does not believe that there is a conflict of interest and it is not clear to him that he would recuse himself. Everything else resolves around that point. It may be a wrong legal point as the Chief Justice pointed out but it is no evidence of sense of entitlement and importance or arrogance or superiority or racism. If Judge Unterhalter was demonstrating superiority, he was demonstrating arrogance, was demonstrating racism, those are very, very serious charges. And if they are to be taken into account without a factual basis and without them being put to them. Then this body would be acting irrationally. Then we do not have to defeat – one commissioner referred to defeat in the attitude.

10

20 The Commission is not here to defeat anything. It is here to select the best possible judges for the country, not for ourselves. So we have got no scores to settle with candidates. We are trying to constitute the best possible judiciary that this country can have. The reality, Chief Justice, is this. Judge Unterhalter is head and shoulders

above every candidate we interviewed in these two days, on experience, on qualifications and on the performance today. I make one basic example. I keep asking every round of interviews this question of the interface of contract and the Constitution. The four candidates I asked before Judge Unterhalter this question and all fluffed it. Judge Unterhalter is in fact the first person to articulate the clear theory of the interface between the two. And where he says, actually, the starting point is the Constitution, which in fact is not a new
10 thing. This is something that was said in the Camshare in relation to the common law. And for the first time, we have someone with a clear theory of how to reconcile the common law and the Constitution and who knows that you actually start with the Constitution. And the truth of that, in the future, Judge Unterhalter if he is made a judge of appeal in the Supreme Court of Appeal is in fact going to be one of the most robust judges who is going to apply the Constitution and he will be one of the most ...[indistinct] judges. We know that already that, in any event, because of the judges is delivering
20 now where he is currently sitting. So if you are looking for the judges that can do the heavy lifting but who will think for the future, then we have Judge Unterhalter by far the best candidate that that we have.

Now that, obviously, does not mean he is a man without flaws. One of the flaws is precisely the failure to read the

mood of the room. And it's more often an emotional intelligence issue that he is trying to appeal to our cerebral paths but he is losing us in the process. But again, I'm appointing judges here. I am not here to punish judges. I am here to appoint judges and I am here to look at what the country needs in terms of a strong judiciary and I have to respond to what the DP is saying that we are weakening the judiciary. So Judge Unterhalter is clearly the best candidate we have interviewed. He is clearly the best candidate on experience. The best candidate on qualifications.

Judge Setiloane comes second from Judge Unterhalter. She has the experience. She interviewed relatively well and smoothly, most importantly, and she has been at the ConCourt at the SCA. She has been at the LAC. She has been everywhere. So she will place – she did not get the contract point right, but I know when I have appeared before her she actually knows this, so she would be the same. Now the reality from my perspective, at least, is that those are the two top candidates we have.

We now have to scramble to fill the other positions because the gap between the top two and the others is so big. Both the gap of experience, the gap of the depth of knowledge and the depth of qualifications is so big. The question, for me at least, as the tribunal, as the Commission is, whether or not we fill the other two positions. Whether or

not we put Judge Siwendu, whether or not we put Judge Smith. I am not that troubled by Judge Kgoele, by the way. I do not think she is far off the mark. It may be that one or two acting ... [indistinct] but I do not think that she is - she did not get the question I tried to ask, but overall her performance was not bad and her judgments - the one judgment I have seen she wrote herself is not bad. But I do not think this is the round to appoint her to the Supreme Court of Appeal. I think we are going to do precisely what we have
10 been warned against by the Deputy President.

So where do I stand in the end? In the end, I agree with Commissioner Baloyi that we have to recommend three candidates. Judge Siwendu should go into the list. Judge Unterhalter should go into the list, and Judge Kathree-Seiloane should go into the list.

[REDACTED]
[REDACTED]
[REDACTED]
Thank you, Chief Justice.

CHIEF JUSTICE ZONDO: Thank you. We said that the last speaker, he was the one who agreed when I said that he will
20 be the last speaker. He was the one who agreed.

[Background speaking - unclear]

CHIEF JUSTICE ZONDO: Hey? Okay. One minute.

COMM NYAMBI: Ja, I think it is important that I come with the Head of Court's view. I've been very muted in these interviews so far. But I think - I have raised it with Judge

Masipa. This trend that we are now seeing in the SCA of judgments going over into other terms is an indication of the quality that goes there because it never used to happen, and we should be responding to that as the Commission to say, are we helping that court in that court getting the people who will make sure that the reputation of that court comes back to what we know it to be? I think that's the one thing. So, I am saying, as the Commission, let us help this court. Let us appoint those people that who have been assessed with in
10 the interview. We know them. We have seen their papers. Who we think would do the heavy lifting. I just wanted to add that. That is of interest to us as heads of courts. And by the way, I have no problem with Unterhalter and with Kgoele.

CHIEF JUSTICE ZONDO: I just say, I think next year when there is a vacuum in the Constitutional Court I will be talking to you very much along the lines of strengthening the highest courts for the future. What we are talking about I think we need to be careful going forward if we want to really make sure that our apex court is strong, but that's for next year
20 April. I think that the secretariat should give us the ballot papers now.

[background speaking – unclear]

CHIEF JUSTICE ZONDO: Oh, I am sorry. Thank you I forgot. I think what Commissioner Nyambi saying that he would be happy if you would consider to say, here are the

names of those that I, Justice Smith, recommending irrespective of who may have said what. I think that is what he is looking for.

DEPUTY PRESIDENT PETSE: Thank you, Chief Justice. I just need to respond to him and to what Commissioner Ngcukaitobi said before I give my take. You know, I think it is important to make the point that there was no attempt on the part of the SCA judges to influence the process.

10 CHIEF JUSTICE ZONDO: You have made that point.

DEPUTY PRESIDENT PETSE: Yes.

CHIEF JUSTICE ZONDO: Ja, you have made that point. 



DEPUTY PRESIDENT PETSE: Yes.

CHIEF JUSTICE ZONDO: 



20

DEPUTY PRESIDENT PETSE: Thank you, Chief Justice.

CHIEF JUSTICE ZONDO: Ja, okay.

DEPUTY PRESIDENT PETSE: 





of my views as a member of this Commission representing the court. And that said, due to the lateness of the hour, might I conclude by saying that I am attracted to the proposition by Commissioner Baloyi.

CHIEF JUSTICE ZONDO: Oh, Baloyi?

CHIEF JUSTICE ZONDO: Yes. Earlier on you said you wanted to respond to Commissioner Ngcukaitobi. That is why I am thinking... Okay, I think that now we can have the ballot papers. Thank you. Thank you to everybody for all your
10 inputs.

VOTING RESULTS:

CHIEF JUSTICE ZONDO: The results are here. They are like this:

The Supreme Court of Appeal for vacancies.

Total number of votes received by candidates:

Judge J P Daffue - Zero
Judge F Kathree-Setiloane - 19
Judge A M Kgoele - 12
Judge M B S Masipa - Zero
20 Judge G N Majali - 1
Judge Z M Nhlangulela - 1
Judge M V Phatsoane - 1
Judge N T Y Siwendu - 12
Judge J E Smith - 12
Judge D N Unterhalter - 12

Total number of votes cast – 21

Total number of abstentions – 1

Total number of spoiled votes = Zero

On the basis of our understanding that was that without a provincial JP and the premier, the total is 23. The Commissioners, if I understand correctly, it becomes 24 if there is a provincial – if there is a JP and 25, if there's a premier.

[background speaking – unclear]

10 CHIEF JUSTICE ZONDO: Ja, it becomes 25. Without those, it means it is 23. So the majority for 20 ..[intervenes]

COMM MAMELA: No, CJ. The JP in the SCA is the Deputy President.

CHIEF JUSTICE ZONDO: Yes, but the SCA is always represented, so we have counted him, whereas a high court is only represented if there is a candidate. The JP of a particular high court comes in only for the candidates that belong to the, otherwise they are not members, permanent members. So that's the distinction I am making, otherwise
20 we are counting the Deputy President as a member of the Commission, so that that's 23. So the majority of 23 is 12. That's the majority.

COMM SINGH: Chief Justice, can we just clear that out again, please?

CHIEF JUSTICE ZONDO: Yes.

COMM SINGH: Can we be very certain about the 13?

CHIEF JUSTICE ZONDO: Ja.

COMM SINGH: We have always work from the basis of 13, as far as I can recall. So I...

COMM MALEMA: Ja, Chief Justice, there has never been a point where a person has gone -- has passed the interview with less than 13. 13 is deemed as the required minimum irrespective of who is there and who is not there. We start from 13 upwards.

10 CHIEF JUSTICE ZONDO: Let us all apply our minds to it because what the Constitution says is that, is the majority of the members of the Commission. It does not say the members who are attending, is the majority of the members. Now, among the - there are permanent members of the Commission. That is like the Chief Justice, the President of the SCA, relevant members of the National Assembly and NCOP, the Minister and those who represent professions, those are permanent, but a premier comes in when there is consideration of a particular high court. When we consider
20 the Supreme Court of Appeal or the Constitutional Court, the premier does not come in. No premier comes in. There is a JP represents JP's. That JP is permanent, but when we deal with a particular division of the high court, the JP of that division becomes a member on that occasion only. So the question, therefore, it seems to me, would be; when the

Constitution says the majority of members, who does it include, who does it exclude? It would seem to me that it cannot include a premier when a premier is disqualified from being part of the interview. And it seems to me that it cannot include a JP who is not entitled to be part of that...[intervenes]

COMM NOTYESI: CJ, I have a different question. I just want to ...[intervenes]

CHIEF JUSTICE ZONDO: I am sorry. I am sorry

10 COMM NOTYESI: Can the numbers be repeated?

[background speaking – unclear]

CHIEF JUSTICE ZONDO: No, no, no. What I was saying was. If we are correct that the total number of members of the Commission is 23, then those people who bought 12 votes would be in. That I what I was saying.

COMM NGCUKAITOBI: No, I was asking for the numbers again.

Of that title question, I just want to answer.

CHIEF JUSTICE ZONDO: Again?

20 Please

CHIEF JUSTICE ZONDO: Let me give the numbers again.

Shall I leave out those who have zero?

COLLECTIVE RESPONSE: Yes.

CHIEF JUSTICE ZONDO: Ja. Those who qualify?

COLLECTIVE RESPONSE: Yes.

CHIEF JUSTICE ZONDO: Yes.

Judge F Kathree-Setiloane - 19

Judge A M Kgoele - 12

I will leave out those who got one vote.

Judge N T Y Siwendu - 12

Judge J E Smith - 12

Judge D N Unterhalter - 12

Ja, how many have got 12? One, two, three have...

[background speaking - unclear]

10 CHIEF JUSTICE ZONDO: Oh, there are four 12's.

[background speaking - unclear]

CHIEF JUSTICE ZONDO: Oh, there are five. Oh, well we should repeat those votes again. Well, if the total number of members of the Commission that we must use is 23, then it would mean that all those who got 12 are supposed to be in but now if there are more than the vacancies we probably need to vote again so that there is no tie.

COMM STEINBERG: Do we vote on those five or on everybody?

20 CHIEF JUSTICE ZONDO: I think to be on the safe side, should we not vote on everybody?

[background speaking - unclear]

CHIEF JUSTICE ZONDO: Ya, let us retake the vote. We agreed?

[background speaking - unclear]

CHIEF JUSTICE ZONDO: Have we agreed that we retake the vote?

COLLECTIVE RESPONSE: Yes.

CHIEF JUSTICE ZONDO: Okay, let us retake the vote.
Chief Justice?

Okay, sorry. Commissioner Molemela?

PRESIDENT MOLEMELA: No, I agree with retaking the vote.

How many are we, the members of the JSC? Are we agreeing on 23?

10 COLLECTIVE RESPONSE: Yes.

CHIEF JUSTICE ZONDO: Ja, I think we agree on 23.

PRESIDENT MOLEMELA: On this particular [intervenes]

CHIEF JUSTICE ZONDO: On this interview

COMM MALEMA: On this one?

CHIEF JUSTICE ZONDO: Ja.

CHIEF JUSTICE ZONDO: Yes. Okay, all right, thank you.

Okay, go and give us the ballot papers. Has this ever happened?

[background speaking – unclear]

20 PROCEEDINGS OFF RECORD

PROCEEDINGS BACK ON RECORD

CHIEF JUSTICE ZONDO: Commissioners, take your seats.

We have the results. I'm going to read them again:

RESULTS OF REVOTING:

The Supreme Court of Appeal for vacancies.

Total number of votes received by candidates:

Judge J P Daffue - Zero

Judge F Kathree-Setiloane - 20

Judge A M Kgoele - 12

Judge M B S Masipa - Zero

Judge G N Majali - 1

Judge Z M Nhlangulela - 2

Judge M V Phatsoane - Zero

Judge N T Y Siwendu - 9

10 Judge J E Smith - 8

Judge D N Unterhalter - 11

Total number of votes cast - 21

Total number of abstentions - Zero

Total number of spoiled votes - Zero

So there is 20. There is 21. So that is 2.

[background speaking - unclear]

CHIEF JUSTICE ZONDO: No, I am sorry. That is 20. No, sorry, 21 is the total. There is 20. There is 12 and the next highest number is 11

20 COMM MEMBER: Only two people, Chief Justice?

CHIEF JUSTICE ZONDO: Yes, Judge Kathree-Setiloane is the one who got 20 this time. It was 19 last time, it is 20 now. But some had got votes the last time. They do not anything now or it is less.

[background speaking - unclear]

CHIEF JUSTICE ZONDO: Ja, Judge Kgoele remains at 12.
So on the basis of a total number of 23 members, it means
that the ones who go in are:

Judge F Kathree-Setiloane – 20

Judge A M Kgoele – 12.

Those are the ones that...

[background speaking – unclear]

CHIEF JUSTICE ZONDO: Well, if the total number is 23 we
are correct because 12 is half of 24. So, okay,
10 commissioners, therefore, the Commission will advise – oh,
there are no spoiled votes, there are no abstentions this time.
So the Commission will advise the President to appoint
Judge Kathree-Setiloane and Judge Kgoele. Thank you.
That is result.

INTERVIEW ADJOURN

SF10



OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

JUDICIAL SERVICE COMMISSION (JSC)

**INTERVIEWS HELD AT THE CAPTIAL ON THE PARK SANDTON
2-6 OCTOBER 2023**

CHIEF JUSTICE ZONDO

Chief Justice Zondo
Deputy President Petse
Adv Ngcubaitobi SC
Mr Notyesi
Mr Nyambi
Mr Singh
Adv Baloyi SC
Adv Steinberg SC
Judge President Mlambo
Ms Shabangu-Mndawe

Mr Malema (virtual)
Prof Marumoagae
Mr Mmoiemang
Mr Dodovu
Ms Lucas
Adv Poswa-Lerotholi
Mr Xaba
Mr Notyesi
Ms Matolo-Dlepu
Mr Malema (virtual)
Mr Barnard (virtual)
Ms Breytenbach (virtual)

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JSC Interviews October 2023	JSC Interviews October 2023

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PLEASE NOTE:

1. *Verbatim transcript, no syntax or grammar changes effected.*
2. *Unknown names typed phonetically.*
3. *Parties speaking simultaneously.*
4. *Unclear enunciation/mumbling/swallowing of words.*
5. *[Indistinct] are caused due to connection interruptions*



Gauteng Transcribers

INTERVIEW HELD ON 02 OCTOBER 2023

CHIEF JUSTICE ZONDO: Good afternoon Judge Unterhalter.

JUDGE UNTERHALTER: Good afternoon Chief Justice.

CHIEF JUSTICE ZONDO: How are you this afternoon?

JUDGE UNTERHALTER: I am very well, and how are you?

CHIEF JUSTICE ZONDO: All right, have you been waiting
10 for a long time?

JUDGE UNTERHALTER: Well, yes nothing like anticipation.

CHIEF JUSTICE ZONDO: Yes.

JUDGE UNTERHALTER: Chief Justice, I wonder if I might
request before the proceedings begin, if I might make a very
brief statement to the JSC?

CHIEF JUSTICE ZONDO: Well, we have not done that with
anybody before, and I was not aware you were going to make
such a request and I have no idea what the statement will be
about. That is the problem.

20 JUDGE UNTERHALTER: Chief Justice, as I think all the
commissioners know there has been a complaint that has
been made against me and I want to make a very brief
statement concerning that matter.

CHIEF JUSTICE ZONDO: If it is the one that is the matter
that is with the JSC

JUDGE UNTERHALTER: It is indeed.

CHIEF JUSTICE ZONDO: Yes, I think there is a committee that has looked at the matter, I think that during the interview you will get a chance to deal with it, because they are going to raise it. I think you can deal with it when they raise it.

JUDGE UNTERHALTER: I will make my statement then, if it is going to be raised in the course of the interview.

CHIEF JUSTICE ZONDO: Yes, they will raise it with you and give you a chance to deal with it.

10 JUDGE UNTERHALTER: Well, then I am ready to proceed.

CHIEF JUSTICE ZONDO: Yes. I will ask you questions and as you know, because you have been to this body quite a few times. Other commissioners will ask you questions, but the questions we will ask you are aimed at us establishing how fare when we look at the selection criteria that this body had adopted for the selection of judges. All of us are committed to treating all candidates with respect and curtesy. That does not mean that we will not be robust if we need to be, but you must just know that nobody has any intention in this room of
20 humiliating you or any candidate.

I think you are appearing before this body where I am chairing maybe for the third time.

JUDGE UNTERHALTER: I think that is correct, yes.

CHIEF JUSTICE ZONDO: Yes, you may have appeared on other occasions when I was not there, but this is not new

territory for you?

JUDGE UNTERHALTER: No, it is not.

CHIEF JUSTICE ZONDO: Thank you very much. So, let me start by thank you for availing yourself for consideration for one of the positions in the Supreme Court of Appeal. We appreciate that you have availed yourself. You hold four degrees BA from Cambridge, LLB from Wits, BCL from Oxford, Ma and Ma from Cambridge. Is that correct?

JUDGE UNTERHALTER: Yes, that is correct.

10 CHIEF JUSTICE ZONDO: Yes, before you were appointed as a judge you practised as an advocate for around 30 years. Is that correct?

JUDGE UNTERHALTER: I think 27.

CHIEF JUSTICE ZONDO: 27, yes, yes During that time you appeared in various courts in this country including the Supreme Court of Appeal and the Constitutional Court and off course you appeared in the High Court various divisions in the High Court.

JUDGE UNTERHALTER: Yes, that is correct quite
20 frequently.

CHIEF JUSTICE ZONDO: The last time you appeared before this body I think if I am not mistaken I may have counted the reported judgments that you had written were they in the region of 300 or was that cases in which you had appeared as an advocate?

JUDGE UNTERHALTER: There are many cases I must say I have not done the tally, but there are a lot.

CHIEF JUSTICE ZONDO: You have written numerous articles that have been published and you have made contributed to some books as well, law books?

JUDGE UNTERHALTER: Yes, Chief Justice, throughout my time at the bar I also taught and held positions at universities and it is part of my academic work, I published various academic articles.

10 CHIEF JUSTICE ZONDO: Yes, what was the year in which you were appointed to the High Court, again?

JUDGE UNTERHALTER: 2018 as I recall.

CHIEF JUSTICE ZONDO: That would make it 7 years as a judge?

JUDGE UNTERHALTER: No, not quite so much, 5 years and some months.

CHIEF JUSTICE ZONDO: Okay, during part of that period you have acted in the SCA, how many stints have you done in the SCA?

20 JUDGE UNTERHALTER: Yes, Chief Justice I must tell you that I somewhat underestimated my acting stints on my application form, because I did not account for the second half of 2021, but if one includes those which were two terms that I in addition spend in the SCA my tally I think nine terms in the SCA.

CHIEF JUSTICE ZONDO: Nine terms, that would make it 2 years and a term?

JUDGE UNTERHALTER: I think that is correct, yes.

CHIEF JUSTICE ZONDO: That is quite some time.

JUDGE UNTERHALTER: It is, yes and then I had two terms as you would know in the Constitutional Court.

CHIEF JUSTICE ZONDO: Yes, how many terms did you do at the Constitutional Court?

JUDGE UNTERHALTER: Two terms.

10 CHIEF JUSTICE ZONDO: Yes, you have obviously enjoyed yourself in the Supreme Court of Appeal, otherwise you would not be making yourself available?

JUDGE UNTERHALTER: Yes, absolutely Chief Justice, it is a court which I have found to have both very interesting cases that come there. There has been a very collegial atmosphere within the court which is very productive and very helpful. I have learned a great deal from those who are on the court and it is a court that I have enjoyed very much contributing to.

20 CHIEF JUSTICE ZONDO: Yes. I know from the previous interviews that many of the cases that you did were constitutional law cases and you appeared in the High Court about them and in the Constitutional Court?

JUDGE UNTERHALTER: When I was an advocate?

CHIEF JUSTICE ZONDO: Yes, when you were an advocate.

JUDGE UNTERHALTER: Yes, indeed. Constitutional law was one of the areas I practised quite substantially

CHIEF JUSTICE ZONDO: Yes, candidates that we have interviewed from yesterday, who are High Court judges, when I asked them about what exposure they have had to dealing with cases in the High Court, where they are called upon to determine whether legislation is constitutionally invalid. Have indicated basically that it is very difficult to get such cases in the High Courts, many of them has not dealt with
10 one, some of them having been judges for more than 10 years. Since you joined the High Court, have you found that it is not easy to find such cases yourself, or you have a different experience?

JUDGE UNTERHALTER: No, Chief Justice they are relatively rare, but I have had numbers of cases in the Appellate Courts which have raised questions to the constitutional validity and respective legislation and I will be happy to explain more about those, if necessary.

CHIEF JUSTICE ZONDO: Yes, obviously as counsel if you
20 appeared in the High Court, the Constitutional Court with such cases you would have been exposed to how the court is supposed to deal with a case such as that. So, one you confirm that you have had such cases both as counsel and as a judge.

JUDGE UNTERHALTER: Yes, I do confirm that many, many

cases as a counsel and a number of cases as a judge.

CHIEF JUSTICE ZONDO: Yes, and do you want to share with the commissioners the question I have been asking every candidate how a judge is supposed to go about the business of determining whether legislation is inconsistent with the constitutional so that they decide whether it should be declared invalid.

JUDGE UNTERHALTER: Yes, I will happily do so.

CHIEF JUSTICE ZONDO: Yes

10 JUDGE UNTERHALTER: The first step in the reasoning is to examine the statutory measure which is sought to be impugned. That is an interpretive exercise, because one of the constitutional imperatives is to interpret the provision in such a way as to bring it into conformity with the constitutional if such an interpretation is supportable. So, we do not assume that statutory provisions are unconstitutional and unless we can find in the first place that there is no reasonable reading of the provision that would allow us to say that there is interpretational violation of the
20 constitution.

If one comes up with an interpretation that simply shows that there is a problematic feature to the statutory provisions One then has to off course examine what is the nature of the right that is being invoked under the bill of rights, if that is the nature of the challenge, which usually is.

One has to understand precisely what does that right have to say and what is its content that might bring about a conflict between the statute properly interpreted and the provision in the constitution that the statute is said to offend. If one finds after interpreting the relevant provision of the constitution and the relevant provision of the statute that there is a violation then the question would turn to the issue of limitation if the state which is seeking to defend the constitutional challenge has raised limitation and that is partly a question of law and partly a question of fact. Depends what is being raised in respect of limitation, and one would then have to consider the matter and if one finds that there is no justification of the invalidity that is established then there is a question of remedy.

So, those are the four essential steps relevant to a challenge in this kind.

CHIEF JUSTICE ZONDO: Yes, thank you. There are two types of discretion in law. Do you want to talk to the commissioners about what types of discretion one finds in law and what differences there are between them and what the legal significance is of their differences for purposes of litigation?

JUDGE UNTERHALTER: Yes well, there are two essential kinds of discretion that have been recognised at least in the context of the question you have posed to me. The first is

what is called discretion in the true sense and a discretion in the true sense is a discretion which empowers the High Court to make a decision in respect of a number of possible options each one of which is permissible. If the High Court decides upon a permissible option available to it, and unless the court has failed to exercise that discretion in a judicial fashion and I will come back to what that means. Then it is not open to an appeal court to say well I would have preferred a different option, because as long as it is a permissible option it is then
10 part of a discretion in the true sense and hence the standard of review is a very vigorous one in respect of appellate interference with the decision of that kind. That is to be contrasted with the discretion which is called a discretion in the loose sense.

A discretion in the loose sense is one where there may be a number of factors that are considered, but ultimately they are considered for the purposes of reaching a decision not simply one of a number of permissible decisions. Under that second kind of discretion an Appellate Court can
20 interview on the grounds of correctness. Whereas in respect of the discretion in the true sense correctness is not the standard. The standard is whether it has been judicially exercised and that is a capacious concept which means a number of things has largely had there been a proper appreciation of the nature of the power enjoyed by the court

and has it been exercised upon the correct facts.

That at least conceptionally is the distinction between these two. I think part of the confusion comes about, because these terms a discretion in the true sense and a discretion in the loose sense or perhaps not the most apt ways of describing this, but that is how our law has come to describe and it is a bit late to change that terminology.

CHIEF JUSTICE ZONDO: Thank you. I will now allow the Deputy President of the SCA to put questions to you.

10 JUDGE UNTERHALTER: Yes.

DEPUTY PRESIDENT PETSE: Thank you, Chief Justice and good afternoon Judge Unterhalter.

JUDGE UNTERHALTER: Good afternoon Deputy President.

DEPUTY PRESIDENT PETSE: When you were being questioned by the Chief Justice, you said that you have served as an acting judge of appeal in the SCA for nine terms?

JUDGE UNTERHALTER: That is correct.

20 DEPUTY PRESIDENT PETSE: Is it so that you will be in fact you are acting still at the end of November this year?

JUDGE UNTERHALTER: That is correct, if we count that in it would be 10 terms.

DEPUTY PRESIDENT PETSE: The judiciary plays a crucial role in giving meaning to the letter and spirit of the constitution and the rights training the constitution and

therefore contributes to the entrenchment of democracy in the country. Do you want to perhaps comment on that statement.

JUDGE UNTERHALTER: Yes, I would like to. Our constitution came into being perhaps at the time of great optimism in our national life. I think that the constitution still remains the absolutely foundation of document which bind us together, and it is central to the purpose and point of our courts of law to allow that constitution to flourish. Now, how that is to happen off course is a process of which cases come and how one can allow the constitution to life unlike certain other appellate judges in other jurisdiction. It is a living document and so it is applied in different circumstances and in different times. If I may say Deputy President, that one of the difficulties is that saying those things is easy, exactly how to do so is often much more difficult, because it is question of making concrete in actual cases how the constitution should move us forward. I will be happy to answer questions as to how that arises in concrete cases, but one of the areas which is obviously one of the key provinces of the courts is the common law. Because that judge made law and how the constitution should work in relation to the common law is a very fundamental part of what we should be doing.

DEPUTY PRESIDENT PETSE: Yes, and what would you say

has been your notable contribution to the development of the South African Law, or jurisprudence and the continuing Democratic project, just briefly?

JUDGE UNTERHALTER: Well, I have listed some of the more important cases that I attach significance to and I am certainly not going to go through them, because I am sure this party has looked at what they think would be relevant in that regard. If I could just very briefly touch on a couple of cases just illustratively of the more general point that I have
10 made. In respect of the Ndoro case which concerned the South African Football Union. The question is when can a private body be understood to be conducting or acting as a public body which is subject to the kind of disciplines that exist are in our administrative law. I sought to formulate a test which gathers together our jurisprudence on this subject. Among the test is to recognise that the dividing line between public and private is one which needs to be carefully navigate. Off course the consequence of drawing that line means that there is not a sense in which private bodies which
20 exercise significant coercive power in an exclusive and regularity fashion can avoid the kind of discipline that exist in our public law.

So, that is just one example of the reach of public law into certain private domains, which some courts have previously considered to simply be a matter of contract and

not a matter of public discipline. That is just one illustration, I do not want to take too much time, I can give you other examples if that would be useful.

DEPUTY PRESIDENT PETSE: Thank you fair enough In practise you had a thriving and diversified practise with administrative and constitutional law being the two areas of the law in which you excelled Would you accept that statement?

JUDGE UNTERHALTER: That is true, but over what was a
10 long career at the bar I was fortunate enough to be exposed to quite a number of areas of law of which I would say commercial law, competition law and then public law were quite important themes of my practise.

DEPUTY PRESIDENT PETSE: Okay, and as you have mentioned you have had the privilege of up to now to serve as an acting judge of the SCA for nine terms. As you would know the convention at the SCA is that the most senior judge in any given panel that is the presider allocates or designate a member of the panel to write to the judgment of the court.
20 Generally, each of the colleague would write about two judgments a term. Are we together?

JUDGE UNTERHALTER: We are certainly together.

DEPUTY PRESIDENT PETSE: But what I have observed in your cases that consistently you have been allocated three judgments to write per term.

JUDGE UNTERHALTER: That is correct DP.

DEPUTY PRESIDENT PETSE: What would you achieve with that two?

JUDGE UNTERHALTER: Well, I think there are a number of things DP the first is that I found that work in the SCA has been extremely interesting and I have as I was indicating to the Chief Justice thrown myself into that work. Colleagues on the court appeared to have been willing to try me out as a judge writing judgments and I have fortunately enough
10 [intervenes]

DEPUTY PRESIDENT PETSE: Sorry to interrupt you Judge Unterhalter, if you could try and speak directly into the mic I am battling to hear.

JUDGE UNTERHALTER: I am so sorry.

DEPUTY PRESIDENT PETSE: Thank you

JUDGE UNTERHALTER: Yes, I have been fortunate enough to have senior colleagues allocate cases to me. I have also co-written with a number of colleagues on a few occasions and on one or two occasions stepped in when a colleague
20 was over burdened as a presider. So, yes I have been both fortunate to be given those opportunities and I hoped that the work product has been adequate.

DEPUTY PRESIDENT PETSE: In the majority of those cases they were not ordinary run of the mill type of case, but those were complex matters, which called for resolution of

vex questions of law?

JUDGE UNTERHALTER: Yes, that is correct, I have found the cases that have come and that I have been lucky enough to write about challenging issues often complex and I had to square up to the issues and the cases and I have sought to set out my judgments as clearly as I could, and as promptly as I was able to do.

DEPUTY PRESIDENT PETSE: I have seen that you were born and bread in Johannesburg. The SCA sits permanently
10 in Bloemfontein, the platteland drop extremely cold in winter extremely hot in summer. Are you prepared for all of that, I am raising this with you because a story is told more than a century ago of a chief justice who came from Cape Town and chose to sit most of the time in Cape Town rather than in Bloemfontein?

JUDGE UNTERHALTER: Well DP, I know that the following is sometimes said about Bloemfontein, that you cry when you arrive and you cry when you leave. So, I am happy to have been there in person this year and I am happy to serve in
20 Bloemfontein, there are things to appreciate about the city that I did not know existed. For example a wonderful planetarium that we were fortunate to visit a few weeks ago.

DEPUTY PRESIDENT PETSE: Thank you Judge Unterhalter. Thank you, Chief Justice

CHIEF JUSTICE ZONDO: Thank you, minister you are

covered. Commissioner Nyambi.

COMMISSIONER NYAMBI: Thank you Chief. Afternoon Judge?

JUDGE UNTERHALTER: Good afternoon

COMMISSIONER NYAMBI: Last time we were here was in early last year when on the Constitutional Court.

JUDGE UNTERHALTER: Yes.

COMMISSIONER NYAMBI: Maybe if you can try to deal with the objection first.

10 JUDGE UNTERHALTER: Yes

COMMISSIONER NYAMBI: Then after the objection probably try to do some reflection about the interview the last time you were here, anything that you think you want to bring to our attention in terms of correction out of the engagement that you have had with you in your own reflection the last time you were here?

JUDGE UNTERHALTER: Well, let me deal firstly with the objection if I may and I am happy to take questions thereafter if there are issues arising from my last interview I will be
20 happy to take those questions which off course you should raise if you wish. I like to just very, very briefly set out what has happened and place it on record. On 15 September 2023, the president of the SCA told me that a Mr Achuko had raised an objection to my appointment to the SCA based upon a complaint he had lodged with the judicial conduct committee

on 10 March 2023. I have not been sent the complaint and on 18 September 2023 the JCC did so

Mr Achuko, had brought proceedings in the High Court against Absa and First Rand Bank. I heard the application in 2019 and dismissed it, I refused leave to appeal as the Supreme Court of Appeal and the Constitutional Court. Mr Achuko complaint against me is this, on 16 February 2023 he received an email from me headed payment advise with an attachment titled payment schedule. Mr Achuko, could not
10 open the attachment, but alleged that the email was evident that I was receiving bribes as a result of the judgment that I handed down in favour of the banks.

Now, I have provided a full answer to the JCC on 20 September 2023 2 days after receiving the complaint and the JSC has been provided with my answer. In my answer I explain the following. Early in the morning on 16 February 2023 while serving in the SCA I received a call from Justice Sachs the retired judge's secretary. She said that Justice Sachs had received a strange email from me. I replied that I
20 have no knowledge of sending an email to him and requested her to send the email to me, and she did. On opening my inbox, it was evident that Justice Sachs was not alone a large number of recipients have received the same email. Headed payment advise, many were returned to me as undeliverable having been blocked as spam, others were open by recipients

some of them who wrote to me to report that my email had been hacked.

An examination of my inbox made this clear some of the recipients are persons known to me with whom I correspond, others are lawyers and judges known to me with whom I do not correspond. Others are persons unknown to me, I reported the matter at once to the IT personal of the SCA and they in turn did so to the OCJ. It was evident that my emails had been hacked. The email received by Mr Achuko save for the identity of the addressee is in every material respect identical to the email sent from my email address to large numbers of recipients on 16 February 2023. Every email is headed payment advise. The text is identical, "Please see attached payment advise! Please confirm receipt."

The attachment is headed "Payment schedule"

With the same numbering convention. I pointed out in my answer that I understand the difference between advice and advise. The email received by Mr Achuko was neither composed nor sent by me. I have never taken bribes, the email relied upon by Mr Achuko is not evidence that I have done so. The email he received was the result of my emails being hacked. I requested the committee to dismiss the complaint. The committee has not yet heard and decided the

complaint that I have requested that they do so urgently. Mr Achuko complaint is without foundation, since the subject matter rests entirely upon the complaint it must fail for the same reasons that this complaint does. That is what I have to say on the subject of Mr Achuko objection.

As to your second question I stand open to answer any questions you may have arising out of my last interview.

COMMISSIONER NYAMBI: It is not a specific question about anything that I want to refer you, but I was just giving
10 you an opportunity because there were issues in the last interview that were raised then that I was just canvassing with you in your own reflection. Whether is there anything that you might have said in the last interview that with the hindsight you might have put it differently this time around.

JUDGE UNTERHALTER: I must say that the interview that I had last time is an interview that I do not think was and I must tell you quite candidly I fair interview. It fastened onto matters some of which I was taken by surprised and ambushed, which is completely conflict of the criteria of this
20 body. Others became the focus of deliberations, which simply failed to engage my record in its totality, and I do not think that is the manner in which this body is enjoyed to conduct itself. I do not think now you can say to me, well go back over your interview and is there anything more I should raise concerning it.

There were numbers of points raised and I am happy as I say to answer any points that are still troublesome in any way to you or to the JSC, but I do not think you can come to me and say please review your interview and have I had second thoughts. I have had thoughts about numbers of matters and I am very happy to engage with you if these are still issue of concern to the JSC.

COMMISSIONER NYAMBI: My last part judge, well I must indicate to you that your technical competency is not even an
10 issue it is outstanding, and your conceptual understanding of the law it is something that we marvel at and you are hard working as it has been reflected by the DP. But you are quite aware that there might be one or two previous cases of other judges about issues that going to JCC. But I am happy about the clarification that you have done. So, you can assure us that with that clarification there is nothing untoward that can just take us back if you can be appointed and join the SCA.

JUDGE UNTERHALTER: I am very pleased to hear that.

COMMISSIONER NYAMBI: Thank you, Judge Unterhalter
20 Thank you, CJ.

CHIEF JUSTICE ZONDO: Thank you. Commissioner Mmoiemang.

COMMISSIONER MMOIEMANG: Thank you Chief Justice. Good Afternoon Judge Unterhalter?

JUDGE UNTERHALTER: Good afternoon

COMMISSIONER MMOIEMANG: Just one question from my side. It relates to the recent judgment that you also raised the Blind South Africa v Minister of Trading Industry.

JUDGE UNTERHALTER: Sorry, I am not hearing which judgment you are referencing.

COMMISSIONER MMOIEMANG: The Blind South Africa v Minister of Trading Industry.


JUDGE UNTERHALTER: Yes

COMMISSIONER MMOIEMANG: What is significant of this
10 judgment as it pertains to the new regime that is being introduced in South Africa in relation to the Copy Right Act. Particularly its relevance to the disadvantage the society the judgment was made in their favour. Off course the other element will be you are not going beyond what the bench must do in the feeling by reading section 13(a) one gets a sense that you were legislating from the bench. Thank you.

JUDGE UNTERHALTER: I must say I consider Blind SA to be one of the more important judgments that I have pend. It concerns as you rightly say a constitutional challenge that
20 was brought to the Copy Right Act. It was brought by persons who suffer visual disabilities, and their complaint was this they said whilst people who do not have those disabilities it can have very wide access to literally works. There is a great scarcity of such works available to people who had these disabilities. The reason that that is so, is that under the Copy

Right Act the owners of copy right have to consent for formats to be created that will be suitable for persons with this visual disabilities. They said that was discriminatory and unconstitutional. Now, many people worry about the way in which constitutional rights should engage with questions of intellectual property. But out constitutional as I was saying earlier is foundational to all our endeavours including those that involve intellectual property. What I found in the case and what the Constitutional Court found as a whole was that
10 the way in which the Copy Right Act worked, and the kinds of rights that were given to copy rights owners in respect of literally works and how proper formats could be created for those with visual disabilities was discriminatory. Because it directly discriminated on the basis of disability, and the observation that I made in that case, which I think does bear some reflection is this. That sometimes in order to treat people equally you have to treat them differently.

That is precisely how this case came to be decided, which is that we cannot simply that the incident of certain
20 rights under the Copy Right Act are of invariable application by Copy Right Owners. It depends how they affect different classes of persons and where it has such a plain detrimental effect to those with a particular disability you sometimes have to do more in order to treat people the same. That is part of the importance jurisprudence around equality which a



fundamental feature of our constitutional jurisprudence and this is a contribution to that jurisprudence.

COMMISSIONER MMOIEMANG: Thank you Judge Unterhalter, thank you Chief Justice.

CHIEF JUSTICE ZONDO: Thank you Commissioner Marumoagae.

COMMISSIONER MARUMOAGAE: Thank you very much CJ. Good afternoon judge?

JUDGE UNTERHALTER: Good afternoon.

10 COMMISSIONER MARUMOAGAE: I want to speak to you about the judgment that you wrote and you were quite right and spot on it. I just want to deal with a different aspect for me. W v William Ashmen.

JUDGE UNTERHALTER: Yes, indeed

COMMISSIONER MARUMOAGAE: Obviously the case was there on your arrival and you completely dealt with it in the right way. That look section 2(b) is quite clear if somebody dies within 3 months then this is are the consequences of it and you do that quite well. I just want to deal with something
20 that when I read the judgment actually came out and I started thinking about it. When I read the judgment the person who wanted to benefit from the will the ex-spouse.

JUDGE UNTERHALTER: Yes.

COMMISSIONER MARUMOAGAE: Raised an issue that there maybe extraneous sort of circumstances that you

should read into in order to find in her favour. Right, I just want to pick your brain on this, that when one looks at the structure of section 2(b) it appears to be the provisions sir, it appears to be a limitation of freedom of testation in somehow. It allows the legislator to say under these circumstances we will read the will in this particular way

JUDGE UNTERHALTER: Yes.

COMMISSIONER MARUMOAGAE: With that thinking in line is there a scope to say but if the parties can bring that
10 extraneous sort of information the court can to some extent given how the testation has already been interfered with thus far. Is it possible that under those circumstances there might be some information that might lead a court to decide differently under these circumstances?

JUDGE UNTERHALTER: Yes, I think you have pin pointed a very important feature of the judgment and the issues that arise from the judgment. Section 2 has its purpose this notion which is that a recently divorced spouse who then dies
20 within 3 months of the divorce is unlikely to have wanted after a divorce on a settlement and a proprietary resolution of their different affairs to have wanted to continue to benefit the ex-spouse unless they have plainly provided for it in the will. Section 2 is an intervention that says that we will allow for the possibility that when people divorce they do not always change their wills and so this is a protective mechanism. It

is a protective mechanism which is intended to show a kind of fidelity to the testator will, because they recognise that amidst the turmoil of divorce, you may not as a divorce spouse have gotten round to changing your will, which he probably drafted in happier times.

So, hence the regularity intervention. What the appellants complained about was that they accepted the regularity intervention on the part of the legislator, but they said there should be a more expansive basis upon which one
10 could look to extraneous evidence for the purposes of understanding what did the testator really intend. What I found there is that there is not warrant in this kind of circumstance to look further than we would ordinarily look for the purposes of interpreting a will. Because the intervention is intended to treat the will in a particular way to treat the former the ex-spouse as if they had pre-deceased the testator.

The question is is there any reason then to adopt a different principle of interpretation of wills as we now do in
20 contract which is a much more expansive doctrine of interpretation and I found that there is very, very good policy that lies behind why we read wills in a highly restrictive way and I continued to apply that basic reasoning even in respect of the statutory presumption which is a regularity intervention, but professor you point out an important

question which is given that there is a regularity intervention, which gives rise to a presumption not to how the will actually reads but how it is taken to read. Should we then be more expansive as to what we can look at for the purposes of them thinking of the will I said no.

COMMISSIONER MARUMOAGAE: With your permission CJ can I just follow up?

CHIEF JUSTICE ZONDO: Yes.

COMMISSIONER MARUMOAGAE: You are right, you are
10 reading it spot on, and you are absolutely right, and I am asking you in this context. When you look at I am not sure if you are familiar with this. Section 37(c) of the Pension Fund Act which gives trustee of a pension fund a discretion to decide how the members of the benefit should be distributed. In other words, it completely takes away the, it throws it out of the window. So, I was just thinking along those lines to say are there circumstances where the court can be open to say, but looking at it, because the legislator has actually
20 guessed what the testator would have done during the course of 3 months before the pass of 3 months.

JUDGE UNTERHALTER: Yes.

COMMISSIONER MARUMOAGAE: So, in that sense I am just thinking is there not a way or room for the courts to think a little bit more purposely if you like?

JUDGE UNTERHALTER: I am worried about that approach.

because what it starts to allow for is a great deal of extraneous evidence to come in which is highly self-serving on the part of the surviving ex-spouse. To say all kinds of things as to what the testator actually intended. When the testator now dead cannot speak for herself which is precisely what happened in this very unfortunate case, and that is the policy reason behind being quite constraint in this sort of context which is to say we assume a recently ex-spouse did not want to benefit the partner who they had just divorced.

10 What I think one needs to think very carefully about, is does one really want to encourage a trial where the living ex-spouse now comes along and says. It was always understood that even though we were going to get divorced if one or other of us was going to die we still have fond enough feelings for each other that really I was intended. How does one run that trial practically speaking, and I think that was part of my concern.

COMMISSIONER MARUMOAGAE: Thank you very much, I really enjoyed that judge and by the way I was in your

20 completion law class at Wits. Thank you, very much.

JUDGE UNTERHALTER: I am not sure that was educative but I hope it was.

CHIEF JUSTICE ZONDO: Commissioner Dodovu?

COMMISSIONER DODOVU: Thank you, very much CJ.
Good afternoon Judge Unterhalter.

JUDGE UNTERHALTER: Good afternoon.

COMMISSIONER DODOVU: The matter that I am going to raise with you pertains to the interview that was held last year in April

JUDGE UNTERHALTER: Yes.


COMMISSIONER DODOVU: Where which an issue arose about where you presided over a matter at a level of the SCA and again on the same matter on the level of the Con Court.

JUDGE UNTERHALTER: Yes.

10 COMMISSIONER DODOVU: But be rest assured, I am not going to use it to penalise you

JUDGE UNTERHALTER: I am happy to address it, if you would yes.

COMMISSIONER DODOVU: Yes, I would not apply double jeopardy because I express a view then and that is water under the bridge. The reason that I am raising this matter, is because such mistakes are not permissible or are not needed especially at this particular level. We cannot afford to make such mistakes where a referee becomes a player or
20 a player becomes a referee you cannot do both things at the same time. Now what guarantees are you giving that going forward in the future for the interpretation of the future perspective that such mistakes are not going to happen again, especially from you a person of your calibre and reputation?



JUDGE UNTERHALTER: Thank you for the opportunity, because I am happy to deal with this point. The first is that I do not accept that it was a mistake and had I not been ambushed at my prior hearing I would have told you why it was not a mistake. It is a contentious question certainly, but I think that because the nature of the test that is applicable for the purposes of determining leave to appeal to the Supreme Court of Appeal and the test that is applicable for the purposes of appeal to the Constitutional Court, are not
10 the same. All though there are certain common elements, the fundamental overall question is quite distinctive

Therefore, the proposition that was put to me last time is simply not a simple proposition at all, as a matter of law but I do not suppose one really wants to investigate that. I do not accept in the first place that it was a mistake. The second thing is this, that to the extent that you suppose that I did you seem to elevate that to some very high level of problem. I am not certain that you fully appreciate the manner in which these two courts work. The volume of cases
20 that come for the purposes of considering whether to give leave to appeal in both these courts they are many voluminous and as was made plain last time. Nobody, nobody in the whole court know none of the people who assist us in determining these matters by way of clerks and the like, picked up this error

So, if it is an error which I do not accept, but if you say it is an error it is a collective error that was suffered by everybody. So, you must be saying of the Constitutional Court where the error occurred if it is an error that everybody is to blame. That is the second that I would say to you. The third thing that I would say is that it is not breaching a question of being a player and a referee. It is just being a referee into context, and they are different contexts. So, for all of those reasons I would suggest to you that while I accept
10 that anyone can make an error and everybody will know that, that can occur because these are big complex cases that come and often under conditions of urgency and pressure, but I do not believe that it is an error of a kind that characterise. I will say this, that I endeavour in all my work not to make errors if I possibly can and you can rest assure that I act diligently and if I have made an error I would be the first to acknowledge this and seek to repair it as quickly as possible.

COMMISSIONER DODOVU: CJ can I just follow up on this?

20 CHIEF JUSTICE ZONDO: Yes.

COMMISSIONER DODOVU: It is quite important. I do not precisely remember all the issues that were ventilated by that time. My recollection I as follows is that you acknowledge that you made a mistake and that is my recollection and I am putting it to you. That you acknowledged that you made a

mistake and that you should not have, you should have actually recused yourself at the Constitutional Court, that is my recollection on this particular ground. Let me just finish.

JUDGE UNTERHALTER: Please off course.

COMMISSIONER DODOVU: Listen to my question first so that you answer me comprehensively. For me this is quite important this is extremely important. I want to repeat it and I will tell you why I am repeating it. I say to you my recollection is that you acknowledged that this was a mistake
10 on your part you should have recused yourself, at a level of the constitutional Court. You saying here that you never said it is a mistake [intervenes].

JUDGE UNTERHALTER: That is not what I said.

COMMISSIONER DODOVU: Are you responding?

CHIEF JUSTICE ZONDO: Did you say something Judge Unterhalter?

JUDGE UNTERHALTER: I am sorry.

CHIEF JUSTICE ZONDO: Just wait until the commissioner is finished.

20 JUDGE UNTERHALTER: Please carry on.

COMMISSIONER DODOVU: This is quite problematic Justice Unterhalter I am saying to you that, that is my recollection that you said I might be wrong, my recollection might totally misplace me. I am saying to you that you said this was a mistake, you should have recused yourself at a

level of the Con Court giving the fact that you checked and you realised that you served at the SCA on the same matter. Now you are saying you never said that it is a mistake. Now my question to you would be if my recollection is correct what procedure and what view should I take about you especially when you got to elevated to the SCA. If my recollection and not yours is correct. Does it mean that you mislead this commission or not. Thank you, CJ.

JUDGE UNTERHALTER: If I may then answer the question
10 that you have posed. Your recollection is absolutely correct, that in the course of the interview after this matter was raised not in accordance with the criteria of the commission, it was done by way of ambush and it was deliberately done, because you may recall that one of your number asked a preliminary question to every single candidate as they came before this body without raising the issue with me in advance of time.

So, as a matter of what happened this body took me by surprise entirely contrary to the criteria that are of application. That is the first thing But when it was raised
20 as it was raised it seemed to me that there was a basis for the mistake and I was willing to acknowledge it as such, because I had not had time to reflect upon the question and it is a question of law. So, it is not correct which is your second proposition to me that I am now saying that I did not say it was a mistake. I am saying that now that I have had

an opportunity to reflect upon the matter, which is an opportunity I should have been granted last time I was here. I reach a different conclusion as to whether it is a mistake or to put it at its lowest. It is far from clear question as to whether it is a mistake as an objective question of law.

So, that is what I am saying, I am saying having now had the opportunity to reflect on the matter an opportunity I should have been given and was not given last time. I am not certain that the premise upon which I was questioned was
10 a correct premise. But if it was a correct premise then I say again that it was a collective mistake that was made by every single judge on the Constitutional Court, and I assume the purpose of your question is not to suggest that the Constitutional Court is made up with judges who should not be sitting in the court because they participated in the same mistake that I made.

COMMISSIONER DODOVU: CJ I really beg your indulgence because there are so many issues that I am picking up and I do not want to find myself in a situation where I have got to
20 make a decision and I have not encumbered all the necessary information.

CHIEF JUSTICE ZONDO: I will allow you to proceed, I was going to have a follow up question myself. So, let us hear.

COMMISSIONER DODOVU: Yes, I must say to you Justice Unterhalter. With what you are responding to me about I am

totally now in the dark. I am more confuse then how I was from the beginning. Firstly, let me just emphasise this point, it is such an important point. I will not judge you and I will not use the interview that was held last year to penalise you to punish you. All I wanted to know is that such a mistake will not be repeated because this where you are applying to is the second highest court in the land and people who got there must go through the eye of a needle if I may put that word. They must be thoroughly scrutinized we must certain
10 ourselves that this is the proper candidates, because of the nature and the complexity of the matters that it deals with. This is why I want to be certain, because there is no doubt in me that you are an emanant person. What I see is here is a person who can make an immense measure of contribution to the judicial to the bench at that level. I take that particular point.

I have got this particular issue that I canvassed with you, that is why I am beating this. I am saying to you my recollection is that at that point not now, at that point you
20 said two things

CHIEF JUSTICE ZONDO: Commissioner?

COMMISSIONER DODOVU: Yes.

CHIEF JUSTICE ZONDO: Remember that he said your recollection is absolutely correct.

COMMISSIONER DODOVU: With those answers I am now



confused now.

CHIEF JUSTICE ZONDO: He said your recollection of what happened what he said last time is correct. What he is saying is this, if I can explain as I understand it and he is there he will tell me if I am misrepresenting him. He is saying last year I was asked this question without any notice. He says I was ambushed. There was a discussion and at that time I took the view that there was a mistake, but he says since then I have had time to reflect properly and think about the
10 issues that relate to that question to what happened. I now say it was not a mistake. I accept that I said it was a mistake then, but there are circumstances under which I said it was a mistake. If you ask me the same question now and say to me was it a mistake, I am going to say to you it was not a mistake. That is what he is saying. Let us allow to ask, because I think he wants to ask what you want to ask if it is a follow up.

COMMISSIONER DODOVU: I am not like you, I have a paralegal training, which is where it ends, but it is extensive.
20 Now, you are saying now this is not a mistake and if it is, it is a collective mistake by the entire bench of the Con Court is this the understanding?

JUDGE UNTERHALTER: Well, what I have said just to be clear is that it seems to me that it is an actually a difficult question of law. My own view is that it is not a conflict, but



I acknowledge that there are others who would take a different view on the point, but the way it was presented to me last time was that I had placed myself in an irretrievably conflictual situation. I do not think that the legal premise is clear. My own view as a lawyer, is that it is not a mistake. I understand that others can take a different prospective on this as a matter of law. It had not been determined by a court of law and I can also accept if this will be helpful to you, that because it is not clear as a matter of law it is generally wise
10 I would think perhaps to step away in the Constitutional Court in these unusual circumstances. But if you want to know where I stand on the question of law, I do not think as a matter of law that it is a conflict. But rest assured that if you consider this to be a matter that in your conception was a mistake. It would be an issue if I could rerun it again that I would speak to my colleagues about and if it is a disputed question of law. It may be the more prudent thing to step away and I accept that, that is that might be the route to take.

COMMISSIONER DODOVU: Thank you, I am okay CJ.

20 CHIEF JUSTICE ZONDO: Thank you. It may well be that one can leave the questioning there, but I do not remember all the facts but what is in my mind about what the issue was, was that you had been involved in the SCA in a matter where you were you dealt with an application for leave to appeal. I cannot remember whether you had granted leave or you had

refused leave. But somehow the matter ended up in the Constitutional Court. I seem to think that you probably had refused leave because I think it was an application. Well, it might have been an application for leave, either way. It was an application for leave in the Constitutional Court as well. That you had taken part in the decision in adjudicating that application for leave in the Constitutional Court. That is what is in my mind and the question that had arisen was whether it was right for you to take part in adjudicating that application for leave in the Constitutional Court in circumstances where you had also taken part in adjudicating the application for leave in the same matter in the Supreme Court of Appeal.

Now, my recollection too is similar to Commissioner Dodovu one that the final position as I understand it was that you said look it was a mistake, maybe it was an oversight, it was a mistake. What I do recall also is that arising out of that experience I suggested that we introduce a new thing at the Constitutional Court where in regard to each new application that arise. The judge who prepares a memo and circulates to all the judges to say what his or her recommendations are that at the top of the memo all the names of judges who have been involved in the matter at different levels before it comes to the Constitutional Court should be listed.

So, that it is going to be easy for everybody to see if anyone of the Con Court Justices or acting Justices has been involved before. That is my recollection of what happened and what steps I took to try and make sure that, it will be easy to see if somebody has been involved before. Is my recollection correct as well?

JUDGE UNTERHALTER: Chief Justice your recollection is absolutely correct.

CHIEF JUSTICE ZONDO: Yes.

10 JUDGE UNTERHALTER: I did acknowledge as I said in answer to the question that it was a mistake at the time it was raised. I have explained that I think the question is to whether refusing leave in the SCA is dispositive: what the question is to be answered at the Constitutional Court, is not the case, but that is a question of law and it has never been determined in our jurisprudence. Indeed, Chief Justice, you did indeed institute a procedure to make sure that it was known if an acting judge justice had previously dealt with a matter in the SCA, and that is now a routine part of the papers
20 that come.

CHIEF JUSTICE ZONDO: Yes, okay. I do not know Commissioner Xaba still has a follow up?

COMMISSIONER XABA: Well Chief Justice, my question was going to be craps.

CHIEF JUSTICE ZONDO: Yes, please go head.

COMMISSIONER XABA: In the sense that since you have engaged and I you know you left me in the dark as to what your position would be if a similar situation were to arise. The question is, will you recuse yourself, that is the question simple and straightforward

CHIEF JUSTICE ZONDO: No, I think it is an important question.

JUDGE UNTERHALTER: Yes, I think it is an important question, and I think the answer to the question is this. That
10 since the question of law has not been determined and there are different views as to what the law is on this subject. It would almost certainly be after discussions with colleagues the approach to take which is err on the side of caution and step away from the case as a pragmatic matter. If that is the view of colleague then that is exactly what I would do

CHIEF JUSTICE ZONDO: If for whatever reason you were to decide either because of what your colleagues sitting with you in the matter say or of your own to participate. Would you invite the parties to make submission on whether you
20 should participate?

JUDGE UNTERHALTER: I think that might well be prudent. It may simply be as I have said a pragmatic answer which is to say that since one does not want to raise questions law or for the purposes of getting on with the business of the court. One could probably simply speak to colleagues and see

where they stand on the matter and if it is a disputed question of law, which is unnecessary to determine. Then simply pragmatically step away unless there is some reason why one needs to participate and if there was some reason to participate it would probably be useful then to secure the use of the parties.

CHIEF JUSTICE ZONDO: Off course this kind of situation if you are at the SCA to only arise in respect of a matter in which you were you were previously involved in the High
10 Court.

JUDGE UNTERHALTER: Well, I think Chief Justice this is a highly unusual circumstance which really only arises because I was in the SCA in one period and relatively shortly thereafter went to act in the Constitutional Court that sometimes happens and it could happen again. It is that move from being in one court and acting in another that gave rise to the problem and that is not the most usual circumstance.

CHIEF JUSTICE ZONDO: Part of my earlier concern was
20 is that the basis on which the matter had been disposed of during the last interview. For me made it easy to say look, this is unlikely to happen, because Judge Unterhalter accepts that it was a mistake or it was an oversight. So, it is not he will it is not easily going to happen, but where somebody says no it is not a mistake, you get worried that if a similar

situation happens he might then sit, because he does not see anything wrong. So, you start thinking about that, but I think the answer you have given that you think it will be prudent irrespective of whether legally it is correct or not, it will be prudent to not to participate. And that if you were to participate probably you would look at inviting the parties to make submission about whether you should participate or not. Probably that might assist in making sure that the matter would be dealt with transparently.

10 JUDGE UNTERHALTER: Indeed Chief Justice, I completely agree. What this illustrates is that if the issue had risen it would be a matter for discussion with colleagues as these matters often and generally are and one would be guided by what colleagues have to say on the subject and quite naturally if there is a sense that there is no point in resolving a disputed question of law where my participation is not needed for the purpose of deciding the case. Well, then off course pragmatically and sensibly that is what I would do. The matter would rest there.

20 CHIEF JUSTICE ZONDO: Thank you. Commissioner Notyesi and then I have got Commissioner [intervene]

COMMISSIONER MALEMA: Chief Justice I just wanted to make a follow up?

CHIEF JUSTICE ZONDO: Who is speaking, virtual platform I have recorded you. Commission Malema, you want to follow

up, please go ahead.

COMMISSIONER MALEMA: Just a quick one. The question is not about what are the views of your colleagues if the matter was to repeat itself. What is your conscious view as we stand down before you get canvassed by different colleagues if the matter was to repeat itself. We want to know where you stand now not what you are going to do, because before you go to the colleague, you have got your own clear conscious position of wanting to participate or not
10 wanting to participate and being persuaded otherwise by colleagues. Having discussed this now and in the past, where do you stand now, not what colleagues say when the matter rises in the future. That is what we want to understand?

JUDGE UNTERHALTER: I hope I have been very clear, my view is a matter of law is that it did not give rise to a conflict of interest. But I am aware of the fact having thought about it quite carefully that other judges and lawyers could take a different view

20 **MECHANICAL INTERRUPTION**

COMMISSIONER NOTYESI: I in fact intended not to ask any question from you, but because of this debate and unfortunately I am the one who asked you this question last time. There is something which discomforts me

CHIEF JUSTICE ZONDO: Please speak up commissioner.

COMMISSIONER NOTYESI: Yes, there is something which discomferts me, because you gave an answer this is the record this what you gave you said at that time to the question. Because the question that was asked was purely a procedural question, whether a judge can sit over a matter in the SCA could sit over that matter in the when it is in the CC. This was your answer, even as an appeal from the SCA the answer would I think be not unless that, unless there is some distinctive feature of the case but no, I think the answer
10 would I think be not, be no that is the answer you gave. When if you were ambush it could have been the production of the actual order, but the question itself it cannot be an ambush. It is just a procedural question. Now, I am worried about the answer now that you give compared to this one, because my understanding was that you simply acknowledge that look because this is an answer that you gave to me at that time. My expectation was look it was a mistake based on the things that you talk about, I mean the volumes of cases that are coming in and everything.

20 But it seems to me now you are taking it further to say well, because there is a different test that is applied and then it would be legal about it. That is where my discomfort is, if you can just.

JUDGE UNTERHALTER: Well, I have explained this position now probably four times over and I can explain it

again. I acknowledge and I have acknowledged at least three times that what the position that I took at the last hearing was the one to acknowledge that it was a mistake. I have had occasion to reflect on the matter, I think it rests on a quite difficult question of law, which has never been resolved and therefore my own view and it may be wrong is that I do not think it was a mistake. But I could be wrong and as I have acknowledged because it could be a disputed point of law I would consult with colleagues and I have given my
10 answer. So, I am not certain what, I am not rowing back from what I said last time. I am saying that the premise of the question that you posed was that it was a mistake, and that is why you thought I should not have sat. I am saying that the legal premise is not correct, but I do not think I can go, there is nothing more I can say on this.

COMMISSIONER NOTYESI: I understand now, I think we got it clear, I understand your position.

CHIEF JUSTICE ZONDO: Thank you. The last one on my list is Commissioner Marumoagae.

20 COMMISSIONER MARUMOAGAE: Thank you very much CJ Judge Unterhalter, I thought when the issue was raised you would say look this was unfortunate and we leave it there and we proceed with the interview. But your answer now concerns me, you are quite right it is a legal issue, but I will take it further. In fact I think it is a constitutional issue in

the sense when somebody applies to the Supreme Court of Appeal and you are one of the judges who are allocated to deal with the matter, the intention that as a litigant I have is those two judges will consider my papers. They will read my papers quite carefully and they will apply their minds on my papers and then make a decision. Usually when the Supreme of Appeal dismisses the matter they do not give reasons, right without a hearing off course. They will not give reasons.


Now I get an order that says my application has been
10 dismissed and I am like okay I do not agree with what the judges are saying, I do not know why they dismissed the application. But you take it like okay I think they have erred then I go to the higher court and when I go there one of the things that I put on my papers is those two judges erred. So, I am going there, because I am expecting different judges to look at the matter. Now the impression that I have is I go to the higher court, those judges at the higher court will be different judges. Who will look at the matter and one would think that if there is a judge who was at the lower court who
20 was at the time when I brought the matter there and that judge is confronted with the same papers. If this judge really looked at my application there will be something a paragraph or something where the judge can say I might have seen this.

Let us say there as an error and you did not because it is possible, we are all human. The point I am putting is the

difficulties herein lies the difficulties that I am expecting different judges to look at this thing, but only to find out that one of the judges who had already pronounced on the matter, is on this panel. I think that is where the difficulty is, when the Chief Justice ask you whether if the matter can arise will there be a possibility of asking the parties to make representations. That also is problematic. One would think that look I have done the matter I take myself out, I think head we left it there it would really have assisted, but that is
10 just my concern, thank you.

JUDGE UNTERHALTER: Well, if I may very briefly respond The expectations of litigants is one thing, but what is the law is another. The matter that is being considered by the Constitutional Court for the purposes of deciding whether to grant leave to appeal is not the same matter as what is being considered by the Supreme Court of Appeal. The test is different and the considerations are different. I have in some sense sought to elucidate some of that in a recent judgment. So, whilst I understand the prospective that you bring as to
20 what might be the expectations of litigants the question at the end of the day is whether the matter is the same and the proposition as I have put is that the matter is not the same and consequently does not arise.

But I have accepted entirely that lawyers can take different position on this proposition and I could be wrong,



but at the end of the day one has to have a view as to what the law is and that is my view and I can be persuaded that I am wrong and if I was persuaded or if it was pragmatically relevant to simply avoid having to deal with the legal point at all, I would be.

COMMISSIONER MARUMOAGAE: No, no thank you Judge thank you Mr CJ.

CHIEF JUSTICE ZONDO: I know that we want to finish, but I have a feeling that it would not be right for this just to be left just at this. What I am talking about is, you have been saying to us legally it is not clear that if a judge sat in an application for leave to appeal at the Supreme Court of Appeal and subsequently an application for leave to appeal is made by one of the parties in the same matter to the Constitutional Court, you say it is not clear that legally the judge who sat in the same matter in the SCA should not sit in the Constitutional Court. That on the face of it sounds quite strange to me.

I hear that now you are saying it is not the same issue, but the fact of the matter is, it would be you have two parties who have a dispute against each other. This dispute might have different issues that is the same disputes. They take it to the High Court, they take to the Supreme Court of Appeal, they take it to the Constitutional Court, they want to resolve this dispute between them, but the one court might use one

issue to resolve it, and another court might resolve another issue. But these are all issues in the same disputes. How can it be that legally a judge who had sat in the SCA and adjudicated an application for leave to appeal in that dispute can also sit in the can possibly sit in the Constitutional Court and adjudicate one or other issue in the same dispute?

JUDGE UNTERHALTER: Chief Justice there.

COMMISSIONER SINGH: Chief Justice.

CHIEF JUSTICE ZONDO: Sorry?

10 COMMISSIONER SINGH: I thought before the judge responds because I am going to be just following up on your question.

CHIEF JUSTICE ZONDO: Commissioner Singh.

COMMISSIONER SINGH: So, I am quite confused, so then he can give one response to it.

CHIEF JUSTICE ZONDO: Yes.

COMMISSIONER SINGH: Because I am quite, thank you Chief Justice. Chief Justice, I am quite confused, you know I am not a lawyer, but for me it is just common sense one
20 cannot be a player and a referee at the same time. In this case as you quite rightly said Chief Justice. The matter was the same it was leave to appeal, and leave to appeal was refused where Judge Unterhalter sat in that matter. When the matter came to the Constitutional Court he sat in the matter without recusing himself. Now, one would think that

was wrong from a common sense point of view and for me it is not law, but it is just common sense that one has to recuse themselves if they had been part of an earlier decision. That is all I have to say on this matter, thank you Chief Justice.

CHIEF JUSTICE ZONDO: Thank you. Just go back to my question, I was saying Judge Unterhalter.

COMMISSIONER MALEMA: Chief Justice.

CHIEF JUSTICE ZONDO: Commissioner Malema.

COMMISSIONER MALEMA: Yes, I was in the same spirit
10 saying that before he responds whereas I should also add something on that one because he says the legal issues and expectations of the litigants are two different things. But my question would have been as a follow up adding to what you asked. What is his appreciation of justice must not only be done, but must be seemed to be done. You have fear for a person who reject your leave to appeal, you go to a higher court and then he says there is no the law is not clear about that, I sit on the same matter. What happens to the principle of justice being seen to be done, will I see justice being done
20 in the context of him sitting on this matter rejecting their leave and then going to sit on the highest court to listen to the same matters. That is what I wanted to add to your question, thank you

CHIEF JUSTICE ZONDO: Thank you. I know they are different questions now Judge Unterhalter you tell me if it is


confusing, but I started off by simply saying I understand you to be saying when you sit in the Constitutional Court it is a different issue not the same as the issue you dealt with in the Supreme Court of Appeal. But I was saying the dispute might be the same but it has different issues. So, you are sitting, if you sit in the Constitutional Court, having sat in the Supreme Court of appeal it would seem to me you are sitting in the same matter the fact that in the SCA the issue was different it was the same dispute, that would be my approach, why do you think one can sit never the less because it is a different issue in the same dispute?

JUDGE UNTERHALTER: From my prospective the question is not whether it is the same dispute, it is the same dispute. The question is what is the test for leave to appeal. The test is distinctive, the considerations are distinctive and therefore the issue is whether in coming to a conclusion as to leave to appeal in the SCA. Has one pre-amped and as it were pre-decided the question is to what is the test and what is the application of that test in the Constitutional Court. It is different and therefore I do not see the conflict, but I understand that this is somewhat rarified question of law about which reasonable lawyers and fairly Chief Justice you and I and with complete difference to you, I understand there is a different view on the law on this subject. I hold a different view, I may be wrong, and precisely because I

recognise that my view of the law may be wrong, but I would obviously consult about it and would take whatever is the pragmatic approach in order to avoid an issue which is unnecessary.

CHIEF JUSTICE ZONDO: One of the issues that both the Supreme Court of Appeal and the Constitutional Court would look at when these two courts consider an application for leave to appeal is prospects of success. Prospects of success, means looking at the merits. What the chances are
10 that the applicant for leave to appeal will succeed if leave is granted. So, that particular issue, if you sat in the Constitutional Court, you would be looking at it for the second time, is it not?

JUDGE UNTERHALTER: It all depends, because the question in the Constitutional Court is whether there is a legal question or a constitutional issue. That whether there is a legal question of public importance to be resolved, or there is a constitutional issue. Now, I accept that there could be circumstances in which that was the issue before the SCA,
20 in which event there would be a coincidence of issue and therefore one would be conflicted out in that circumstance. But it is not the case that is true in every single case, so for example if the question is the interest of justice that is a consideration relevant to the Constitutional Court, but the SCA said it is not a consideration relevant to the SCA.




CHIEF JUSTICE ZONDO: Off course the SCA has got constitutional jurisdiction and can consider constitutional issues as well, which may end up going to the Supreme Court of Appeal and it can consider questions of law which can end up in the Constitutional Court as well. We all know that?

JUDGE UNTERHALTER: They can be. I am not for a moment suggesting that there are not circumstances in which it could be the same issue in which event there could be a conflict and it might warrant a recusal. I am saying though
10 that it is not an inevitable feature because the test for leave to appeal are distinctive and hence the issues relevant for the determination can and sometimes are distinctive.

CHIEF JUSTICE ZONDO: Yes, thank you, very much Commissioner Malema, asked the question asked you to comment on the dictum that justice must not only be done, but must be seen to be done whether if now in the Constitutional Court you were to sit and adjudicate the application for leave to appeal which you adjudicated in the Supreme Court of Appeal. Whether how that would affect the
20 perception of justice in terms of people saying is this justice He wanted to hear what you have to say about that?

JUDGE UNTERHALTER: Well, the test for recusal is very well understood as to what a litigant might reasonably understand on the basis of the correct fact and a correct appreciation of the law. There are two principles that apply



you have to you cannot recuse yourself generally simply because a litigant feels that you should go. You have to apply the law of your recusal, and I am saying that the law of the recusal here would be responsive to what is the issue and what is the relevant test of application in the two courts and only once had appreciated those questions could you concretely determine whether there was a conflict and whether there was a perception on a reasonable basis with the proper appreciation of law and fact as to whether recusal
10 is required. Recall if I may Chief Justice, because we are having a very lengthy discussion about this matter. That the way this was put to me when I was last here. Was it is an obvious conflict, you were clearly mistaken and you had to recusal yourself an it is a grave error that you made That is what was put to me when I was last here.

CHIEF JUSTICE ZONDO: I think there was another commissioner who had a follow up or put a follow up earlier on, but probably you have answered it, because I do not see an indication. I think if it is possible I would like Justice
20 Petse to be the last one on this.

DEPUTY PRESIDENT PETSE: Noted, Chief Justice, I do also, not necessary being the last of I am happy to refer to Justice Petse as the last.

CHIEF JUSTICE ZONDO: I was saying on this, otherwise I got you on my list.



DEPUTY PRESIDENT PETSE: Yes, I do have something on this point, but I will defer to seniority

CHIEF JUSTICE ZONDO: Okay.

DEPUTY PRESIDENT PETSE: Judge Unterhalter, I just want to come from a different angle on the same facts you considered an application for leave to appeal in the SCA, you refuse it. Would it then be appropriate if the same litigant were to be in section 17(2)(f) application for reconsideration of your refusal to consider the re-consideration?

10 JUDGE UNTERHALTER: No, it would not be because the same issue that arises for consideration, so there you could not sit twice

DEPUTY PRESIDENT PETSE: Thank you, thank you Chief Justice.

CHIEF JUSTICE ZONDO: Thank you. Commissioner Marumoagae, I have got you here but I think.

COMMISSIONER MARUMOAGAE: I am covered thank you

CHIEF JUSTICE ZONDO: You are covered, thank you
Then it is Commissioner Ngcukaitobi.

20 COMMISSIONER NGCUKAITOBI: Thank you, Chief Justice. Justice Unterhalter you know when I was a junior I use to watch you argue cases with a lot of skill and a lot of admiration on my part. It struck me in the course of listening to you today on this point that one of the skills I enjoyed specifically is that you did not give up on a point. You know

Justice Unterhalter, the thing is that even when a point is initially appeared hopeless you argued it in the High Court and you ultimately prevailed in the Constitutional Court. We ask for a record of the JSC deliberation in the High Court. The point was hopeless, everybody said the point is hopeless. You know we won 11/0 at the Constitutional Court. But it just struck me now that actually you were playing the role of advocate, but today you are trying to get a job at the Supreme Court of Appeal as a judge.

10 Maybe there are scope for concessions here and there, because it is a different position that you are trying to get that. So, in that spirit then I just want to just remind the actual facts of what happened on the last occasion. Because I am now going through the actual transcript and I think there has been a conflation of two things not intentional I think everybody has acted *bona fide*. What you considered was an error is that you were not factually aware that you had sat in the SCA when you sat in the Constitutional Court. That is what you said twice was an error. What you did not concede
20 that it was a legal wrong. So, today you have been arguing that it was not a legal wrong, but there is no problem in making the legal concession without all the facts going back, because on the facts you said it was an error, because I had not been aware. That is what today you are saying is a collective error. It is the lack of factual appreciation that you

have sat in both, that is what fell through the cracks.

JUDGE UNTERHALTER: Indeed.

COMMISSIONER NGCUKAITOBI: So, in the light of that I mean there is actually preferably reconcilable factual premises here in terms of what you said then and what you said here. I felt uncomfortable with Commissioner Dodovu saying have you mislead the forum this body. That is why I actually went to see what did you say which is different, and I do not see what the differences are. So, I will just like to
10 encourage you not to argue the point and for us to move on from the point. I think the general view is that whether you are right or not, this is not going to be decided by the Constitutional Court. You are no longer an Advocate Unterhalter, you are Justice Unterhalter.

JUDGE UNTERHALTER: I thank you for that intervention I accept entirely that I did not appreciate at the time that I sat on the matter in the Constitutional Court that I had sat on it on the SCA. I just simply did not recognise that was the case and I said so last time and I say so again. Nobody else on
20 the Constitutional Court recognised it either and in that sense it was a collective failure. What the legal position is in circumstances where this does happen because of the lack of appreciation of the fact that I sat previously is a disputed question of law and I have had everything I could possibly want to say on that score

COMMISSIONER NGCUKAITOBI: I think it is enough to say it is a disputed question of law, I think what I was to resolve was the factual issue of what happened. I think we are together there. Chief Justice, I do have a legal question to pose to the candidate.

CHIEF JUSTICE ZONDO: Please go ahead.

COMMISSIONER NGCUKAITOBI: Yes, thank you. The judgment you wrote the minority judgment in Eskom.

JUDGE UNTERHALTER: Yes.

10 COMMISSIONER NGCUKAITOBI: Yes, would you regard that as a hard case in the [indistinct] sense that there would have been two permissible outcomes, because the way you describe in your application is that the majority adopted the consequential approach.

JUDGE UNTERHALTER: Yes.

COMMISSIONER NGCUKAITOBI: You by contrast examined the substantive content of the right and if the claim of the applicant could it be located in the substantive content of the right the consequences hardened they may be and that is the
20 hard case according to [indistinct] we had to live with those. Now, there is a lot to be said about the majorities approach in the context the new South Africa finds itself. The anxiety in which the courts feel disempowered. Why should you not intervened when we can see so much suffering and so much misery which we can resolve by a piece of paper. So, I do



want to just look whether that judgment is a reflection of your philosophy and you would approach similar hard cases in the future. Because only one version the [indistinct] approach is devoid of principle or maybe not principle maybe legal principle that is devoid of empathy

JUDGE UNTERHALTER: Yes.

COMMISSIONER NGCUKAITOBI: That could be a point to be raised, but on the other hand say well in order for the law to keep its credibility it has to reside ultimately on legal principle and that is what is actually is important as a teacher. So, is that a reflection of your philosophy, it is one of things that I do not understand is, is why you had to go through all of that it is hundreds of pages, but it was an interim interdict application. I wonder whether if we had a full application on disputed clear rise issues, whether your prospective would have changed in that case or because maybe that is what would have happened instead of the matter been decided on very difficult philosophy questions of law on an interim basis, it should have simply been left to the final judgment.

JUDGE UNTERHALTER: Yes, well I am glad the Eskom case has come up, because I think of all the cases that I have written about. That was the case that is a truly, truly hard case and it is a truly hard case, because the reduction in the supply of electricity to that community was giving rise to very,

very considerable hardship and indeed probably immiseration of people who were very vulnerable. So, it is incredibly difficult when you get a case of that kind, to say well surely that is the moment you just intervene and provide a remedy perhaps an interim remedy is to try and alleviate the immediate harm. That is why it is a hard case and the majority of the Constitutional Court said in affect we look at the harm and we determine the right by reference to the harm.

Now, I think and three other justices of the court
10 agreed with me on this point which is this. That and it too I think points in the one is a point really around the division of powers. Too often the courts are being asked to resolve problems that under our constitutional order are actually the constitutional responsibility of other organs of state. In this case what is highlighted is that it is the municipality the Constitutional Court has previously held that has the responsibility for dealing with those very conditions and the risk of displacement which is to say court should decide and resolve every hard consequence of what happened through
20 various species of government failure is a temptation that I think one needs to be very, very careful about.

So, I firstly raised the question around separation of powers. But the second and maybe this does reflect my judicial philosophy is this. That the key feature of our bill of rights is that one has to understand what they say, what their



content is, because it is so important to the work that those rights has got to do, and what they do not say. One has to work out what is a litigant claiming and what is a litigant not claiming. It seem to me and it seem to those who agreed with me, that is the correct starting point as lawyers and what courts must do, is not simply say I have to intervene because the consequences are harsh, unless the test involves a consideration of consequences. I must start with where is the right, and if that is considered to be too lawyerly a view
10 I do not think it is, because the liberating aspects of our constitution must both begin with an understanding of what the rights are about. But they must also appreciate what courts can do and what they cannot do, and that I am supposed why the Eskom case is important and why it is somewhat reflective of my philosophy.

COMMISSIONER NGCUKAITOBI: Just one more point Chief Justice. I think I mean I get your point that you got to look at the text first and try and locate the right in the text. That I see, I wander whether because when you look at the
20 majority instead of derivative right, it is not right to electricity, right. But electricity implicates a number of other rights. The right to dignity, health, education etcetera. So, what they do a derivative exercise and I wander whether in fact there is a distinction in the approach that in principle versus consequentialism in the approach of the minority and

majority. I wonder whether we needed this in an interim interdict application, whether it should have just be kept for later.

JUDGE UNTERHALTER: It may well have been the pragmatic answer to say let us all come back against the fuller facts and resolve these ultimate questions of right. But it did seem that an answer needed to be given, because it had systemic consequences for the country as a whole. If the majority found the municipality in this instance was permitted simply to avoid its constitutional duty and Eskom would be required to supply irrespective of whether there were any rights to assert. It has a massive impact both upon Eskom about what happens across the country. So, I think that was part of what went into the consideration of this as an interim interdict.

As to the question of the derivative right, I agree that it is a significant part of how to think about this problem, but the difficulty I had with that notion was this. That particularly when one is talking about positive rights as we know they feature in the bill of rights on the basis of what is reasonably required of the state. So, to dictate the means is seemingly pre-emption of what the station is given the liberty to determine for itself. I thought that was problematic in at least the derivative components of the case that was raised.

CHIEF JUSTICE ZONDO: Thank you, that was the last

commissioner on my list.

COMMISSIONER STEINBERG: I have raised my hand.

CHIEF JUSTICE ZONDO: Sorry, sorry you did raise your hand, I did not write you down, go ahead.

COMMISSIONER STEINBERG: Good evening judge.

JUDGE UNTERHALTER: Good evening.

COMMISSIONER STEINBERG: Just to say that on the very last point you made I acted in the High Court in Pretoria just after that judgment came out, and I think was faced with two
10 interdicts around cutting electricity and I was obliged to say that well you know Eskom must supply the electricity. I did fear what your judgment I think had anticipated was a terrible opening of a floodgate. I did wonder how Eskom can possibly hold up if the court is intervening to tell us on a fairly arbitrary basis where it cannot load shed or it cannot cut off supply. So, I experienced the difficulty in the court.


JUDGE UNTERHALTER: Yes.

COMMISSIONER STEINBERG: I wanted to I really wanted to come back to the substantial contributions that you have
20 made to the development of our law. Which the reports we get from the law bodies are unanimous I do not think anyone really disputes that. I want to focus on two the one is really procedural and I think it is the judgment you might have been referring to in the previous debate. I think it is TKW Agriculture.

JUDGE UNTERHALTER: Yes.


COMMISSIONER STEINBERG: Where you did start to distinguish on behalf of the SCA, the difference between the jurisdiction the apparent jurisdiction of the two in court. I for one welcome that judgment at a very pragmatic level and that is off course it is created a far greater level of certainty to those of us in practise and I think for the High Court as to when an interim order maybe appeal to the SCA. I wanted your comment on that, that being a procedural case. Just a
10 question on development of law at a substantive level. We have asked previous candidates about how we infuse contract law with constitutional values. You have written quite a consequential judgment in that regard in the SCA the Capitec Carl Lagon. I like you to talk specifically about that judgment but also a little bit more detail as to how in a country like South Africa with some of the most terrible inequalities in the world. We deal with *pacta sunt servanda* and at the same time infuse the law with our constitutional values.

20 JUDGE UNTERHALTER: Yes, if I may take those questions in sequence. Firstly, on the question of Eskom, and its consequences, one of the significant features which certainly figured largely in my consideration of that case. Is that there is a very, very detailed regularity structure which governs Eskom and gives rights of recourse to parties including the



parties who came to seek interim relief. One should be very, very careful about disregarding what parliament has set up as a regularity structure for the determination of the obligations that Eskom has. Again, it seems to me on separation of powers questions one should be very, very cautious about say on the consequentialist form of reasoning we will just accept that Eskom has to do certain things even though parliament has created a very, very significant regularity system which includes the opportunity to raise the
10 very kinds of issues that the applicants did in that case. So, I just raise that as another point which is why the consequences of the Eskom judgment are ultimately ones which burden Eskom in ways where an entity that is in the public interest of everybody to be an effective provider of electricity is set upon with huge problems. The questions is did we make it better or worse. In my own view we made it worse, and I do not think that is something a court should likely do. There is another view and I accept that.

The second if I may on the question of the standard of
20 appeal. I went to some lengths in that judgment in the appeal court. To explain something else which I think is extremely important about the constitution and the way in which we adopt standards. Which is that the rule of rule requires that there should be clarity as to a matter as important as whether you can come to the Supreme Court of Appeal on appeal. I



vised the concern that both High Courts and litigants was simply taking their chances in every single kinds of case to bring their cases to the SCA. That what really counted at least in the SCA was the issue of finality and the tripartite consideration under Zweni. I made special reference however, if there is a hierarchy of consideration here. The High Court must generally speaking finalise the cases before them. If they are finalised and there is a point worthy of consideration on appeal they can come to the SCA. What the
10 role of the Constitutional Court is, is not to become a court of general appeal, but to pick carefully as it does those cases that specially require the Apex Court to give consideration to the matter. It is not the court that you go to as in every single case. That is why I sought to make clear what the relationships are between these three levels of courts. What are the kinds of comity issues that should be respected as between those courts. Why the Constitutional Court is special and should be given a very wide scope within which to pick what it spends its very precious resources on
20 determining. That is the effect of that case.

Lastly, in respect of Capitec and the question of how does one infuse as it is so often said the values of the constitution into the common law. I think that is so easily said but concretely how you do it is very, very much more problematic. I you may think this is a degree of ridicules

that Justice Vroonman underestimates that they should not be thought of in the same way.

If you ask me the question as to whether not just in this country but in many, many countries. That one does not want to develop a doctrine around how parties can engage in contracts without regard to the relationships of power that exist as between them. I would say there is a doctrine that require some deliberation. The existing law of contract already holds many of these principles as part of what it
10 does. What the law of misrepresentation is about is partly about exploiting power which you are not entitled to in the context of contracting and one can say the same of mistake and a variety of other doctrines in the law of contract. But the question is against the principle where do you go further. In my own view is that it should not simply be consigned to this notion of public policy, which has just become a tag for not actually explicating the really important questions about what is a constitutional theory of contract. That is my view about that point.

20 CHIEF JUSTICE ZONDO: Thank you, thank you. We will keep this candidate very long it is half past 7. I think we have come to the end of this interview Judge Unterhalter. Once again thank you very much for availing yourself for the interview. We appreciate it, you are now excused

JUDGE UNTERHALTER: Thank you, very much.

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JSC - rb
2023-10-02

69

JUDGE UNTERHALTER

CHIEF JUSTICE ZONDO: Thank you.

INTERVIEW CONCLUDED



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OFFICE OF THE JUDGE PRESIDENT

KWA ZULU-NATAL DIVISION OF THE HIGH COURT, SOUTH AFRICA



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23 January 2024

NORTONS INC
JOHANNESBURG

Per Email

Dear Sirs

**RE: REVIEW OF THE JUDICIAL SERVICE COMMISSION'S DECISION IN
RELATION TO THE APPOINTMENT OF JUDGES TO THE SUPREME COURT OF
APPEAL**

Your letter dated 4 December 2023 refers.

My office did not receive your letter dated 29 November 2023. By the time I received this letter, you had already issued and served the papers on Judge Masipa.

Nonetheless, I have no objection to you citing Judge Masipa on the papers.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'T Poyo Dlwati'.

Judge President T Poyo Dlwati
HIGH COURT OF SA: KZN

A handwritten signature in black ink, appearing to be 'J' followed by a flourish.