

CANDIDATE : JUDGE TATI MOFFAT MAKGOKA

APPLICANT: JUDGE TATI MOFFAT MAKGOKA

COURT FOR WHICH APPLICANT APPLIES: SUPREME COURT OF APPEAL

1 The candidate's appropriate qualifications

1.1 The candidate holds the following academic qualifications:

1.1.1 B PROC degree obtained in 1992 from the University of the North.

1.2 The candidate has additionally completed:

1.2.1 A seminar on Intellectual Property Rights and Public Health, in Elmina, Ghana; and

1.2.2 A Judicial Retreat on Money and People Laundering, in Swakopmund, Namibia;

1.3 The candidate has a long career in law:

1.3.1 In 1992 – 1993, the candidate completed his articles of clerkship in Pretoria;

1.3.2 The candidate completed a practical legal training course from January 1994 - June 1994;

1.3.3 The candidate was admitted as an attorney in July 1994;

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- 1.3.4 The candidate practised as an admitted attorney from December 1994 – 25 August 2009;
- 1.3.5 During 2006 – 2007, the candidate served as a member of the disciplinary committee of the Law Society of the Northern Provinces;
- 1.3.6 In 2007, the candidate sat as an acting Judge of the High Court (Transvaal Provincial Division);
- 1.3.7 From 2009 to date, the candidate has sat as a Judge of the High Court (Gauteng Division, Pretoria);
- 1.3.8 In April 2015, the candidate sat as an acting Justice of the Lesotho High Court, Constitutional Division;
- 1.3.9 During June 2015 – November 2015, the candidate sat as an acting Judge of Appeal in the Labour Appeal Court;
- 1.3.10 During June 2016 – November 2016, the candidate sat as an acting Judge of Appeal in the Supreme Court of Appeal; and
- 1.3.11 In November 2017, the candidate once again sat as an acting Judge of Appeal in the Supreme Court of Appeal.

2 Whether the candidate is a fit and proper person

- 2.1 The candidate is a fit and proper person.
- 2.2 In this regard:
- 2.2.1 The candidate has sat as a Judge of the Gauteng Division, Pretoria, since 2009;

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- 2.2.2 There are no circumstances known to the candidate that may cause him embarrassment in undertaking the office of a Judge of the Supreme Court of Appeal;
- 2.2.3 The candidate has never been convicted of any offence involving dishonesty, violence, or any other disreputable or dishonourable conduct; and
- 2.2.4 No legal professional body has ever found the candidate guilty of any unprofessional or disgraceful conduct.

3 Whether the candidate's appointment would help to reflect the racial and gender composition of South Africa

- 3.1 Currently, the SCA comprises of twenty-two permanent Judges. Five are black women, eleven are black men, one is a white woman and five are white men.
- 3.2 It is apparent, therefore, that while strides have been taken to address racial representivity, the Court is not representative of either the racial or gender composition of South Africa. In particular, gender representivity still lags behind. While a positive step was taken in the appointment of a black woman as the President of the SCA, there remains a significant gender imbalance in the ranks of permanent Judges of the SCA.
- 3.3 The candidate is a black man. His appointment would assist in reflecting the racial composition of South Africa, but would not address the gender imbalance in the SCA.

4 **The candidate's knowledge of the law, including constitutional law**

- 4.1 The candidate's knowledge of the law is extensive but not beyond criticism.
- 4.2 The candidate has also displayed a sound knowledge of constitutional law, particularly as can be seen in the discussion of cases upheld on appeal.
- 4.3 The reviewers received comment on the case of *Rand Water v Wykwet 31 (Pty) Ltd and Others* (28033) 2016 (GD). Comments received were critical of the judgment, in that it was internally inconsistent and came to a problematic conclusion. It was also drawn to the reviewers' attention that Sonnekus has criticised the judgment in an article entitled "(On)Geregistreede Diensbaarheid van Pypleiding en tog eie Reg Tot Sloping van Onskuldige Eienaars se Wonings".

5 **The candidate's commitment to the values of the Constitution**

- 5.1 The candidate appears to be committed to the values of the Constitution.
- 5.2 This commitment is evidenced in the following judgments:
- 5.2.1 *Magidiwana and Other Injured and Arrested Persons v President of the Republic of South Africa and Others (No 2)* [2014] 1 All SA 76 (GNP), in which the candidate held that arrested and injured persons (comprising of mostly indigent workers) were entitled to legal representation, at state

expense, for their participation in the Marikana Commission of Inquiry; and

- 5.2.2 *Standard Bank of South Africa v Caster Transport CC and Others and related cases* (13700/2012, 444/2014 [2014] ZAGPPHC 314 (4 June 2014), in which the candidate found that returns of service referencing black women solely by their first names and referring to them as ‘domestics’, was unacceptable, and that Courts should not accept returns of service couched in such terms, which were reminiscent of a painful history, in which black individuals were treated with indignity.

6 **Whether any judgments have been overturned on appeal**

- 6.1 The candidate has listed 10 judgments which have been overturned on appeal. They are referenced below. In this section, the reviewers discuss only a few of these judgments.

- 6.2 *SARS v Terraplas South Africa (Pty) Ltd* [2104] 2 All SA 11 (SCA)

The reviewers could not locate the candidate’s judgment in this matter. The case dealt with SARS’s classification of tiles imported by Terraplas in terms of the Customs and Excise Act, 91 of 1964. The candidate determined that SARS’s interpretation of the classification was too restrictive. On appeal the SCA found that Part 1 of Schedule 1 of the Act was critical in deciding which classification applies to any case. The SCA found that SARS’s classification was correct.

6.3 *Mantella Trading v Kusile Mining* (191/2014) [2015] ZASCA 10 (12 March 2015)

The reviewers could not locate the candidate's judgment. The candidate sat as Court of the Commissioner of Patents. The primary issue was whether a barrier used to create a ventilation passageway constructed and installed by Kusile Mining (Pty) Ltd (Kusile), in an underground tunnel at its Khutala Colliery in Ogies infringes Mantella Trading 310 (Pty) Ltd Patent No.98/7391, entitled 'An underground Barrier'.

The candidate correctly noted that a key dispute between the parties concerned the sufficiency of the patent specification. The candidate held that the word "rigid" as it appeared in the patent specification was not meant to have a technical meaning. He reasoned that it must therefore be given its ordinary meaning being 'stiff, unyielding, not pliant or flexible'. He found for Mantella on 3 of the claims of infringement. On Kusile's counterclaim, the candidate found that the invention lacked an inventive step and ordered revocation of Mantella's patent.

After considering the evidence and the law, the SCA disagreed. It was persuaded that the patent in suit did disclose a step forward. It found that "*the combination by Mantella of known techniques in relation to the use of corrugated iron sheeting in barriers or stoppings in underground passage-ways involved creative ingenuity. The challenge to the patent on the ground of obviousness must therefore fail. The court below erred in its conclusion on this aspect.*"

6.4 *Chetty v Italtile* (668/2011) [2012] ZASCA 170 (28 November 2012) overturned the candidate's judgment in *Italtile Ceramics Ltd v Dhayalan Chockanathan Chetty and Another* (34660/2009) [2011] ZAGPPHC 126 (13 July 2011)

This was an action based on the *condictio furtiva*. The candidate was essentially required to determine whether the plaintiff has discharged the onus of proving, on a balance of probabilities that the defendant's conduct amounted to theft in civil law. This involved a two-fold inquiry: first, whether the defendant's delivery book system resulted in loss of stock for which no payment was received by the plaintiff; secondly, whether the defendant's stock-rolling resulted in stock loss, and by implication, patrimonial loss for the plaintiff.

The candidate found that Mr Chetty's delivery book system, false write-off's and reversals of missing stock resulted in Italtile's suffering patrimonial loss. Accordingly, the candidate found that the claim had been proven.

The SCA, on appeal, disagreed. It found "*with respect to the learned judge*" that the candidate had addressed the wrong issue. The question was whether Mr Chetty could be held liable on account of *furtum usus* both in respect of the manual delivery system and his stock rolling. This required an investigation into whether the requirements of theft of this kind had been met. The SCA held:

"I do not agree that the conduct complained of constituted the use of another's property. What Mr Chetty did was to post false entries to the accounts to mislead Italtile. This could well

have amounted to fraud in as much as it would have caused an increase in Mr Chetty's profits, but it is not use of the stock. Most of the stock, in any event, went missing prior to the false entries so that no use of it was possible. The question is rather whether Mr Chetty's conduct was calculated to conceal any unlawful taking of the stock. There is no direct evidence of theft nor of Mr Chetty's participation in theft. Nor is such an inference the most plausible or the most likely one to be drawn from the proven facts."

The appeal was upheld with costs.

7 **The extent and breadth of the candidate's professional experience**

7.1 The extent of the candidate's professional experience is set out in paragraph 5 above.

7.2 In addition, the candidate has contributed to the judiciary by authoring the following documents for purposes of assisting in training aspirant and newly appointed Judges:

7.2.1 Managing the unopposed motion Court (2014);

7.2.2 National Credit Act – A practical approach (2014);

7.2.3 Managing the opposed motion court (2016);

7.2.4 Aspects of Constitutional Litigation (2016); and

7.2.5 Practical aspects on judgment writing (2016).

8 **The candidate's linguistic and communication skills**

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8.1 The candidate has fair linguistic and communication skills, as borne out by the judgments reviewed.

9 **The candidate's ability to produce judgments promptly**

9.1 The candidate appears to deliver judgments expeditiously.

9.2 As at the time of his application, the candidate had two outstanding reserved judgments (reserved as at August 2017). He expected to hand down judgment in both matters on 18 December 2017.

10 **The candidate's fairness and impartiality**

10.1 The candidate appears to be fair and impartial.

11 **The candidate's independent mindedness**

11.1 The candidate appears to be independently minded.

12 **The candidate's ability to conduct court proceedings**

12.1 The candidate has sat as a Judge since 2009. He has also sat as an acting Judge in both the Labour Appeal Court and the Supreme Court of Appeal.

12.2 The candidate is undoubtedly able to conduct Court proceedings.

13 **The candidate's administrative ability**

13.1 The candidate's administrative ability appears to be unassailable.

14 **The candidate's reputation for integrity and ethical behaviour**

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14.1 The candidate's reputation for integrity and ethical behaviour appears to be beyond reproach.

15 The candidate's judicial temperament

15.1 The candidate appears to have a fair and even-tempered judicial temperament.

16 The candidate's commitment to human rights, and experience with regard to the values and needs of the community

16.1 The candidate appears to be committed to human rights.

16.2 In addition to his contribution to the judiciary, the candidate has contributed to legal education and advocacy training, as follows:

16.2.1 From 2010 to date – the candidate has been a faculty member of the Legal Education Centre of the Black Lawyers Association;

16.2.2 From 2012 to date – the candidate has been a guest lecturer to pupils of the Pretoria Society of Advocates on the National Credit Act; and

16.2.3 From 2014 to date – the candidate has been a lecturer to aspirant Judges.

16.3 The candidate has acted as:

16.3.1 A church warden for the St Francis Parish in Mamelodi (2008 – 2010);

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- 16.3.2 The Deputy Chancellor and Chancellor of the Anglican Church Dioceses of Pretoria (2011 to date);
- 16.3.3 The Chairperson of the board of members of Loreto School in Pretoria (2006 – 2008); and
- 16.3.4 A board member of Loreto School in Pretoria (2009 to date).

17 **The candidate's potential**

- 17.1 The candidate has potential to be a valuable member of the Supreme Court of Appeal.

18 **The message that the candidate's appointment would send to the community at large**

- 18.1 The candidate's appointment would send a positive message to the community at large.

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ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Reported decisions

African Bank Ltd v Myambo NO 2010 (6) SA 298 (GNP)

Nyathaza v Johannesburg Mwtropolitan Bus Service SOC Ltd t/a Metrobus
2016 (3) SA 74 (LAC)

Mubake and Others v Minister of Home Affairs and Others 2016 (2) SA 220 (GP)

Commissioner, South African Revenue Service v Marshall NO and Others 2017
(1) SA 114 (SCA)

Edwards v Firstrand Bank Ltd t/a Wesbank 2017 (1) SA 316 (SCA)

Eskom Holdings Ltd v Halstead – Cleak 2017 (1) SA 333 (SCA)

GN v JN 2017 (1) SA 342 (SCA)

Transnet SOC Ltd v Total South Africa (Pty) Ltd and Another 2017 (1) SA 526
(SCA)

Fluxmans Inc v Levenson 2017 (2) SA 520 (SCA)

*The Asphalt Venture Windrush Intercontinental SA and Another v UACC
Bergshav Tankers AS* 2017 (3) SA 1 (SCA)

*Democratic Alliance v Ministers of International Relations and Cooperation and
Others* 2017 (3) SA 212 (GP)

*Wishart NO and Others v BHP Billiton Energy Coal South Africa (Pty) Ltd and
Others* 2017 (4) SA 152 (SCA)

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Unreported decisions

Sampo v Ivan Davies Theunissen Inc 2007 JDR 0907 (T)

Ex Parte Application: Barratt 2008 JDR 0643 (T)

Research & Development (Pty) Ltd v Dougall (Pty) Ltd 2008 JDR 0898 (T)

Tshwane Switchboards (Pty) Ltd v BHL Construction Services Group (Pty) Ltd
2008 JDR 0897 (T)

Payne v Minister of Safety and Security 2010 JDR 0130 (GNP)

Tjaard v Du Plessis Ingelyf v SJP Joubert 2010 JDR 1586 (GNP)

JW v SW 2011 (1) SA 545 (GNP)

Marynco Motors BK 2011 JDR 1200 (GNP)

Harmony Gold Mining Company Limited v Regional Director: Free State,
Department of Water Affairs 2012 JDR 1110 (GNP)

Cloete v Van Den Heever NO 2013 JDR 1075(GNP)

Mandarijn Limited v Connectivity Dynamics (Pty) Ltd 2013 JDR 1222 (GNP)

Central African Services (Pty) Ltd v Minister of Transport 2013 JDR 0407 (GNP)

Moosa v Phumelela Gaming and Leisure Limited 2014 JDR 1553 (GP)

Burmeister v Spitskop Village Properties Ltd (Commissioner for the South
African Revenue Service Intervening Party) 2015 JDR 1983 (GP)

S v Mahlangu 2015 JDR 0834 (GP)

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S v Dakalo 2015 JDR 0760 (GP)

S Mokwele 2015 JDR 0159 (GP)

Maswanganye v Baloyi NO 2015 JDR 1967 (GP)

Burden & Swart Attorneys v Govender 2016 JDR 1245 (GP)

Afgri Corporation Limited v Eloff 2016 JDR 1815 (SCA)

Phetla v Tendaupenju NO 2017 JDR 0918 (GP)

Rand Water v Wykwet 31 (Pty) Ltd and Others (28033) 2016 (GD)

Head of Department Western Cape Education Department v Saffer (Woman's Legal Centre Amicus Curiae) 2017 JDR 2018 (SCA)

Judgments upheld on appeal

Legal Aid South Africa v Magidiwana and Others 2015 (6) SA 494 (CC) upheld the candidate's judgment in *Magidiwana and Another v President of the Republic of South Africa and Others* [2014] 1 All SA 76 (GNP).

African Information Technology Bridge 1 v The MEC for Infrastructure Development Gauteng Province (134/2014) [2015] ZASCA 104 (2 July 2015) upheld the candidate's judgment in *African Information Technology Bridge 1 (Pty) Ltd v MEC for Infrastructure, Gauteng Province* 2013 JDR 1710 (GNP)

Piater v S (743/13) [2014] ZASCA 134 (25 September 2014)

Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs & others 2014 (3) SA 149 (SCA) upheld the

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candidate's judgment in *Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs and Others* (68161/2008) [2012] ZAGPPHC 127 (29 June 2012)

Kubyai v S (829/2014) [2015] ZAGPPHC 985 (15 December 2015)

Tarspray CC v Asphalt Services CC (A5061) [2017] ZAGPJHC (8 November 2017)

Atkin v Botes 2011 (6) SA 231 (SCA)

Maroi Boerdery CC v Rabie and Others (A560/2013) [2016] ZAGPPHC 861 (19 September 2016)

Wilkinson v The Law Society of the Northern Provinces (783/2016) [2017] ZASCA 69 (31 May 2017)

Pieterse v Lephalale Local Municipality 2017 (2) BCLR 233 (CC)

Judgments overturned on appeal

SARS v Terraplas South Africa (Pty) Ltd [2104] 2 All SA 11 (SCA)

Bengwenyama-ya-Maswazi Community v Minister for Mineral Resources 2015 (1) SA 197 (SCA)

Bengwenyama-ya-Maswazi Community v Genorah Resources (Pty) Ltd and Others 2015 (1) SA 219 (SCA)

Mantella Trading v Kusile Mining (191/2014) [2015] ZASCA 10 (12 March 2015)

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Standard Bank of South Africa Ltd v 3M Future Africa (Pty) Ltd 2013 JDR 2748
(SCA)

Plaaskem (Pty) Ltd v Nippon Africa Chemicals (Pty) Ltd 2014 (5) SA 287 (SCA)

Chetty v Italtile (668/2011) [2012] ZASCA 170 (28 November 2012) overturned
the candidate's judgment in *Italtile Ceramics Ltd v Dhayalan Chockanathan
Chetty and Another* (34660/2009) [2011] ZAGPPHC 126 (13 July 2011)

Neil Harvey & Associates (Pty) Ltd v Medscheme & Others (621/10) [2011]
ZASCA 75 (26 May 2011)

Gert Thomas Van Der Merwe v Simon Molefe Pitje (232/11) [2012] ZASCA 50
(March 2012)

DPP Gauteng Division, Pretoria v Portia Thulisile Tsotetsi (170/2017) [2017]
ZASCA 083 (2 June 2017)

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