

*CANDIDATE : JUDGE MAHUBE BETTY MOLEMELA*

**APPLICANT: JUDGE MAHUBE BETTY MOLEMELA**

**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 Bachelor of Laws degree ("LLB") and a Master of Laws ("LLM") degree, both conferred by the University of the Free State, over and above various other legal qualifications including a certificate in advanced military law.

1.1.2 A Baccureus Procurationis ("B. Proc") degree from the University of Fort Hare, which was preceded by a Bachelor of Arts ("BA") degree, laid the foundation for the above-mentioned legal qualifications.

1.2 The candidate is appropriately qualified.

**2 Whether the candidate is a fit and proper person**

2.1 There is nothing to suggest that the candidate, who has withstood various Judicial Service Commission ("JSC") interviews as she rose to the position of Judge President of the Free State Division of the High Court, is not a fit and proper person.

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2.2 There is no indication or any suggestion from the candidate's previous JSC interviews that she may not be a fit and proper person to sit on the bench.

2.3 No adverse comments have been received.

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 woman and her appointment would therefore assist in reflecting the gender and racial demographics of the Republic.

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

4.1 The candidate demonstrates a solid knowledge of the law in general including constitutional law.

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- 4.2 During an acting stint (January to May 2015) in the Constitutional Court the candidate wrote at least two notable judgments on behalf of the majority.
- 4.3 In the case of *Oppelt v The Department of Health, Western Cape* 2016 (1) SA 325 (CC), the candidate wrote on behalf of the majority in a case concerned with delictual liability. In this case, the candidate diligently grappled with expert testimony before turning to consider the elements of causation and negligence in a well-written and reasoned judgment.
- 4.4 In *Provincial Minister for Local Government, Western Cape v Oudtshoorn Municipal Council & Others* 2015 (6) SA 115 CC, again the candidate wrote for the majority in confirmation of the Constitutional invalidity of section 30(4) of the Local Government: Municipal Structures Act. The candidate, after dispensing with the confirmation order, then capably considered the issue of remedy and eventually opted for reading-in as an appropriate remedy.
- 4.5 In the Labour Appeal Court the candidate also penned two important judgments which traversed constitutional issues.
- 4.6 In *Emakhazini Springs (Pty) Ltd v Mnomiya* 2014 (8) BLLR 737 (LAC), the candidate ably dealt with the right to equality in the context of an employment relationship and vindicated the right of the respondent who had been unfairly dismissed on the pretext that she fell pregnant out of wedlock. The candidate demonstrated a lucid understanding of both labour and constitutional law. The candidate

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also demonstrated a sensitivity to the protection of vulnerable persons in our society.

4.7 In *Potgieter v Tubatse Ferrochrome and others* 2014 (35) ILJ 2419, the candidate ably navigated Environment Law in the context of Protected Disclosures underpinned strongly by constitutional principles.

4.8 In the Supreme Court of Appeal, in the case of *EH Hassim Hardware (Pty) Ltd and FAB Tanks CC*, the candidate demonstrated an understanding of adjectival law when she had to consider an appeal for the refusal, in the court *a quo*, of the rescission of a judgment granted by default.

4.9 In the same forum, the candidate, in the case of *Pilane v The State* 2017 (2) SACR 154 SCA, the candidate laid down the proper interpretation of section 165 of the Criminal Procedure Act, specifically in relation to the proper administering of an oath.

4.10 Overall, the candidate demonstrates a firm grasp of the law no doubt flowing from her exposure on the benches, acting or otherwise, of the High Courts (Gauteng and Free State Divisions), the Labour Appeal Court, The Competition Appeal Court, The Supreme Court of Appeal and the Constitutional Court.

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

5.1 Based on the judgments analysed in paragraph 2 above, the reviewers consider that the candidate is committed to the values of the Constitution.

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

6.1 Two of the candidate's judgments have been overturned on appeal. These are *Lekhele v The State* (Case number 234/2008) and *Liberty Group v Jordaan* (Case number A289/2011).

6.2 We have been unable to locate the *Lekhele* judgment.

6.3 *Liberty Group v Jordaan* dealt with whether Jordaan (the plaintiff in the court *a quo*) was entitled to be paid the proceeds of a life policy. A factual finding regarding the purpose of the policy and whether it had been ceded was required. The full bench decided that the candidate had not correctly evaluated the evidence and had not looked at the inherent possibilities of the case.

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

7.1 Before being appointed to the bench in 2008, the candidate boasted a legal career of over two decades which commenced in 1987 when the candidate was appointed as a prosecutor.

7.2 This period includes a part-time stint in academia as a part-time lecturer, being admitted as a conveyancer and notary and about 3 years as an Arbitrator for the Commission for the Commission for Conciliation Mediation and Arbitration ("CCMA").

7.3 The candidate also served as a Military Judge in the year 2004.

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

8.1 Based on the judgments analysed, the candidate's grasp of the English language is impeccable; while her grasp of other languages is unknown.

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

9.1 The candidate has indicated that she has no outstanding judgments.

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

10.1 The candidate, based on the cases analysed, is fair and impartial.

10.2 No adverse comments have been received.

**11 The candidate's independent mindedness**

11.1 The candidate has demonstrated that she is independent minded and does not shy away from penning dissenting judgments when the occasion called for it.

11.2 This is demonstrated by her dissent from the majority in the case of *Mahaeeane and Another v Anglogold Ashanti Ltd* 2017 (6) SA 382 (SCA).

11.3 The candidate also gave a dissenting judgment on the issue of costs in the case of *Harriellal v University of KwaZulu-Natal*. Although dissenting from mulcting a student with a cost order, the candidate agreed with the majority that the *Biowatch* principle did not apply to the case. The Constitutional Court later found that the SCA had erred in failing to apply the *Biowatch* principle.

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

12.1 Given that the candidate has been elevated to the position of Judge President and has acted in the Labour Appeal Court, the Supreme Court of Appeal and the Constitutional Court, her ability to conduct Court proceedings can be assumed to be excellent.

**13 The candidate's administrative ability**

13.1 Given that the candidate was elevated to the position of Judge President her administrative ability can be assumed to be excellent.

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

14.1 There is no suggestion that the candidate falls short of the standard for integrity and ethical behaviour expected of a judge.

**15 The candidate's judicial temperament**

15.1 Given that the candidate was elevated to the position of Judge President, her judicial temperament can be assumed to be excellent.

15.2 No adverse comments have been received.

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

16.1 The candidate has demonstrated, both in her judgments and community involvement, including mentoring and training future members of the profession, a real and authentic commitment to human rights and a responsive attitude towards the community.

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16.2 The candidate served as the Chancellor of Central University of Technology after spending several years on the council of the same institution.

17 **The candidate's potential**

17.1 The candidate demonstrates a great potential especially for higher leadership on the bench.

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

18.1 The appointment of the candidate would send a clear message to women and girls that anything is possible since the candidate serves as a role model.



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## **ANNEXURE: LIST OF JUDGMENTS CONSIDERED**

### **Reported decisions**

*Friedrich and Others v Smit No And Others* 2017 (4) SA 144 (SCA)

*Nelson Mandela Bay Municipality v Amber Mountain Investments 3 (Pty) Ltd*  
2017 (4) SA 272 (SCA)

*Manukha v Road Accident Fund* 2017 (4) SA 453 (SCA)

*Primat Construction CC v Nelson Mandela Bay Metropolitan Municipality* 2017  
(5) SA 420 (SCA)

*PA Pearson (Pty) Ltd v Ethekekwini Municipality and Others* 2017 (6) SA 82 (SCA)

*Mahaeane and Another v AngloGold Ashanti Ltd* 2017 (6) SA 382 (SCA)

*Minister of Defence and Military Veterans v Thomas* 2016 (1) SA 103 (CC)

*My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1)  
SA 132 (CC)

*Oppelt v Department of Health, Western Cape* 2016 (1) SA 325 (CC)

*Eke v Parsons* 2016 (3) SA 37 (CC)

*Competition Commission v South African Breweries Ltd and Others* 2015 (3) SA  
329 (CAC)

*Coughlan No v Road Accident Fund* 2015 (4) SA 1 (CC)

*DE v RH* 2015 (5) SA 83 (CC)

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*South African Reserve Bank and Another v Shuttleworth and Another* 2015 (5) SA 146 (CC)

*Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC)

*Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Others* 2015 (5) SA 370 (CC)

*Sasol Chemical Industries Ltd and Another v Competition Commission* 2015 (5) SA 471 (CAC)

*Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others* 2015 (6) SA 32 (CC)

*Provincial Minister for Local Government, Western Cape v Oudtshoorn Municipal Council and Others* 2015 (6) SA 115 (CC)

*Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape and Others* 2015 (6) SA 125 (CC)

*Tshwane City v Link Africa and Others* 2015 (6) SA 440 (CC)

*Legal Aid South Africa v Magidiwana and Others* 2015 (6) SA 494 (CC)

### **Unreported decisions**

*S v MS* 2017 JDR 0295 (FB)

*Friedrich and Others v Smit NO and Others* 2017 JDR 0544 (SCA)

*Manukha v Road Accident Fund* 2017 JDR 0556 (SCA)

*Harrielall v University of KwaZulu-Natal* 2017 JDR 0565 (SCA)

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*Nelson Mandela Bay Municipality v Amber Mountain Investments 3 (Pty) Ltd*  
2017 JDR 0581 (SCA)

*Cathay Pacific Airways Ltd v Lin* 2017 JDR 0585 (SCA)

*Griesel v Haasbroek* 2017 JDR 0695 (SCA)

*S v Llale* 2017 JDR 0778 (SCA)

*S v Leeto* 2017 JDR 0802 (FB)

*Hospital Association of South Africa NPC v MEC of Health for the Free State*  
*Province* 2017 JDR 0803 (FB)

*P A Pearson (Proprietary) Limited v Ethekwini Municipality* 2017 JDR 0922  
(SCA)

*S v Zimila* 2017 JDR 0926 (SCA)

*NMB Bank Limited v Capsopoulos* 2017 JDR 0992 (SCA)

*Primat Construction CC v Nelson Mandela Bay Metropolitan Municipality* 2017  
JDR 1090 (SCA)

*S v Ramoba* 2017 JDR 1101 (SCA)

*The Director of Public Prosecutions: Gauteng Division, Pretoria v Moabi* 2017  
JDR 1119 (SCA)

*Director of Public Prosecutions, Gauteng Division, Pretoria v KM* 2017 JDR  
1120 (SCA)

*Mahaeane v AngloGold Ashanti Limited* 2017 JDR 1133 (SCA)

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*S v Pilane* 2017 JDR 1194 (SCA)

*S v Tsoaeli* 2017 JDR 1427 (FB)

*Van Heerden v The National Director of Public Prosecutions* 2017 JDR 1550  
(SCA)

*Director of Public Prosecutions Gauteng Division, Pretoria v Heunis* 2017 JDR  
1575 (SCA)

*Khumalo v Twin City Developers (Pty) Ltd* 2017 JDR 1579 (SCA)

*S v GO* 2017 JDR 1582 (SCA)

*Du Preez v Pretorius* 2017 JDR 1590 (SCA)

*Drift Supersand (Pty) Limited v Mogale City Local Municipality* 2017 JDR 1611  
(SCA)

*Morudi v NC Housing Services & Development Co Ltd* 2017 JDR 1614 (SCA)

*EH Hassim Hardware (Pty) Ltd v Fab Tanks CC* 2017 JDR 1655 (SCA)

*S v Mofokeng* 2016 JDR 0840 (FB)

*Competition Commission v South African Breweries Limited* 2015 JDR 0177  
(CAC)

*S v Mafoyane* 2015 JDR 0382 (FB)

*Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of  
the South African Social Security Agency (Corruption Watch, Centre For  
Child Law and Black Sash Trust Amicus Curiae)* 2015 JDR 0572 (CC)

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*Minister of Home Affairs v Johnson* 2015 JDR 0576 (CC)

*Coughlan NO v Road Accident Fund (Centre for Child Law Amicus Curiae)* 2015  
JDR 0735 (CC)

*Cross-Border Road Transport Agency v Central African Road Services (Pty)  
Limited (Road Freight Association Amicus Curiae)* 2015 JDR 0866 (CC)

*Chevron SA (Pty) Ltd v Wilson* 2015 JDR 1055 (CC)

*Acting Speaker of the National Assembly v Teddy Bear Clinic for Abused  
Children* 2015 JDR 1198 (CC)

*South Africa Reserve Bank v Shuttleworth* 2015 JDR 1229 (CC)

*City of Cape Town v South African Municipal Workers Union* 2012 JDR 1469  
(LAC)

*National Commissioner of The South African Police Service v Myers* 2012 JDR  
1470 (LAC)

*Gardner v Central University of Technology Free State* 2012 JDR 1492 (LC)

*Independent Municipal and Allied Trade Union v Witzenburg Municipality* 2012  
JDR 1604 (LC)

*S v Sebagalo* 2012 JDR 2533 (FB)

*S v Matsoso* 2012 JDR 2537 (FB)

*S v Lephuthing* 2012 JDR 2555 (FB)

*S v Moticoe* 2012 JDR 2557 (FB)

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*Dipuo Urandar Sehlabaka (for the appointment of a curator bonis BE Khumalo)*  
2011 JDR 0170 (FB)

*Matjhabeng Local Municipality v Erasmus* 2011 JDR 0208 (FB)

*S v Mwase* 2011 JDR 0211 (FB)

*S v Van Der Merwe v* 2011 JDR 0821 (FB)

*S v Tshabalala* 2011 JDR 1526 (FB)

*S v Thole* 2011 JDR 1530 (FB)

*S v Mnisi* 2011 JDR 1534 (FB)

*Firststrand Bank Ltd v Western Breeze Trading 213 (Pty) Ltd* 2011 JDR 1535 (FB)

*S v Mthandeki Nkomo* 2011 JDR 1536 (FB)

*Maartens v Kobus Van Zyl Boerdery BK* 2010 JDR 0387 (FB)

*Karsten v Road Accident Fund* 2008 JDR 1359 (O)

*S v Talenyane* 2006 JDR 0370 (O)

### **Judgments upheld on appeal**

*Mothepe v The State* (Case number 231/2011)

*Khoza v The State* (Case number A63/2012)

*Potgieter v The State* (Case number A165/2012)

*Kula v The State*

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*Tladi v The State*

*S v Melato*

**Judgments overturned on appeal**

*Lekhele v The State* (Case number 234/2008)

*Liberty Group v Jordaan* (Case number A289/2011)

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