

CANDIDATE : MR MFUNISELWA ELIJAH NKOSI

APPLICANT: MFUNISELWA ELIJAH NKOSI

**COURT FOR WHICH APPLICANT APPLIES: KWAZULU-NATAL
HIGH COURT, DURBAN**

1 The candidate's appropriate qualifications

1.1 The candidate holds B Proc and LLB degrees.

1.2 He is suitably qualified.

2 Whether the candidate is a fit and proper person

2.1 The candidate was admitted as an attorney on 28 February 1994 and has been a member, in good standing, of the KwaZulu-Natal Law Society since that date.

2.2 He currently practises as a partner in the firm Shepstone and Wylie, at Durban.

2.3 He has been nominated by Glen Goddard SC, a member of the Society of Advocates of KwaZulu-Natal, who confirms that he is a suitable candidate for such a position.

2.4 The candidate is a fit and proper person.

CANDIDATE : MR MFUNISELWA ELIJAH NKOSI

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

3.1 The candidate is a black man and his appointment would indicate a commitment to the racial transformation of the judiciary.

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

4.1 The candidate has considerable experience in the areas of local government and administrative law. The candidate was the instructing attorney in two matters heard by the Constitutional Court, namely *De Beer N.O. v North and South Central Local Councils and Others* 2002 (1) SA 429 (CC) and *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council and Others* 1998 (2) SA 61 (CC).

4.2 While it would appear that the candidate has no experience in criminal law in his practice as an attorney, it is apparent from the judgments prepared in his capacity as an acting judge, he was well able to deal with a number of criminal appeals.

4.3 From the varied judgments submitted, it appears that the candidate has presided over a variety of matters, including building and construction disputes, opposed motions, trials, commercial litigation.

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

5.1 There is nothing in the judgments of the candidate or in any publically available information which suggests that the candidate is not committed to the values of the Constitution.

CANDIDATE : MR MFUNISELWA ELIJAH NKOSI

- 5.2 The candidate reports that he has been involved in the drafting and reviewing of various by-laws including, sport by-laws for the Johannesburg Metropolitan Municipality, and by-laws of the eThekweni Municipality and the Emadlangeni Local Municipality.
- 5.3 The candidate was involved in election processes as the National Liaison Officer, Adjudication Secretariat of the Independent Electoral Commission (“IEC”) as a well as a permanent member of the Voter’s Roll Revision Court for the then Durban Transitional Metropolitan Council.
- 5.4 The candidate drafted the Elimination and Prevention of Recurrence of Slums Act No 7 of 2007 for the Provincial Government of KwaZulu-Natal.
- 5.5 The candidate is further involved in training local government officials in KwaZulu-Natal.

6 Whether any judgments have been overturned on appeal

- 6.1 The candidate indicates that there were two matters, in which he gave judgment, which were taken on appeal.
- 6.2 Only the matter of *Breakers Shareblock Ltd v eThekweni Municipality [2016] [JOL] 36651 (SCA)* could be located. In this matter, the Appeal Court was asked to decide on a separate issue to those dealt with by the candidate in the court *a quo*. Nevertheless, the decision of the candidate *a quo* was ultimately upheld.

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

7.1 The candidate has been a practising attorney for a period of twenty-four years. In this time, he has been involved with the drafting and the rationalisation of various local government legislation. He has also been involved in the training of various local government officials.

7.2 The candidate has acted as a Judge in the KwaZulu-Natal High Court for a cumulative period of approximately seven months from the period 2011 to 2017 and the judgments listed in the annexure hereto were located and considered.

7.3 The candidate delivered the following judgments in respect of criminal appeals on conviction and/or a sentence:

7.3.1 *Mthembu and Another v the State;*

7.3.2 *I M M v the State;*

7.3.3 *Dumisa v the State; and*

7.3.4 *Khumalo v the State.*

7.4 The candidate presided over (together with sitting Judges) civil appeals in the following matters in which judgments he concurred:

7.4.1 *Eskom Holdings Ltd v Grundy; and*

7.4.2 *Mundell v Wright.*

7.5 The candidate prepared judgments (or reasons for judgments) in the following matters:

CANDIDATE : MR MFUNISELWA ELIJAH NKOSI

- 7.5.1 *eThekwini Municipality v Multitude Investments (Pty) Ltd*, an opposed application relating to Municipal by-laws and unlawful construction;
- 7.5.2 *Meenaaskshma Investments (Pty) Ltd & Others v L Naidoo N O & Others*, an application for an adjournment relating to a point *in limine* in relation to locus standi;
- 7.5.3 *Firstrand Bank v Field Crest International KwaZulu-Natal (Pty) Ltd*, a trial matter in relation to commercial litigation and contract; and
- 7.5.4 the *Breakers Shareblock Limited* matter previously mentioned.

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

- 8.1 The judgments written by the candidate are well reasoned with appropriate references to legislation, cases and the law in the appropriate circumstances.
- 8.2 The judgments written by the candidate are in English and he appears to be able to communicate proficiently in the judgments considered.

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

- 9.1 In all the criminal appeal matters, where judgments were delivered by the candidate, the judgments were handed down within a period of two weeks from the date of the hearing.
- 9.2 In the remaining civil matters, judgments were handed down within a period of one month save for the *Breakers Shareblock* matter,

CANDIDATE : MR MFUNISELWA ELIJAH NKOSI

where judgment was handed down after a period of six weeks. This matter was eventually referred to the Supreme Court of Appeal.

9.3 In all the circumstances judgments were delivered timeously and without undue delay.

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

10.1 From the judgments reviewed, the candidate appears to be impartial and fair and there is no reason to doubt the same.

11 **The candidate's independent mindedness**

11.1 The candidate has prepared no dissenting judgments and has concurred in the judgments of *Eskom Holdings Limited v Grundy and Mundell v Wright*.

11.2 The candidate prepared an article, published in the De Rebus Journal in 2009, in which he criticised a finding of the Constitutional Court. It can reasonably be inferred that the candidate has the confidence and ability independently to express his views.

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

12.1 The candidate, by his own admission, does not often appear in court in litigious matters.

12.2 However, the candidate has had experience of some seven months as an acting judge.

12.3 There are no adverse reports in the manner in which the candidate conducted proceedings.

CANDIDATE : MR MFUNISELWA ELIJAH NKOSI

13 The candidate's administrative ability

13.1 The candidate has been a partner at the firm Shepstone and Wylie for the past twenty years and further currently heads the Local Government and Administrative Law Department.

13.2 The candidate is a member of the Management Board of Shepstone and Wylie Attorneys.

13.3 In the light of the above experience, there is reason to doubt the candidate's administrative abilities.

14 The candidate's reputation for integrity and ethical behaviour

14.1 There is no indication from the judgments or the KwaZulu-Natal Law Society of that there is any reason to question the candidate's integrity and ethical behaviour.

15 The candidate's judicial temperament

15.1 No concerns appear from the judgments we have considered in this regard and there were no adverse reports in relation to the candidate's temperament during the time he acted as judge.

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

16.1 The candidate was employed at the Community Law Centre for a cumulative period of two years and five months.

CANDIDATE : MR MFUNISELWA ELIJAH NKOSI

16.2 The candidate also appears to be involved in various education and community organisations (see paragraph 9 of the candidate's application).

16.3 In such circumstances, it would appear that the candidate is committed to human rights and the needs of the community.

17 The candidate's potential

17.1 The candidate has been a practising attorney for the last twenty-four years.

17.2 He has sat, as an acting judge for a cumulative period for seven months.

17.3 He has been involved in the drafting of a number of pieces of local government legislation.

17.4 While the candidate may not have experience in a wide variety of litigation personally, from the judgments he has delivered, it would appear that he has the ability.

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

18.1 The candidate is a black man, and a successful partner in a large law firm (which has national and international branches).

18.2 The candidate's appointment would send a strong message to the community in relation to racial transformation of the judiciary and in the legal profession at large.

CANDIDATE : MR MFUNISELWA ELIJAH NKOSI

ANNEXURE: LIST OF JUDGMENTS CONSIDERED

Ethewini Municipality V Multitude Investments (Pty) Ltd & Others 6838/2012

Meenaaskshma Investments (Pty) Ltd & Others V L Naidoo N O & Others
9779/14

First Rand Bank V Ltd V Firle Crest International KZN (Pty Ltd 1652/2012

Breakers Share Block Limited V Ethekewini Municipality 6933/2014

Mthembu And Another V S [2017] JOL 37345 (KZP)

I M M v The State: AR487/16 (KZNP)

Dumisav v S AR483/16 (KZP)

Khumalo v S AR 150/16

Judgments in which the candidate concurred

Eskom Holdings Limited V Grundy [2018] JOL 39523 (KZP)

Mundell V Wright [2013] JOL 29820 (KZP)

CANDIDATE : MR MFUNISELWA ELIJAH NKOSI